I. ATTORNEYS

A. APPOINTMENT OF COUNSEL

1. PROBATION REVOCATION

Newbern v. State, 356 Ga.App. 696, 849 S.E.2d 39 (September 17, 2020). **Probation revocation vacated and remanded to consider whether defendant was entitled to appointment of counsel in revocation proceeding.** Following guilty plea to exploitation of an elderly person, State moved to revoke probation based on failure to pay victim restitution as ordered. Trial court denied defendant's request for appointment of counsel and, following hearing, revoked probation. **1.** "[E]ven under the Due Process Clause of the Fourteenth Amendment, the probationer in a revocation proceeding has no "inflexible constitutional" right to have counsel appointed,' **[FN2:** *Vaughn* [*v. Rutledge*, 265 Ga. 773, 774(2), 462 S.E.2d 132 (1995)] (punctuation omitted); *see Gagnon* [*v. Scarpelli*, 411 U.S. 778, 790 (III), 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973)] ('We thus find no justification for a new inflexible constitutional rule with respect to the requirement of counsel.'). *But see* OCGA § 17-12-23(a)(2) ('The circuit public defender shall provide representation in ... [a] hearing on a revocation of probation in a superior court[.]').**]** so there is 'no absolute requirement that he be informed of that right.' **[FN3:** *Vaughn*, 265 Ga. at 774(2), 462 S.E.2d 132; *accord Kitchens v. State*, 234 Ga.App. 785, 785(1), 508 S.E.2d 176 (1998).**]** Nevertheless, **a probationer *is* entitled to 'be informed of his right to *request* counsel.**' **[FN4:** *Vaughn*, 265 Ga. at 774(2), 462 S.E.2d 132 (punctuation omitted) (first emphasis supplied); *accord Kitchens*, 234 Ga.App. at 785(1), 508 S.E.2d 176; *see Gagnon*, 411 U.S. at 790(III), 93 S.Ct. 1756 ('Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request ....'); *Elrod v. State*, 354 Ga.App. 177, 183(4), 840 S.E.2d 658 (2020) (quoting *Gagnon* to recognize that, presumptively, 'it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer makes such a request').**]** And consistent with this requirement, our Supreme Court has further explained that—even with 'the more limited and conditional right to counsel' in proceedings such as those seeking to revoke probation—the right 'is not waived merely by a party unknowingly failing to insist upon a lawyer in a proceeding in which he is *not even advised* that he might request counsel.' *Miller v. Deal*, 295 Ga. 504, 506-07(1), 761 S.E.2d 274 (2014) (emphasis supplied); *see Brewer v. Williams*, 430 U.S. 387, 404(III), 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) ('[T]he right to counsel does not depend upon a request by the defendant....' (citations omitted)).'' **2. "**It is evident from the record … that the trial court never advised Newbern of his right to request appointed counsel, as it should have done. **[FN13:** *Vaughn*, 265 Ga. at 774(2), 462 S.E.2d 132 ('A probationer is entitled ... to be informed of his right to request counsel.' (punctuation omitted)); *Kitchens*, 234 Ga.App. at 785(1), 508 S.E.2d 176 (same); *see Gagnon*, 411 U.S. at 790(III), 93 S.Ct. 1756 ('Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request ....').**]** Indeed, even after Newbern stated on the record that he wished to have counsel, the trial court never determined whether Newbern was, in fact, entitled to have counsel appointed.[fn] Additionally, the trial court never stated any reasons on the record for *not* appointing counsel. **[FN15:** *Gagnon*, 411 U.S. at 790(III), 93 S.Ct. 1756 (explaining that when a request for counsel is refused, 'the grounds for refusal should be stated succinctly in the record'); *Vaughn*, 265 Ga. at 775(3), 462 S.E.2d 132 (same); *Kitchens*, 234 Ga.App. at 785-86(1), 508 S.E.2d 176 (same).**]** To the contrary, the transcript of the hearing 'reveals that the court gave no consideration whatsoever as to whether [Newbern] should be given such assistance.' *Kitchens*, 234 Ga.App. at 787(1), 508 S.E.2d 176." Although defendant here admitted he failed to pay the restitution, he attempted to offer medical and other explanations, but never tendered his supporting documents. "*Gagnon* also provides that 'even if the violation is a matter of public record or is uncontested,' **[FN26:** *Gagnon*, 411 U.S. at

790(III), 93 S.Ct. 1756; *accord Vaughn*, 265 Ga. at 775(3), 462 S.E.2d 132; *Kitchens*, 234 Ga.App. at 785(1), 508 S.E.2d 176.] counsel should be provided if 'there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.' **[FN27:** *Gagnon*, 411 U.S. at 790(III), 93 S.Ct. 1756; *accord Vaughn*, 265 Ga. at 775(3), 462 S.E.2d 132; *Kitchens*, 234 Ga.App. at 785(1), 508 S.E.2d 176.**]"** *Accord, Torregano v. State*, 361 Ga.App. 65, 862 S.E.2d 729 (August 30, 2021) (probation revocation vacated and remanded to make record of reasons for refusal of counsel).

B. INEFFECTIVE ASSISTANCE OF COUNSEL

1. WITNESSES/ SECURE WITNESSES/PRESENT EVIDENCE/SECURE EVIDENCE/FAILURE TO PRESENT

Bates v. State, 313 Ga. 57, 867 S.E.2d 140 (January 4, 2022). Malice murder and related convictions affirmed; no ineffective assistance of counsel. "The record reflects that trial counsel properly subpoenaed Dr. Dzagnidze under Georgia law, but failed to properly subpoena Dr. Dzagnidze, a VA employee, in compliance with federal [*United State ex rel. Touhy v. Ragen*, 340 U.S. 462, 71 S.Ct. 416, 95 L.Ed. 417 (1951)] regulations contained in 38 CFR § 14.800 et seq. These regulations govern '[t]he production or disclosure of ... records of the [VA]; and ... [t]he testimony of present or former VA personnel relating to any official information acquired by any individual as part of that individual's performance of official duties ... in federal, state, or other legal proceedings covered by these regulations.' 38 CFR § 14.800." No prejudice shown, however, even if deficient.

C. RIGHT TO COUNSEL

1. ON APPEAL

Britt v. State, 362 Ga.App. 456, 868 S.E.2d 824 (February 1, 2022). **Following defendant's pro se guilty plea to failing to register as a sex offender, trial court erred "by allowing [defendant] to proceed pro se during the hearing on his motion to withdraw his guilty plea" without "inform[ing] of the dangers of self-representation during the plea withdrawal proceedings."** Defendant was warned of the dangers of self-representation before being allowed to discharge his public defender and proceed pro se on his plea. Following the plea, defendant filed a timely pro se motion to withdraw it, and requested appointed counsel. The court appointed counsel, but at hearing on the motion defendant "Britt expressed his desire to represent himself because his appointed counsel had filed a motion for a continuance and he did not want the hearing to be continued. The trial court asked Britt again if he wanted to represent himself, and Britt responded affirmatively but requested that his appointed counsel remain in the courtroom on a standby basis. The trial court denied Britt's request for standby counsel, and, after confirming that Britt wanted to proceed pro se, dismissed Britt's counsel. Britt represented himself at the hearing, which took place over two days." The court denied the motion to withdraw the plea, and defendant appealed, with counsel, "arguing in his sole enumerated error that the court erred by allowing him to represent himself during his motion to withdraw his plea. Britt argues that the trial court failed to warn him of the risks of proceeding pro se in his post-conviction proceeding, and therefore he did not make a knowing waiver of appellate counsel." **1. Post-conviction waiver.** "While the record shows that Britt was warned of the dangers of self-representation *at trial*, he was not advised of the dangers of self-representation in his post-conviction proceeding. An examination of the record reveals that there were no discussions at any of the hearings about the dangers of self-representation in Britt's post-conviction proceeding." **2. Functional waiver – dilatory tactics.** "At the hearing on his motion to withdraw his guilty plea, Britt expressed his desire to proceed pro se rather than with counsel because his appellate counsel had requested a

continuance. As such, the record does not reflect that Britt functionally waived his right to appointed counsel through dilatory tactics," *citing Allen v. Daker (May 17, 2021), below.*

Allen v. Daker, 311 Ga. 485, 858 S.E.2d 731 (May 17, 2021). Following convictions for malice murder and related offenses, habeas court properly found that defendant's right to appellate counsel had been violated. Defendant represented himself at trial after the Cobb Circuit Defender's Office (CDO) found that he was not indigent. After his conviction he repeatedly asked for appointed counsel, but those requests were denied without reassessing his financial status. He represented himself on appeal, and his convictions were affirmed. **1. Waiver of counsel.** "[A] defendant may validly elect to represent himself during post-conviction proceedings by waiving his right to counsel either **expressly**, see *Merriweather v. Chatman*, 285 Ga. 765, 766, 684 S.E.2d 237 (2009), or **functionally,** see *Bryant v. State*, 268 Ga. 616, 617-618, 491 S.E.2d 320 (1997); *Calmes v. State*, 312 Ga.App. 769, 773, 719 S.E.2d 516 (2011). See also *Iowa v. Tovar*, 541 U.S. 77, 87-88, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004) ('While the Constitution "does not force a lawyer upon a defendant," it does require that any waiver of the right to counsel be knowing, voluntary, and intelligent.' (citation omitted))." **2. The record doesn't show "that the defendant has validly chosen to proceed pro se" on appeal. "**In most cases, before a defendant may properly proceed pro se in initial post-conviction proceedings and on direct appeal, he must be advised of the dangers of such self-representation and knowingly, intelligently, and voluntarily waive his right to appellate counsel on the record. See *Merriweather*, 285 Ga. at 766, 684 S.E.2d 237. 'In the absence of a showing in the record that the trial court made such admonitions, the defendant has not validly waived his right to appellate counsel.' Id." Here the trial court obtained a valid waiver of the right to trial counsel, but not appellate counsel. *Disapproving Weber v. State,* 203 Ga.App. 356, 416 S.E.2d 868 (1992) "to the extent it can be read to establish a required colloquy for the waiver of the right to appellate counsel"; neither the Supreme Court of Georgia, the U.S. Supreme Court, or any federal circuit court "has ever 'delineated what is constitutionally required for knowing, voluntary, and intelligent waiver of *appellate* counsel,'" *quoting United States v. Hammonds,* 782 Fed. Appx. 899, 901 (11th Cir. 2019). *Accord, Donovan v. State,* 362 Ga.App. 408, 868 S.E.2d 808 (January 31, 2022); *Britt (February 1, 2022), above.*. **3. Functional waiver – failure to act diligently to secure counsel.** "'[W]hen presented with a non-indigent defendant who has appeared for trial without retained counsel, the trial judge has a duty to delay the proceedings long enough to ascertain **whether the defendant has acted with reasonable diligence in obtaining an attorney's services and whether the absence of an attorney is attributable to reasons beyond the defendant's control.'** *Porter*, 358 Ga.App. at 448, 855 S.E.2d 657 (emphasis and citations omitted). *See also Shaw v. State*, 251 Ga. 109, 112, 303 S.E.2d 448 (1983). A functional waiver of this sort is not presumed simply because a non-indigent defendant lacks counsel. It is incumbent on the trial court to determine on the record whether the defendant has exercised reasonable diligence in attempting to retain counsel and whether the absence of counsel is attributable to reasons beyond the defendant's control. See *Porter*, 358 Ga.App. at 450-451, 855 S.E.2d 657; *Martin v. State*, 240 Ga.App. 246, 249-250, 523 S.E.2d 84 (1999). **After Daker was convicted and sentenced, the trial court never inquired about his efforts to retain counsel and never admonished him to do so,** even as he repeatedly expressed his desire for appellate counsel and even as the court repeatedly rejected his requests to have counsel appointed to represent him." **4. Functional waiver – engaging in dilatory tactics.** "A second type of functional waiver occurs when a trial court concludes that a defendant (whether indigent or not) is attempting to use the discharge and employment of counsel as a dilatory tactic and declines to continue a proceeding until the defendant obtains new counsel. See *Bryant*, 268 Ga. at 617, 491 S.E.2d 320; *Hobson v. State*, 266 Ga. 638, 638, 469 S.E.2d 188 (1996). See also *Jefferson v. State*, 209 Ga.App. 859, 861, 434 S.E.2d 814 (1993) (explaining that if a defendant does not have good reason for discharging his counsel, a trial court does not err by requiring him to choose

between continued representation by that attorney and proceeding pro se). Before a trial court requires a defendant to proceed pro se under this waiver theory, the court should advise the defendant of the dangers of self-representation. See *Hobson*, 266 Ga. at 638, 469 S.E.2d 188." Although the trial court noted defendant's pretrial dilatory tactics, "[a]t no time during the post-conviction proceedings did the trial court advise Daker of the dangers of representing himself at that distinct stage, ask him to choose between representing himself or retaining counsel, or give him a deadline by which to obtain counsel." *Accord*, *Britt (February 1, 2022)*, *above*. **5. Determination of indigency. Contrary to defendant's argument, the determination of indigency lies with the public defender under Georgia law.** "The Indigent Defense Act of 2003 (IDA), OCGA § 17-12-1 et seq., expressly assigns to the circuit public defenders (and other indigent defense providers), rather than to the trial courts, the authority and responsibility to determine if criminal defendants are indigent and therefore entitled to appointed counsel at the government's expense." "If Daker believed that his indigency status had changed with respect to his right to appointed counsel, his remedy was to seek a re-determination from the CDO, by mandamus if necessary. See *Calmes*, 312 Ga.App. at 774, 719 S.E.2d 516 (explaining that when a defendant asserts that a circuit public defender has failed to fulfill the duties prescribed by the IDA, the defendant may seek relief by application for a writ of mandamus); *Bynum v. State*, 289 Ga.App. 636, 637-638, 658 S.E.2d 196 (2008) (same)."

2. WAIVER OF AT TRIAL

Stewart v. State, 361 Ga.App. 636, 865 S.E.2d 237 (October 26, 2021). Convictions for aggravated battery and related offenses reversed; trial court erred by allowing defendant to proceed to trial pro se without obtaining a valid waiver of counsel. In the year prior to trial, defendant was represented by three different attorneys who withdrew, two of them over defendant's objection. Defendant repeatedly told the court he intended to hire an attorney for trial, but failed to do so. Noting the absence of counsel at trial, and defendant's announcement of "ready," the court appointed a public defender to sit with defendant at trial and answer his questions, but did not make further inquiry as to defendant's waiver. **1.** "We have declined to divine from the constitutional text any specific questions or information a trial court *must* ask or provide to make sure a defendant's waiver of the right to counsel is knowing and voluntary. See *Tariq-Madyun* [*v. State*, 361 Ga.App. 219(2), 863 S.E.2d 703 (September 23, 2021)]. But at the least, **our precedents say that the record must show that the defendant is aware of two sets of information: (1) the 'dangers' and 'disadvantages' of self-representation, and (2) the basics of his case, including the general nature of the charges and case against him, possible defenses and mitigating circumstances, and the range of consequences if convicted of those charges.** See *McDaniel v. State*, 327 Ga.App. 673, 674-75(1) (761 S.E.2d 82) (2014) (citing *Prater v. State*, 220 Ga.App. 506, 509 (469 S.E.2d 780) (1996)). The record here shows that Stewart heard from the State and the trial court about a subset of the second set of information (the charges against him, the fact that he would be sentenced as a recidivist, and the maximum sentences he faced, but not possible defenses to the charges or any mitigating circumstances). But the first set of information—why self-representation is a bad idea—is noticeably absent. All we have is the trial court's conclusory pretrial statement—'[w]e talked about the pitfalls about representing yourself before'—and Stewart's agreement that they did. But a trial court's 'conclusory statement that it had previously warned [the defendant] about the risks of self-representation' that 'fails to provide details about the information actually provided ... cannot be used to satisfy the State's burden.' *McDaniel*, 327 Ga.App. at 680(1)(b). And not a single conversation providing any detail at all about the 'pitfalls' of self-representation appears in the record." **2. "The presence of standby counsel does not cure a violation of the right to counsel.** See, e.g., *Rutledge v. State*, 351 Ga.App. 355, 360 n.2 (b) (829 S.E.2d 176) (2019) (if the defendant's right to counsel is violated, the presence of standby counsel is not enough to prove the

error was harmless beyond a reasonable doubt); *McDaniel v. State*, 327 Ga.App. 673, 680(1)(c) (761 S.E.2d 82) (2014) (same); *Humphries v. State*, 255 Ga.App. 349, 351(1) (565 S.E.2d 558) (2002) (same); see also *Morman v. State*, 356 Ga.App. 685, 694 n.9 (2) (848 S.E.2d 165) (2020) (explaining there is no right to standby counsel, and standby counsel's failure to assist in the defense does not violate the defendant's right to counsel)."

Wright v. State, 358 Ga.App. 798, 856 S.E.2d 391 (March 8, 2021). Aggravated assault and related convictions reversed. Trial court erred by denying defendant's request for appointment of counsel, made during voir dire. "Wright made a post-waiver request for counsel during voir dire when he stated, 'I got a right to an attorney. Still got a right to an attorney.'" A lengthy argument between defendant and court ensued, in which the court refused to consider appointment of counsel. Later that day, after the first of State's thirteen witness had testified, defendant filed a hadwritten notice of insanity defense, request for evaluation, and request for appointment of a specific attorney. The trial court never ruled on defendant's oral or written requests for counsel. "Wright contends that this constituted an abuse of discretion and structural error, requiring reversal.[fn] We agree. We are mindful of the record, which shows that Wright was antagonistic toward his appointed attorneys prior to trial and during post-trial proceeding, and he filed multiple pro se motions prior to trial. Nevertheless, failure to appoint counsel post-waiver may constitute structural error, which can never be harmless,[fn] and a trial court's failure to exercise its discretion is in itself an abuse of discretion.[fn] Although Wright did not request a ruling on his written motion for reappointment for counsel,[fn] it was the second request for reappointment made by Wright at that point. Most of the trial remained to be conducted, and **the trial court's failure to consider and rule on the motion was error.** Accordingly, the judgment of conviction is reversed."

Porter v. State, 358 Ga.App. 442, 855 S.E.2d 657 (February 19, 2021). Identity fraud convictions reversed; "the record fails to demonstrate that the trial court properly advised Porter of the dangers of proceeding pro se. Moreover, we conclude that, even if there was no unequivocal request to proceed pro se, the trial court failed to properly evaluate whether Porter acted with reasonable diligence in obtaining counsel and whether the absence of counsel was attributable to reasons beyond Porter's control." **1. Dangers of proceeding pro se.** "In this case, no transcripts of any pre-trial proceedings are included in the record or, apparently, even exist." At hearing on motion for new trial, and subsequently, the court recited that it had discussed with defendant his right to counsel, and that defendant originally stated an intent to hire counsel after failing to qualify for the public defender, but "[d]uring the course of this time, Mr. Porter became embolden[ed] in the fact that he wanted to represent himself." "At no time did the trial court indicate it had discussed the dangers of proceeding pro se with Porter, and Porter did not testify during the hearing on his motion for new trial." "[N]ot only is there no evidence of a *Faretta* hearing, and even though we accept the trial court's statements about the substance of his discussions concerning self-representation as true, there is no indication from the trial court's post-trial statements that it ever advised Porter, in any form, of the dangers of self-representation.[fn] In view of the presumption against a waiver of the right to counsel, [cits.] it follows that Porter's convictions must be reversed." **2. Evaluation of defendant's diligence in securing counsel.** "'[W]here a non-indigent defendant has not invoked his right to represent himself at trial, but has also failed to hire an attorney to represent him, ... the determination of whether he validly waived his right to counsel does not turn upon whether he knowingly and intelligently chose to proceed pro se. Instead, a finding of waiver depends on whether the non-indigent defendant exercised reasonable diligence in securing representation.' (Citations and emphasis omitted.) *Longo v. City of Dunwoody*, 351 Ga.App. 735, 742(2), 832 S.E.2d 884 (2019). Therefore, '[s]ince a non-indigent defendant's right to counsel is predicated upon his own diligence, a failure on his part to retain counsel may constitute a waiver of the right to counsel.

Thus, when presented with a non-indigent defendant who has appeared for trial without retained counsel, the trial judge has a duty to delay the proceedings long enough to ascertain whether the defendant has acted with reasonable diligence in obtaining an attorney's services and whether the absence of an attorney is attributable to reasons beyond the defendant's control.' (Citations and punctuation omitted; emphasis supplied.) *Eason v. State*, 234 Ga.App. 595, 597-598(2), 507 S.E.2d 175 (1998); see also *Longo*, 351 Ga.App. at 741-742(2), 832 S.E.2d 884; [other cits.]." **This requires the court to "'determine three issues on the record: (1) whether [a defendant is] eligible to have appointed counsel represent him, and, if not, (2) whether [the defendant] exercised reasonable diligence in attempting to retain trial counsel and (3) whether the absence of trial counsel was attributable to reasons beyond [the defendant's] control.'** *Martin v. State*, 240 Ga.App. 246, 248(2), 523 S.E.2d 84 (1999)." **A. Trial court**'s finding that defendant failed to exercise reasonable diligence "was based largely upon a singular fact — Porter's appearance for trial without counsel — which it automatically equated to a lack of reasonable diligence. But '[t]he fact that [Porter] did not retain counsel as instructed by the trial court, standing alone, is not sufficient to establish a waiver of right to counsel by the defendant.' *Ford* [*v. State*, 254 Ga.App. 413, 416, 563 S.E.2d 170 (2002)]. **B. Factors beyond defendant's control.** "[T]he record does not demonstrate that the trial court inquired of Porter whether the reason he appeared without counsel was based upon reasons beyond his control. See *Martin*, 240 Ga.App. at 250-251(3), 523 S.E.2d 84." **C. "'Even if a defendant is determined to be nonindigent, a trial court has a duty to affirmatively exercise its discretion to appoint counsel for nonindigent defendants based on individual circumstances" if authorized by Uniform Superior Court Rules 29.4 and 29.5,"** *citing Martin.*

Haynes v. State, 356 Ga.App. 631, 848 S.E.2d 644 (September 10, 2020). Armed robbery convictions affirmed; trial court properly granted defendant's request to represent himself. "Here, the record shows that the trial court warned Haynes that unlike his lawyer, Haynes was neither trained nor skilled in presenting defenses, cross-examining witnesses, or picking a jury; that he was facing a prosecutor who, unlike him, was trained and knew the law; that neither the court nor the prosecutor could give him legal advice, although standby counsel could advise him on procedural matters; that the court reporter was having difficulty hearing him, and that if he presented his own case he would need to speak louder; that he would be held to the same standards of performance as an attorney; that he would not get a new trial simply because he made the decision to represent himself; and that representing himself was a 'bad idea.' The court also questioned Haynes about his education and informed him of the sentence he was facing. Simply put, **Haynes 'had been informed ... of the nature of the charges against him and of the statutory ... maximum penalties. The record reflects that the trial court, fulfilling its important responsibility in this area, repeatedly apprised him of the dangers to a layman in conducting his own defense. He was well aware [that his sovereign-citizen defense was meritless]. Moreover, an attorney was made available during [his period of self-representation] to respond to any questions of law or procedure that he might have. We find no error in the trial court's determination that [Haynes] waived his right to appointed counsel and that he voluntarily and intelligently elected to proceed pro se after being fully apprised of the possible consequences.'** *Staples v. State*, 209 Ga.App. 802, 804(3), 434 S.E.2d 757 (1993) (citations omitted)."

II. CONSTITUTIONAL ISSUES

A. CONFRONTATION

1. UNAVAILABLE WITNESS/*CRAWFORD*

State v. Gilmore, 312 Ga. 289, 862 S.E.2d 499 (August 24, 2021). *Reversing* 355 Ga.App. 536, 844 S.E.2d 877 (2020); in prosecution for sale of methamphetamine and related offenses, trial

court erred by excluding video of confidential informant's drug buy under Confrontation Clause. Informant is now deceased, so unavailable to testify. Informant made the drug buy and video at request of officers investigating Gilmore. The video had no intelligible audio, but showed informant handing money to Gilmore and receiving drugs in return. **1.** Trial court, and Court of Appeals, found the informant's actions shown on the video to be nonverbal statements, but Supreme Court disagrees. **"We have noted that 'the key to the definition of 'statement' is that nothing is an assertion unless intended to be one.'** *State v. Orr*, 305 Ga. 729, 741, 827 S.E.2d 892 (2019) (quoting Fed. R. Evid. 801(a) advisory committee's note on 1972 Proposed Rules). … On the other hand, this Court and others have concluded that **nonverbal conduct does *not* constitute a statement when it is not intended to be an assertion.** See *Orr*, 305 Ga. at 741, 827 S.E.2d 892 (stating that a defendant's failure to call the police after he was allegedly attacked by the victim was not a nonverbal statement). See also, e.g., *United States v. Farrad*, 895 F.3d 859, 877 (6th Cir. 2018) (rejecting defendant's argument that photographs of guns—including one featuring a person who looked like the defendant and others showing a close-up of a hand holding a gun—'were all out-of-court "statements" that [the defendant] illegally possessed a firearm,' and concluding that the photographs did not constitute nonverbal statements) (citation and punctuation omitted); *United States v. Kool*, 552 Fed. Appx. 832, 834 (10th Cir. 2014) (holding that a defendant did not intend to make an assertion when he, upon being told that law enforcement officials had an incriminating photograph showing a hand with tattoos on it, moved his hands from the interview table and placed them under his armpits). Here, Gilmore contends that the CI's nonverbal conduct in the video recording constituted a statement because the CI intended to 'prove [that] Gilmore sold drugs.' But we are not convinced. Unlike a witness pointing to a specific person in a police lineup (nonverbal conduct intended to assert something along the lines of 'that is the person') or a person nodding her head in response to a specific question (nonverbal conduct that is intended to assert 'yes') **we cannot say that a person handing money to another person and taking possession of a physical object in return is 'intended [to be] an assertion.'** See Rule 801(a)(2). We simply cannot conclude on this record—as Gilmore implicitly asks us to—that the CI intended to assert through his conduct something along the lines of 'You are a drug dealer' or 'We are entering into a sale of illegal drugs' when he handed a $20 bill to Gilmore and received drugs in exchange." **2.** Significantly, officers here asked informant to purchase drugs specifically from Gilmore, *distinguishing* "*United States v. Gomez*, 617 F.3d 88, 91-97 (2d Cir. 2010) (holding that an agent's testimony that he told a CI to 'call his [drug] supplier,' took the CI's phone, and dialed the defendant's number before handing the phone back to the CI was 'prejudicial hearsay' because it created the 'inescapable' inference that the CI 'had told [the agent] that [the defendant] was his supplier,' and recognizing that such testimony 'directly implicates the Confrontation Clause and [the defendant's] right to confront his accusers in court')." **3.** *Also distinguishing* "*United States v. Martinez*, 588 F.3d 301, 310-311 (6th Cir. 2009) (holding that a doctor's conduct on a video recording, which depicted him performing a medical procedure, constituted a nonverbal statement about the proper way to perform the procedure)." "Dr. Boswell made the video in response to an FBI request, with the purpose of demonstrating the proper performance of nerve-block injections. Accordingly, because of Dr. Boswell's intent, we conclude that his conduct during the course of the video is an assertion of proper medical performance and is, therefore, a statement under Rule 801(a) of the Federal Rules of Evidence."

B. JURY TRIAL, WAIVER OF

Agee v. State, 311 Ga. 340, 857 S.E.2d 642 (April 19, 2021). Malice murder and related convictions affirmed; record showed "that Appellant made a knowing, voluntary, and intelligent waiver of his right to a jury trial." Defendant answered "yes" when trial court asked, before trial, **"Do you understand you've got a right to a jury trial if you chose to have one?" and "with a**

bench trial, the court will make the—will be the finder of fact as well as the person that presides over the law, as opposed to in a jury trial, the jury would be the fact-finder and the court would provide the law for the jury. Do you understand the difference in that?" Defendant also affirmed that he had discussed it with his attorney and wanted to waive jury trial. "Based on the record, we conclude that Appellant personally, knowingly, intelligently, and voluntarily waived his right to a jury trial. See *Watson v. State*, 274 Ga. 689, 690-691(2), 558 S.E.2d 704 (2002) (waiver was knowing, intelligent, and voluntary where defendant was asked personally on the record whether he wanted to proceed with a bench trial, and defendant orally affirmed the waiver)." Rejects defendant's suggestion that trial court must inquire "into the defendant's education and mental status, or allowing the defendant the opportunity to watch another bench trial before making a decision," as in *Johnson v. State*, 157 Ga.App. 155, 155-156(2), 276 S.E.2d 667 (1981) and *Safford v. State*, 240 Ga.App. 80, 82-83(2), 522 S.E.2d 565 (1999). "[I]n both of those cases, the specific inquiries and the opportunity to observe a bench trial were afforded after the trial court determined that the defendant knowingly, intelligently, and voluntarily waived a jury trial, and were additional measures that the trial court elected to provide. Such measures are not categorically required for a trial court to establish that a defendant's waiver is knowing, intelligent, and voluntary."

C. PRESENCE

1. DEFENDANT ABSENT

Bland v. State, A21A1547, ___ Ga.App. ___, ___ S.E.2d ___, 2022 WL 731081 (March 11, 2022). Convictions for aggravated child molestation and related offenses reversed; **trial court erred by continuing trial in defendant's absence.** "The record shows that after the State had presented its evidence and rested, Bland presented several defense witnesses and then began to testify in his own defense. But before Bland addressed the specific allegations of abuse in this case, the trial court interrupted his testimony and indicated that the trial would resume the following day. The next morning, which was a Friday, Bland did not appear in court and his counsel informed the judge that Bland was hospitalized with injuries sustained after he had jumped from a vehicle while on the way to the courthouse. The judge immediately revoked Bland's bond, announced that he was under arrest, and directed the sheriff's department to monitor his hospital room. The judge recessed the case until the following Monday morning, indicating that the options at that point would be to proceed with the trial in Bland's absence, continue the case, or declare a mistrial. … That following Monday, Bland's attorney told the court that Bland was still at the hospital and that after he was physically cleared he would be monitored for 72 hours for psychological evaluation. Defense counsel told the court that Bland wished to be present at trial and he submitted a video-recorded statement from Bland informing the court that he still wanted to be heard at trial and that his testimony was crucial to his case." The court denied a defense request for continuance and mistrial and proceeded with the trial with defendant in absentia, finding that defendant had voluntarily absented himself from the trial. Defendant was convicted in absentia. ***Distinguishing Hunter v. State*, 263 Ga.App. 747, 748(1), 589 S.E.2d 306 (2003) where "a defendant who had left court during a break in his trial and attempted to commit suicide by slitting his wrists was 'thereafter voluntarily absent from the proceeding, [and thus] waived his right to be present at the remainder of the trial'" (citation and punctuation omitted). Here, "there is no evidence that Bland's act of jumping from the vehicle was an attempted suicide.** There was no evidence presented to the trial court as to any circumstances surrounding the incident; there was no evidence explaining why he jumped; and there was no testimony from Bland, as there was from the accused in *Hunter*, stating that he wanted to commit suicide. Given the lack of evidence, the State's characterization of the incident is mere speculation and distinguishes it from *Hunter*. Moreover, Bland expressly informed the court in his recorded statement that he wanted to return to the trial. So unlike

Hunter, the judge in this case had a clear statement from the accused that he was not voluntarily waiving his right to be present for the remainder of the trial. Furthermore, Bland indicated in his recorded statement that he wanted to finish his trial testimony that had been interrupted by the court. So the continuance of the trial without Bland deprived him of his right to testify."

Brennan v. State, 313 Ga. 345, 868 S.E.2d 782 (February 1, 2022). Felony murder and related convictions affirmed; no violation of right to be present by conducting pretrial conference pursuant to USCR 33.5 in defendant's absence. At the pretrial conference, lawyers for both sides presented a proposed plea deal to the court, but the court rejected the deal when the lead detective in the case appeared and argued against it. **Held, a pretrial conference is not a "critical stage" "in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or one in which the outcome of the case is substantially affected in some other way,"** *quoting Allen v. State*, 310 Ga. 411, 418(5), 851 S.E.2d 541 (2020) (citation and punctuation omitted). "USCR 33.5 merely provides that parties may or may not disclose a tentative plea agreement to the trial judge, and the judge may or may not indicate whether he or she 'will likely concur in the proposed disposition if the information developed in the plea hearing or presented in the presentence report is consistent with the representations made by the parties.' Moreover, even if the trial judge does indicate that he or she will likely concur in the tentative plea agreement, the judge can still depart from that determination as long as the judge explains his or her reasons based on information provided prior to or at the plea hearing. Here, the trial judge indicated that he rejected the tentative plea agreement. After the judge offers his or her indication or declines to indicate, the defendant still has a choice on whether to tender a guilty plea. If he or she chooses to enter a guilty plea, USCR 33.5 contemplates the formal tendering of a guilty plea at which the defendant will be present. … An indication by the trial court, under USCR 33.5 (B), that it 'will [not] likely concur' with the parties' tentative plea agreement at the formal tendering of a guilty plea is separate from USCR 33.10 because the trial court is not formally rejecting the tentative plea agreement. Thus, it is clear that at the USCR 33.5 conference, the trial judge is merely providing an indication as to what may occur at a formal tendering of the guilty plea, provided that 'the information developed in the plea hearing or presented in the presentence report is consistent with the representations made by the parties.' USCR 33.5(B). Put simply, a USCR 33.5 conference gives the parties a preview of how the trial judge may likely rule at a separate, subsequent USCR 33.10 formal guilty plea hearing at which the defendant is required to be present." **"[W]e] conclude that disclosure of a tentative plea agreement at a conference under USCR 33.5 is not a critical stage for the following reasons: (1) a defendant's rights cannot be lost because a defendant has no right to enter a guilty plea [FN11: See *Carr* [*v. State*, 301 Ga. 128, 130(3), 799 S.E.2d 175 (2017)] (defendants have no right to enter a guilty plea). Additionally, … there is nothing prohibiting a defendant from formally tendering a guilty plea after a trial judge provides his or her indication to the parties.]; (2) a defendant's defenses or privileges cannot be waived because there is no impact on a defendant's opportunity to defend against the charges [FN12: We note that a defendant waives certain defenses and privileges by formally entering a guilty plea, but no defenses or privileges are waived by disclosing a tentative plea agreement to a trial judge. See OCGA § 24-4-410(3) and (4) (concerning the inadmissibility of any statements 'made in the course of plea discussions' and 'made in the course of any proceedings in which a guilty plea ... was entered and was later withdrawn ...').]; and (3) the outcome of the case cannot *substantially* be affected in some other way because (a) a defendant still retains the option to formally tender a guilty plea, and (b) a defendant can still proceed to trial and raise any and all permissible defenses and privileges during trial."**

Gobert v. State, 311 Ga. 305, 857 S.E.2d 647 (April 19, 2021). Felony murder and related convictions affirmed; no violation of defendant's right to be present at bench conferences.

"Before the first bench conference in the jury selection process after Gobert's case had been called for trial, the trial court stated the following: 'Let's take that up, up here. Mr. Dunn, your client's always welcome up here just so you know.' Dunn, Gobert's trial counsel, responded, in Gobert's presence, 'Mr. Gobert, the defendant is staying here, Your Honor.' … Gobert was present in court both when the trial court invited him to 'always' join his counsel at bench conferences and when his attorney waived his presence at such conferences, and he did not voice any objection to his counsel's statement. Nor did he or his counsel ever seek his inclusion in any of the subsequent bench conferences of which Gobert now complains on appeal. Thus, his right to be present was waived.

Champ v. State, 310 Ga. 832, 854 S.E.2d 706 (February 15, 2021). Following convictions for malice murder and firearms offense, judgment vacated and remanded for hearing on whether defendant "acquiesced to his absences from the bench conferences" discussing excusal of jurors. During jury selection, the court conducted numerous bench conferences with counsel and/or prospective jurors, and excused for cause several prospective jurors. Defendant was generally present in the courtroom but not at the bench, and apparently unable to hear or participate in the conferences. "There is no indication in the record the Appellant personally waived his right to be present for these bench conferences or that his counsel waived that right in Appellant's presence or with his express authority." As the issue was raised for the first time on appeal, not at trial or in motion for new trial, Supreme Court remands for hearing by trial court on acquiescence, "at which the parties have an opportunity to supplement the record with relevant evidence and after which the trial court may make factual findings and issue an order ruling on the claim." Reasoning: "[f]irst, … **acquiescence is a fact-specific issue that turns on how to interpret a defendant's silence after his absence from a proceeding. Trial judges are generally better situated than appellate courts to make such inferences in the first instance,** particularly in a context where the trial judge's own practices, procedures, and observations of what occurred during the trial may be pertinent. Second, **we should not lightly assume that defense counsel allowed his client's constitutional right to be present to be violated without the client's consent; rather, we would normally expect that if bench conferences or other proceedings to which the right applies happened without the defendant's presence, counsel advised the defendant of his right to be present and of what occurred to ensure that the defendant acquiesced to his absence.** [Cit.] Third, and relatedly, **it would promote gamesmanship and create ethical concerns if defense counsel** – having realized that the defendant did not participate in a bench conference or other proceeding at which he had a right to be present and that the trial transcript would not show acquiescence, even though a fuller record could or would show acquiescence – **could secure reversal of a conviction by not raising the issue until appeal, depriving the State of the opportunity to create that fuller and more truthful record."** Notes that "we are *not* holding today that there is in this context a presumption that defense counsel ensured their clients' acquiescence to violations of the right to be present, which (if unrebutted) could be relied on without more to prove such acquiescence. But we also should not presume that defense counsel performed their professional duties deficiently by allowing their clients' constitutional rights to be violated, even if they did not make as clear a record of their clients' waiver or acquiescence as they perhaps should." Also, suggests that the Court may reconsider case law prohibiting harmless error analysis on this issue if asked to do so, *citing Rushen v. Spain*, 464 U.S. 114, 117-120, 104 S.Ct. 453, 454-57, 78 L.Ed.2d 267 (1983) (per curiam) and cases from other states.

D. SILENCE/TESTIMONY BY DEFENDANT

1. WHEN APPLICABLE

Fuller v. State, A21A1481, ___ Ga.App. ___, ___ S.E.2d ___, 2022 WL 712982 (March 10,

2022). Armed robbery and related convictions affirmed. Trial court erred, but not plain error, in cutting off defense counsel's cross-examination of co-conspirator who "communicated his desire to assert his Fifth Amendment right to remain silent." The witness, Pabon, had pled guilty and was awaiting sentencing. Pabon was called to the stand by co-defendant Hill, and testified that Hill was not present at the robbery, but then took the Fifth when questioned by Fuller's attorney. **1. "Although Pabon had pleaded guilty, he had not yet been sentenced, so he likely was entitled to assert his Fifth Amendment right to remain silent.** See *Shealey v. State*, 308 Ga. 847, 852(2)(b), 843 S.E.2d 864 (2020) (citing *Mitchell v. United States*, 526 U.S. 314, 326, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999), for the proposition that 'a defendant's Fifth Amendment privilege against self-incrimination is not extinguished by the entry of a guilty plea but rather may be asserted at least until sentencing')." **2. "'When the witness manifests his intention to claim Fifth Amendment protection, the court must conduct a hearing outside the presence of the jury to determine whether the testimony the State seeks to elicit potentially could incriminate the witness."** *Parrott v. State*, 206 Ga.App. 829, 832(2), 427 S.E.2d 276 (1992). See also *Brown v. State*, 295 Ga. 804, 809(5)(a), 764 S.E.2d 376 (2014) (same process applied when a criminal defendant intended to call witness)." Trial court's failure to do so here was error, but no prejudice to defendant because proper procedure would have been to strike Pabon's testimony. **"'When a witness declines to answer on cross examination certain pertinent questions relevant to a matter testified about by the witness on direct examination, all of the witness' testimony on the same subject matter should be stricken.'** *Mercer v. State*, 289 Ga.App. 606, 608-609(2), 658 S.E.2d 173 (2008) (citation, punctuation, and emphasis omitted). … Therefore, had the court followed the proper procedure, Fuller would still not have been entitled to the testimony he desired from Pabon; he would have been entitled merely to striking Pabon's testimony that Hill was not with him during the robbery."

III. CONTEMPT

Collins v. State, A22A0442, ___ Ga.App. ___, ___ S.E.2d ___, 2022 WL 1002694 (April 4, 2022). Trial court erred by denying defendant's motion to dismiss State's motion for criminal contempt against her. Collins was a witness in a civil case who, after other disruptive acts, allegedly "looked straight at the judge, made a 'gun' symbol with her right hand by extending her thumb and forefinger, putting it to her head, then pointed it at the judge and made a motion as if 'pulling the trigger' with the imaginary gun's hammer coming down. This action was witnessed by the Defendant and court personnel, including Deputy Warren, who were present in the courtroom and clearly conveyed a threat to the Court." "Two months later, the State filed a motion for criminal contempt in the pending civil case based upon Collins' conduct in the courtroom." "Collins filed a motion to dismiss the motion for contempt, which the newly assigned judge denied." **Held**, the trial court should have granted the motion to dismiss. "The proper procedure is for the trial judge, not the State, to institute criminal contempt proceedings. See, e.g., *Moton v. State*, 332 Ga.App. 300, 302, 772 S.E.2d 393 (2015) (trial judge informed witness that a criminal contempt hearing would be scheduled and issued rule nisi advising the witness of the charge against him)."

In re: Ragas, 359 Ga.App. 670, 859 S.E.2d 827 (June 8, 2021). Physical precedent only. Evidence didn't support criminal contempt finding against defense attorney. Ragas represented defendant Taylor, who pled guilty in three criminal proceedings. "Among other things, Taylor's sentence required him to complete a twelve-month Extension Residential Recovery Program. As part of the sentence, Taylor was to 'remain in jail until accepted and space is available.'" "Ragas picked up Taylor [from jail] and drove him to a treatment center where he was interviewed but not accepted into a rehabilitation program due to a lack of available bed space. Ragas then drove Taylor to a restaurant and left him there with Taylor's brother." Taylor never reported back to

jail. Ragas didn't report what happened to the court until a week later, after Taylor failed to report to probation. Ragas was found in contempt based on failing to return Taylor to jail, and for his "lack of candor" with the court during the week before reporting the incident to the court. **1. "The sentencing order in this case was not directed to Ragas. … The sentencing order did not require Ragas to take any action or refrain from any action; it did not mention Ragas at all. Generally '[a] person cannot be found in contempt of a court order or writ which was not directed to him.'** *American Express Co. v. Baker*, 192 Ga.App. 21, 23(2), 383 S.E.2d 576 (1989)." But "[i]n *The Bootery v. Cumberland Creek Props.*, 271 Ga. 271, 517 S.E.2d 68 (1999), our Supreme Court adopted rules in force in 'the majority of foreign jurisdictions' setting out the circumstances in which 'the violation of a court's order by one who was not a party to the proceedings can be punished as a contempt.' Id. at 272 (2), 517 S.E.2d 68. It must be 'alleged and proved that the contemnor had *actual* notice of the order for disobedience of which is sought to be punished [and that] the nonparty be in privity with, aid and abet, or act in concert with the named party in acts constituting a violation of the order.' Id. at 272(2), 517 S.E.2d 68 (citations and punctuation omitted; emphasis in original)." *Distinguishing* cases which "involved express commands or prohibitions that the contemnors, in their capacities as legal representatives of the persons to whom the orders were directed, were obliged to follow": *Murphy v. Murphy*, 330 Ga.App. 169, 176-177(6)(a)(ii), 767 S.E.2d 789 (2014) (affirming "a contempt judgment against an attorney in a child custody case for discussing the case with his client's minor children … when the trial court had ordered his client not to discuss the case with them") and *Sullivan v. Bunnell*, 340 Ga.App. 283, 290-291(2), 797 S.E.2d 499 (2017) ("contempt action could proceed against a person who, acting under a power of attorney, caused payments required by the principal's divorce decree not to be paid"). "It may be that Ragas was given specific obligations, responsibilities, or authority in connection with transporting Taylor. But aside from the sentencing order, which assigns no such responsibilities or authority to Ragas, the state presented no evidence of any order or direction that it claims Ragas disobeyed." **2. "Lack of candor": "[T]he trial court determined that Ragas was in criminal contempt for not informing her that Taylor, whom the jail had released to him to transport to the rehabilitation facility, had in fact not been admitted to the facility and currently was in violation of the terms of Taylor's sentence. '**A court is authorized to find an attorney, as an officer of the court, in contempt for misbehavior in his or her official transactions [under OCGA § 15-1-4(a)(2)].' [*In re Dillon*, 344 Ga.App. 200, 202, 808 S.E.2d 436 (2017)]. **… But the evidence does not show that Ragas was engaged in an official transaction with the court when he took Taylor to the rehabilitation facility. There is no evidence that Ragas was still providing Taylor with legal representation at that time. More fundamentally, responsibility for enforcing a sentencing order or transporting a convicted defendant to and from jail generally is not imposed upon an attorney.** It is true that attorneys' tripartite responsibilities to their client, opposing counsel, and the court are often in tension. But calling upon an attorney to enforce a criminal sentence of incarceration is a difference not merely in degree but in kind. As there is no evidence that Ragas had been ordered or had agreed to assume such responsibilities, or that he otherwise was assigned some sort of official capacity in transporting Taylor, we should not step in to establish and set out the parameters of such responsibilities or such a capacity." "While Rule 3.3 of Georgia's Rules of Professional Conduct speaks to an attorney's duty of candor to the court, we do not undertake to extend that rule beyond the scope of an attorney's conduct as an attorney. And we have found no authority supporting the imposition of criminal liability upon an attorney based solely on a breach of a rule of professional conduct."

IV. DUI

A. IMPLIED CONSENT AND CHEMICAL TESTS

1. INDEPENDENT TEST, REQUEST FOR, WHAT CONSTITUTES

State v. Henry, 312 Ga. 632, 864 S.E.2d 415 (October 19, 2021). *Reversing* 355 Ga.App. 217, 219-222(2), 843 S.E.2d 884 (2020), and ***disapproving*** **line of cases beginning with *Ladow v. State*, 256 Ga.App. 726, 569 S.E.2d 572 (2002).** In DUI prosecution, ineffective assistance of counsel remanded to Court of Appeals for reconsideration under the proper standard as to "when a person accused of driving under the influence has invoked his or her right to additional, independent chemical testing under OCGA § 40-6-392(a)(3)." Defendant here asked officer, 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?" Court of Appeals held that this question "reasonably could be construed to be an expression of a desire for such a test." **1.** Court of Appeals here applied the standard set forth in *Ladow*: "a request for additional testing has been lawfully asserted when a suspect has made some statement that 'reasonably could be construed, in light of the circumstances, to be an expression of a desire for such test.' Id. at 728." "We … reject the 'reasonably could' standard set forth by the Court of Appeals in *Ladow*, and we overrule *Ladow* and all other decisions of the Court of Appeals holding that a suspect's right to an additional, independent test is invoked by a statement to a law enforcement officer that 'reasonably could' - rather than 'reasonably would' - be construed as an expression of a request for such a test." **2.** OCGA § 40-6-392(a) allows a state-administered test to be admitted despite failure to afford the defendant an independent test where that failure was "justifiable." "The statute therefore indicates a strong preference for the admissibility of the state-administered chemical test," but fails to define "justifiable." **3.** "While there may be various excuses or reasons that could justify a law enforcement officer's failure or inability to obtain additional, independent chemical testing, the only relevant excuse at issue here is a law enforcement officer's explanation that the officer did not understand that the defendant wanted such testing. **When a reasonable officer would understand that a suspect has requested an additional, independent chemical test but ignores that request, that failure is not justifiable. But when a reasonable officer would not understand that a suspect has made a request for additional, independent chemical testing, the failure to obtain such testing is justifiable. An officer does not unjustifiably fail to obtain an additional, independent chemical test when a suspect makes only an unclear, ambiguous, or equivocal statement that could have been, with the benefit of hindsight, interpreted as a request for additional testing.** See, e.g., *Wright v. State*, 338 Ga.App. 216, 228 (789 S.E.2d 424) (2016) (Peterson, J., concurring). **Whether a clear request was made is determined by examining the words used by the suspect, the context of the conversation between the officer and the suspect regarding chemical testing, and other circumstances relevant to whether or not the suspect expressed a desire for such testing," *analogizing to* "the evaluation of how clearly a suspect must invoke his or her right to counsel during a custodial interview. A suspect's request for counsel must be made 'sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney'** in order for the suspect to invoke his or her Fifth Amendment right to counsel during a custodial interrogation following the giving of *Miranda* warnings.[Cit.] *Davis v. United States*, 512 U.S. 452, 459(II) (114 S.Ct. 2350, 129 L.Ed.2d 362) (1994)."

2. SELF-INCRIMINATION

Awad v. State, 313 Ga. 99, 868 S.E.2d 219 (January 19, 2022). *Reversing* 357 Ga.App. 255, 850 S.E.2d 454. In DUI prosecution, trial court properly granted motion to suppress defendant's refusal of urine testing pursuant to implied consent. **1.** "**Under the reasoning of *Olevik* and *Elliott,* we hold that the right against compelled self-incrimination protected by Paragraph XVI prohibits the State from admitting into evidence a defendant's refusal to urinate into a collection container as directed by the State for purposes of providing a urine sample for chemical testing."** "[A]s made clear in *Olevik,* the Georgia constitutional right against compelled self-incrimination requires a trial court to grant a motion to suppress incriminating results from a

state-administered chemical test unless the State proves that (1) the defendant was not required to perform an act to generate the test sample, or (2) the defendant was not compelled to submit to the test." **2.** *Distinguishing Green v. State*, 260 Ga. 625, 398 S.E.2d 360 (1990) (no violation of self-incrimination in State's use of urine sample procured pursuant to terms of probation): "In context, … *Green* held that 'the use of a substance naturally excreted by the human body [such as urine] does not violate a defendant's right against self-incrimination' *unless* the defendant was *compelled* to perform an act to produce the substance." *Green* did not identify the method of collection, whether force was used to obtain the sample, or "state that the probationer was compelled to provide a urine sample, and we will not infer such compulsion from *Green*'s silence." Suggests a different result if the defendant were not required to perform an act (urinate into a collection container as directed by the State), such as being catheterized, see fn.2. **3.** "**FN8:** Because … the State has the burden of establishing that evidence of the defendant's refusal is admissible, it must show that the collection method that the defendant refused would not have required him to perform an act to generate self-incriminating evidence. Evidence that the defendant's refusal concerned several collection methods, some of which implicate his rights under Paragraph XVI and some of which do not, fails to carry that burden."

V. EVIDENCE

A. FLIGHT/ESCAPE

Harris v. State, 313 Ga. 225, 869 S.E.2d 461 (February 15, 2022). Felony murder and related convictions affirmed; no error in admitting evidence of the circumstances of defendant's arrest. At his arrest, four months after the shootings at issue, defendant was found with a .45 caliber pistol and "a bag with a 'tremendous' amount of ammunition in it." "Here, the evidence related to Harris's attempt to evade arrest by barricading himself in a room—evidence that included the handgun and ammunition that was found near Harris at the time of his arrest—had probative value because it suggested that Harris had a reason to evade law enforcement officers and therefore demonstrated Harris's consciousness of guilt. And in a circumstantial case like this one, the need for this type of evidence was greater because it provided an additional set of facts from which the jury was authorized to infer Harris's guilt." **"[T]he Eleventh Circuit has explained that it is '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, are admissible as evidence of consciousness of guilt, and thus of guilt itself.'** *United States v. Borders*, 693 F.2d 1318, 1324 (11th Cir. 1982) (citation and punctuation omitted)."

B. HEARSAY

1. ADMISSIONS AGAINST INTEREST

Parrish v. State, 362 Ga.App. 392, 868 S.E.2d 270 (January 18, 2022). Voluntary manslaughter and related convictions affirmed; **trial court properly admitted into evidence statement to police prepared by defendant's attorney.** "Around the same time that Parrish turned himself in to police, his trial counsel provided law enforcement with a statement recounting Parrish's version of the shooting, which he claimed was in self defense. Parrish testified at trial, and during the State's cross-examination, the statement was introduced for impeachment purposes. The trial court admitted the statement despite the objections of Parrish's trial counsel, who argued that Parrish did not draft the statement and had never specifically reviewed its contents. Thereafter, the State cross-examined Parrish regarding the inconsistencies between his direct testimony and the statement prepared by his counsel. Most notably, the State questioned him regarding the contrast in his trial testimony, in which he claimed to be unaware there was a handgun in his vehicle until reaching down to the floorboard for something to ward off Lumpkin's attack, with the claim in the prepared statement that he reached for 'my pistol.' The State also noted that,

again in contrast to his trial testimony, the prepared statement provided to police did not claim Lumpkin was on top of Parrish and choking him when Parrish shot him." "OCGA § 24-8-801(d)(2)(C) and (D), … provide: '**Admissions shall not be excluded by the hearsay rule. An admission is a statement offered against a party which is ... [a] statement by a person authorized by the party to make a statement concerning the subject [or] [a] statement by the party's agent or employee,** but not including any agent of the state in a criminal proceeding, concerning a matter within the scope of the agency or employment, made during the existence of the relationship[.]' Federal case law—which is relevant in interpreting our Evidence Code[fn]—has held that the federal counterpart to this statute (Federal Rule of Evidence 801(d)(2)(D))—allows statements by an attorney to be admissible against a defendant in criminal cases in certain situations. *See United States v. Amato*, 356 F.3d 216, 218-20 (2nd Cir. 2004) (holding that the district court properly admitted defendant's attorney's letter regarding aspect of case under Rule 801(d)(2)(D) after defendant's testimony at trial contradicted statement in letter); *United States v. Harris*, 914 F.2d 927, 931 (7th Cir. 1990) (finding that defense counsel's out-of-court statements in inquiry into whether witness might have confused defendant's brother with defendant were admissible against defendant as statements of agent on behalf of his principal under Rule 801(d)(2)(D)); *see also* Ronald L. Carlson & Michael Scott Carlson, Carlson on Evidence, p. 498-99 (6th ed. 2018) (noting that courts have concluded that both Rules 801(d)(2)(C) and (d)(2)(D) can encompass statements made by an attorney on her client's behalf)."

2. CHILD HEARSAY

Grier v. State, 313 Ga. 236, 869 S.E.2d 423 (February 15, 2022). Malice murder and related convictions affirmed; **1.** trial court erred, but harmless, in admitting testimony of DA's employee, repeating statements of child witness who did not testify at trial. "[Witness] Paa's testimony about [child declarant] A.G.'s statement clearly should have been excluded under the Confrontation Clause." **2.** But same witness's testimony repeating statements of child witness who did testify was properly admitted. **"Appellant argues that J.F. did not actually 'testify' at trial as required by the Child Hearsay Statute, because most of her responses were non-verbal, so Paa's testimony about J.F.'s statement was inadmissible. But J.F. did testify at trial, was cross-examined, and provided responses to many of the questions asked to her.** That defense counsel willingly abandoned his case-related questioning of J.F. after she provided non-verbal responses to some of the State's questions does not mean she did not 'testify' as required by the Child Hearsay Statute." **3.** Witness who heard child's statements at the scene was properly allowed to testify to those statements, regardless of whether the child was speaking to the witness or someone else. **"[N]othing in the Child Hearsay Statute precludes the admission of a statement simply because it was made to multiple people simultaneously. The evidence shows that Delmar was an original recipient of J.F.'s statement, so this argument also fails." 4.** Child hearsay is not excludable based on lack of notice absent a showing of bad faith and prejudice. "[T]he ordinary remedy for failure to comply with a requirement that a witness must be identified prior to trial is simply a continuance to allow for an interview of the witness, and we assume that the trial court would have followed the law if an objection to notice had been made."

3. DOUBLE HEARSAY

Grier v. State, 313 Ga. 236, 869 S.E.2d 423 (February 15, 2022). Malice murder and related convictions affirmed. Child's exclamation at murder scene ("daddy shot mommy"), and witness's statement to someone else repeating the child's exclamation while paramedics were still trying to resuscitate the victim, were both properly admissible as excited utterances, *citing* Rule 803(2) (regarding excited utterances) and Rule 805 ("Hearsay included within hearsay shall not be excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule.").

C. OTHER ACTS

1. SIMILARITY OF OFFENSES -- DUI

Webb v. State, 359 Ga.App. 453, 858 S.E.2d 546 (May 17, 2021). DUI-per se conviction affirmed; no error in admitting defendant's prior DUI to show general intent to drive while impaired. Even if admission of the evidence was erroneous, it was harmless error because "the evidence supporting Webb's DUI per se conviction was substantial. There was no dispute that Webb was driving his vehicle when it crossed over the center line and collided with a guardrail. And although Webb claims that the accident was a result of his medical condition, his performance on the field-sobriety tests suggested he was impaired, he emanated an alcoholic-beverage odor, and his breath, in fact, tested positive for alcohol. Furthermore, Webb's blood—drawn by an EMT at the scene of the accident—had a blood-alcohol content of 0.088 grams per 100 milliliters, with a margin of error of plus or minus 0.005 grams per 100 milliliters—placing that content over the legal limit of 0.08, even if one subtracted the margin of error. Accordingly, it is highly probable that Webb's prior DUI per se guilty plea did not contribute to the jury's verdict of guilty as to DUI per se in this matter. That said, even though the trial court did not commit reversible error in this case, we would be remiss in neglecting to advise State prosecutors to exercise circumspection in seeking to admit prior acts evidence in cases like this one. **To be sure, the Supreme Court of Georgia has thus far declined to adopt a categorical rule that extrinsic act evidence is inadmissible as to intent in DUI cases because DUI is a crime of general intent [FN27: *Jones* [*v. State*, 301 Ga. 544, 548(2), 802 S.E.2d 234 (2017)] ((refusing to adopt a bright-line rule that extrinsic act evidence is inadmissible as to intent in DUI cases because DUI is a crime of general intent where intent may be inferred from the doing of an act, i.e., driving after consuming alcohol).] but within the very same opinion our Supreme Court nonetheless noted that 'if the State's threshold to prove intent as an element of a crime is relatively low, as it likely is when the charged crime is one of general intent, then the probative value of the extrinsic act evidence would necessarily be minimal.' *Id.* So, given this potential pitfall, State prosecutors would be wise to exercise caution before presenting evidence of prior DUI convictions to show intent and first ask themselves whether 'what [they] *want* and what [they] *need* has been confused,' [FN29: *See* R.E.M., *Finest Worksong, on* Document (I.R.S. Records 1987) (emphasis in original)] lest otherwise unobjectionable convictions become candidates for reversal."**

D. RAPE SHIELD STATUTE

1. FALSE ACCUSATIONS

Vallejo v. State, 362 Ga.App. 33, 865 S.E.2d 640 (November 3, 2021). Whole court opinion; physical precedent only on this point. Child molestation conviction affirmed; trial court properly excluded alleged false accusation evidence. After hearing on motion to admit the evidence, "the trial court denied Vallejo's motion, finding that the evidence presents only 'a possibility of falsehood as opposed to a reasonable probability of falsehood.'" *Burns (June 10, 2019), below,* established that false accusation evidence is not categorically admissible, but must satisfy a Rule 403 prejudicial vs. probative balancing test. It did not, however, overrule prior precedent **requiring the trial court to "make a threshold determination outside the presence of the jury that a reasonable probability of falsity exists.** In this context, a reasonable probability is a probability sufficient to undermine confidence in the outcome. Defendants have the burden of coming forward with evidence at the hearing to establish a reasonable probability that the victim had made a prior false accusation of sexual misconduct," *quoting Williams v. State*, 266 Ga.App. 578, 580(1) (597 S.E.2d 621) (2004) (citations and punctuation omitted). Three judges concur in judgment only on this point; five judges dissent on this point.

State v. Burns, 306 Ga. 117, 829 S.E.2d 367 (June 10, 2019). *Affirming* 345 Ga.App. 822, 813 S.E.2d 425 (2018); reversing trial court; and *overruling in part Smith v. State*, 259 Ga. 135(1), 377 S.E.2d 158 (1989). In prosecution for incest and related offenses, trial court erred by excluding evidence of victim's admittedly-false accusation of sexual assault against another person, based on *Smith v. State*. **1.** *Smith* correctly held that the Rape Shield Statute, now codified at OCGA § 24-4-412(a), does not exclude evidence of false allegations. The 2013 Evidence Code keeps the "core language" of the prior Rape Shield Statute, rather than adopting the federal counterpart, so prior Georgia case law remains relevant. **2. *Smith* incorrectly held that the Sixth and Fourteenth Amendments require admission of false accusation evidence, even in the face of contrary evidentiary rules.** "What this Court failed to recognize in *Smith* is that, though our statutory rules of evidence may 'operate[ ] to prevent a criminal defendant from presenting relevant evidence, [and consequently diminish] the defendant's ability to confront adverse witnesses and present a defense ... [t]his does not necessarily render the statute[s] unconstitutional.' *Michigan v. Lucas*, 500 U.S. 145, 149, 111 S.Ct. 1743, 114 L.Ed.2d 205 (1991). States may lawfully 'exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability – even if the defendant would prefer to see that evidence admitted.' *Crane* [*v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986)]. Our sweeping decision in *Smith* lacked nuance. The holding was reached without any meaningful analysis and without consideration of whether the relevant rules of evidence (or other applicable statutes) could pass muster under the Sixth and Fourteenth Amendments; our blanket holding that rules of evidence must 'yield' to constitutional concerns – and must permit the admission of evidence that may be considered for both impeachment and as substantive evidence – was unwarranted and incorrect.[fn] Our conclusion in this regard is bolstered by language from *Nevada v. Jackson*, [569 U.S. 505, 509, 133 S.Ct. 1990, 186 L.Ed.2d 62 (2013)], in which the Supreme Court of the United States explained, in the context of the application of state evidence rules that prevented a rape defendant from presenting evidence of the victim's prior false allegations of sexual assault, that it **has never held that the Confrontation Clause 'entitles a criminal defendant to introduce *extrinsic evidence* for impeachment purposes.'** *Nevada v. Jackson*, 569 U.S. at 512, 133 S.Ct. 1990." **3.** Contrary to Court of Appeals, Rule 403 balancing test applies. "In a sexual-offense prosecution, where, like here, the case comes down to witness credibility, evidence that the complaining witness has made a prior false allegation of sexual misconduct is not of 'scant' probative force. See *Olds* [*v. State*, 299 Ga. 65, 76, 786 S.E.2d 633 (2016)] (recognizing that the probative value of disputed evidence depends, in part, upon the need for such evidence). As to the issue of 'unfair prejudice,' the primary concern is that a jury will decide a case on 'an improper basis, commonly, though not necessarily, an emotional one.' (Punctuation and citations omitted.) *Pierce v. State*, 302 Ga. 389, 394-395, 807 S.E.2d 425 (2017). Here, it is unclear how K.R.'s admittedly false statement would inflame passions of the jury or inspire an emotional decision rather than facilitate a reasoned decision based on the evidence and determinations of credibility. Finally, with respect to 'confusion of the issue,' this prosecution involves one defendant and a single incident that allegedly occurred in July 2015. The false allegation at hand plainly describes an event involving someone else at a separate time; there is no basis for confusion. As such, OCGA § 24-4-403 does not pose a bar to the jury learning about K.R.'s false statement." **4.** "We note that, though our analysis concludes with the application of OCGA § 24-4-403, there may be other rules of evidence or law which bear on the admission or exclusion of the disputed evidence."

E. SCIENTIFIC EVIDENCE

Mitchell v. State, 301 Ga. 563, 802 S.E.2d 217 (June 26, 2017). Interlocutory appeal in DUI prosecution. **No equal protection or separation of powers violations in different standards for admission of scientific evidence in civil (*Daubert* standard) and criminal (*Harper***

standard) cases. 1. Equal protection. "[T]his Court rejected the equal protection argument with regard to the distinct provisions governing expert testimony in civil and criminal proceedings in *Mason v. Home Depot USA Inc*., 283 Ga. 271, 276-277(2) and (3) (658 S.E.2d 603) (2008) (construing former OCGA § 24-9-67 [now OCGA § 24-7-707] and OCGA § 24-9-67.1 [now OCGA § 24-7-702]); see also *Zarate-Martinez v. Echemendia*, 299 Ga. 301, 304(2) n.2 (788 S.E.2d 405) (2016)." *Same issue transferred to Court of Appeals*, *Woods v. State*, 310 Ga. 358, 850 S.E.2d 735 (November 2, 2020), but note special concurrence by Nahmias (joined by Blackwell and Peterson): "if that court affirms Woods's convictions, I would be inclined to grant a petition for certiorari asking this Court to reconsider its equal protection holding in *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 273-275 (658 S.E.2d 603) (2008), as summarily extended to claims by criminal defendants in *Mitchell v. State*, 301 Ga. 563, 571-572 (802 S.E.2d 217) (2017)." *Accord, Woods v. State*, 361 Ga.App. 844, 864 S.E.2d 194 (October 25, 2021). **2. Separation of powers.** "In direct contradiction to [appellant's] argument, the Georgia Constitution specifically provides that '[a]ll rules of evidence shall be as prescribed by law.' Ga. Const. of 1983 Art. VI, Sec. I, Par. IX. By providing evidentiary guidance to the judiciary through the passage of OCGA § 24-7-702(c), the General Assembly has simply acted consistently with its constitutional duty, rather than in contravention of it. See *Bell v. Austin*, 278 Ga. 844, 846(2) (607 S.E.2d 569) (2005) ('[T]he legislature has power to establish rules of evidence where not in conflict with the constitution or rights guaranteed by it') (citation and punctuation omitted)."

F. STATEMENTS BY DEFENDANT

1. CUSTODIAL INTERROGATION – WHEN IS DEFENDANT "IN CUSTODY" FOR *MIRANDA* PURPOSES?

Wright v. State, A21A1655, ___ Ga.App. ___, 870 S.E.2d 484, 2022 WL 610627 (March 2, 2022). Physical precedent only; one judge dissents on other grounds. Controlled substance and firearms convictions reversed on other grounds. Trial court properly denied motion to suppress defendant's statements to police; contrary to defendant's argument, he was not in custody when the statements were made. "[A] narcotics investigator and other law enforcement officers arrived at a home in Richmond County in search of a fugitive. The homeowner let the officers in and gave consent to search the home. In addition to the homeowner, Wright and another person were in the home at the time. After Wright emerged from a bedroom, the investigator asked him to wait with the other occupants on a screened-in porch. Another officer stood in the yard, 'a few feet from the steps leading onto the porch' at that time." A short time later, "[t]he investigator … walked out to the porch, where all three occupants were waiting, and asked 'who did the bag belong to.' At that time, the investigator did not describe the bag he was asking about. Wright, the only one to respond, said that the bag was his. To confirm which bag he was asking about, the investigator retrieved the black book bag and asked Wright if it was his. The record contains no indication that any of the bag's contents were visible to Wright or the others on the porch at that time. Wright responded, 'Yeah, that's my bag and everything in it,' and he added that the others on the porch 'didn't have anything to do with it.'" **"'[A]s a general rule, one who is the subject of a general on-the-scene investigation is not in custody though he may not be free to leave during the investigation.'** *State v. Lucas*, 265 Ga.App. 242, 244(2), 593 S.E.2d 707 (2004) (citation and punctuation omitted); see *Miranda*, 384 U. S. at 477-478(III), 86 S.Ct. 1602 (the requirements of *Miranda* do not apply to '[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process' because '[i]n such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present'). In that situation, officers may make inquiries 'solely to determine whether there currently is any danger to them or other persons' and 'may even temporarily detain anyone who tries to leave before the preliminary investigation is completed.' *State v. Wintker*,

223 Ga.App. 65, 67, 476 S.E.2d 835 (1996). **A detention accompanied by such inquiries does not trigger *Miranda*'s requirements 'unless the questioning is aimed at obtaining information to establish a suspect's guilt.'**[fn] Id. (citations and punctuation omitted); accord *Thompson* [*v. State*, 313 Ga.App. 844, 847-848(1), 723 S.E.2d 85 (2012)]; *Lucas*, 265 Ga.App. at 244(2), 593 S.E.2d 707; see *Futch v. State*, 145 Ga.App. 485, 486, 488-489(3), 243 S.E.2d 621 (1978) (a question regarding who owned a closed trunk suspected of containing marijuana, made during an initial on-the-scene investigation involving two suspects at a motel before any arrest, did not require *Miranda* warnings). Thus, *Miranda* warnings are not required where a defendant who is not in custody 'responds to an officer's initial inquiry at an on-the-scene investigation that had not become accusatory.' *Taylor v. State*, 235 Ga.App. 323, 326(2), 509 S.E.2d 388 (1998) (citation and punctuation omitted); see id. at 324-327(1)-(2), 509 S.E.2d 388 (concluding that *Miranda* warnings were not required when a detective informed the defendant, while standing outside of a store where her purse had been found by a store clerk, 'that he was investigating the marijuana found in her purse,' because the detective's statements did not constitute interrogation 'aimed at establishing her guilt,' but rather were focused on assessing the general nature of the situation)." Factors here: **1.** defendant and others present weren't told they were under arrest or forbidden to leave the premises. **2. T**he investigator's initial question wasn't directed to Wright individually, but to all three occupants of the porch. "Such a general request for information to all persons present in a residence (or its curtilage) does not bear the hallmarks of a 'custodial interrogation' or questioning aimed at establishing a particular suspect's guilt, but rather more closely resembles a 'general on-the-scene investigation,'" *citing Lucas, Wintker and Futch, above*. **3.** Rejects defendant's argument "that the subjectively accusatory or incriminating nature of an officer's question (from the officer's point of view)[fn] during an initial, on-the-scene investigation — standing alone — is sufficient to transform a non-custodial situation into a 'custodial interrogation' for purposes of the *Miranda* requirements." *Distinguishing Lucas* (defendant confronted with contraband) and *Thompson* (already found in possession of drug paraphernalia, defendant asked where he put stolen items, a question "clearly aimed at establishing his guilt"). "Here, by way of contrast, the record contains no indication that Wright was expressly confronted with contraband or any other objectively obvious wrongdoing when merely asked to confirm his ownership of the black book bag." "Naturally, it is apparent that the investigator in this case, having found suspected drugs on top of the black book bag's other contents, subjectively may have perceived his second question as being aimed at establishing Wright's guilt and that Wright — assuming that he knew of the book bag's contents — subjectively may have perceived that question in the same way. Those considerations, however, play no part in our analysis, which asks only what a reasonable person neither guilty of criminal conduct nor insensitive to the seriousness of the circumstances would perceive. See *Chavez-Ortega* [*v. State*, 331 Ga.App. 500, 502-503(1), 771 S.E.2d 179 (2015)]; see also [*Rhode Island v. Innis*, 446 U. S. 291, 300-301(II)(A), 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)]. And under that test, **there was no objectively accusatory, 'compulsive,' or 'isolated and police-dominated' aspect to the investigator's questions.** See *Wintker*, 223 Ga.App. at 68-69, 476 S.E.2d 835; see also *Chavez-Ortega*, 331 Ga.App. at 503(1), 771 S.E.2d 179; *Taylor*, 235 Ga.App. at 326(2), 509 S.E.2d 388."

2. IMMUNIZED STATEMENTS

State v. Ward, 361 Ga.App. 684, 865 S.E.2d 267 (October 28, 2021). Following convictions for enticing a child and aggravated child molestation, trial court properly granted motion for new trial based on State's derivative use of defendant/police officer's statement to internal affairs investigator and trial counsel's ineffective assistance in failing to object thereto. **1.** The statement itself was excluded from evidence, but evidence at motion hearing showed that prosecutors were not aware of their duty not to make derivative use of the statement. "Thus, the prosecutors did not

make an effort to quarantine the information to ensure their investigation was not tainted by the protected statements." After Ward testified in his own defense, denying the charges against him, the internal affairs investigator who took the statement testified that he would not believe Ward under oath. At motion hearing, the investigator agreed that the prosecutors would have known that his opinion was based, at least in part, on the defendant's internal affairs statement. *See standard under Ward (October 31, 2019), below.* **2.** Defense counsel also was unaware of the ban on derivative use. The failure to object thus was not strategic; was not reasonable; and was prejudicial.

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)."

3. JUVENILE/MINOR DEFENDANT

Daniels v. State, S21A1268, ___ Ga. ___, ___ S.E.2d ___, 2022 WL 677634 (March 8, 2022). Felony murder and related convictions affirmed. Trial court properly denied motions to suppress 14-year old defendant's statements to police. **1. Exclusion was not required by OCGA § 15-11-502(a)(3),** which provides "A person taking an alleged delinquent child into custody, with all reasonable speed and without first taking such child elsewhere, shall ... [b]ring such child immediately before the juvenile court or promptly contact a juvenile court intake officer." OCGA § 15-11-502(b), however, "provides that, notwithstanding the general rule of subsection (a), **'a law enforcement officer may detain an alleged delinquent child for a reasonable period of time sufficient to conduct interrogations and perform routine law enforcement procedures including but not limited to fingerprinting, photographing, and the preparation of any necessary records.'"** "[S]ubsection (b) plainly authorized the police to detain and interrogate Daniels for a reasonable period of time after his arrest. And we cannot say that a period of roughly five and a half to six hours was an obviously unreasonable time for interrogation in this case, particularly given the range and number of incidents about which Daniels was questioned by the police." **2. Record supports finding that *Miranda* waiver was knowing and voluntary. A. Record was clear that trial judge considered *Riley* factors where both counsel argued them in detail. B. "**Daniels, who the record shows was nearly 15 years old and could read and write, was clearly advised of his rights two times and appeared to understand them. And although his interviews were fairly lengthy [at five-and-a-half to six hours], there is nothing in the record to suggest that he was coerced, intimidated, threatened, or held incommunicado by the police. He was permitted to speak with his mother and was given food and drink at the police station. He never asked to speak with a lawyer or anyone else. Under these circumstances, we cannot say that the trial court erred in concluding that, under the totality of the circumstances, Daniels made a knowing and voluntary waiver of his *Miranda* rights under the *Riley* factors." "Compare *State v. Lee*, 298 Ga. 388, 389, 782 S.E.2d 249 (2016) (trial court properly concluded based on the totality of the circumstances that 15-year-old defendant did not knowingly and intelligently waive his rights where video recording showed that defendant, who was at the police station for ten hours and extremely distraught, never signed the waiver form, never expressed an understanding of his rights, and appeared to have minimal capacity to understand what little the investigators attempted to communicate regarding his rights)." **C. Rejects defense argument "that entering a plea of not guilty constituted a repudiation of his statements." D. "**While Detective Carden's statements suggested to Daniels that his cooperation and truthfulness regarding the uncharged 'property' crimes he had been involved in would result in Daniels being charged with fewer crimes, and thus may have constituted a 'hope of benefit' under Georgia law, see OCGA § 24-8-824, these assurances by Carden were not determinative as to the 'methods of interrogation' factor or the *Riley* test as a whole.**[FN19, see below.]** See *Oubre* [*v.* Woldemichael, 301 Ga. 299, 306, 800 S.E.2d 518 (2017)] ('[O]ffering a hope of benefit is a method of interrogation, a factor to be considered in evaluating the totality of the circumstances under *Riley*.')." **E. "**That [defendant] was upset during his call with his mother and was seen crying after his interview with Detective Odom does not show that the interrogation was abusive," *citing Norris v. State*, 282 Ga. 430, 651 S.E.2d 40 (2007) ("(noting that even though the juvenile suspect became upset and began to cry when confronted with accusations, there was no evidence that the interrogation was abusive."). **F. FN19: "We note that Daniels never challenged the admission of his custodial statements under OCGA § 24-8-824,** the Georgia statute which provides that '[t]o make a confession admissible, it shall have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury.' **Instead, Daniels repeatedly argued only that his statements should have been excluded as being in violation of the requirements**

***Miranda* established under the United States Constitution using the *Riley* test applicable to juvenile defendants.** We have suggested that the statute and the *Riley* test are intertwined such that a violation of the statute weighs strongly toward exclusion of the statements under *Riley*. See *Oubre*, 301 Ga. at 306-307(2)(a), 800 S.E.2d 518. However, although *Oubre* indicated that the use of aggressive interrogation methods, including providing a hope of benefit, may be the 'most significant[ ]' factor in the *Riley* analysis, *Oubre*, 301 Ga. at 306, 800 S.E.2d 518, it did so while considering the *Riley* factors in the context of a federal due process analysis, rather than whether the juvenile defendant had voluntarily waived his rights under *Miranda*, which is at issue in this appeal. Moreover, with regard to whether a defendant's inculpatory statement (rather than his waiver of his right against self-incrimination) was made voluntarily, **OCGA § 24-8-824 and the *Riley* test actually provide separate paths for suppressing the statement. We have noted this distinction in the context of interrogations of adult suspects. See *Matthews v. State*, 311 Ga. 531, 542 (3) (b), 858 S.E.2d 718 (2021) (contrasting constitutional question of whether a confession is inadmissible as a violation of due process because it was not voluntary under the totality of the circumstances with OCGA § 24-8-824, which 'involves 'a narrowly focused test that presents "a single question" targeted at "the reliability – the truth or falsity – of [the defendant's] confession[.]"'** (quoting State *v. Chulpayev*, 296 Ga. 764, 779(3)(b), 770 S.E.2d 808 (2015)). As we discussed in *Chulpayev*, with regard to adult confessions, 'our decisions have sometimes conflated the analysis of whether a confession is voluntary under the statutory standard with the analysis of whether the confession is voluntary under the constitutional due process standard.' 296 Ga. at 779(3)(b), 770 S.E.2d 808. We noted that '[t]his imprecision may stem from the fact that proof that a defendant's incriminatory statement was induced by a hope of benefit or fear of injury in violation of OCGA § 24-8-824 is generally significant proof that his constitutional [due process] rights were also violated.' Id. When a defendant challenges the admission of his statement under OCGA § 24-8-824, the statement must be excluded by the trial court if the statement was induced by a hope of benefit. See *Chulpayev*, 296 Ga. at 777(3)(b), 770 S.E.2d 808 ('There is no doubt that the statutory text mandates the exclusion from evidence of incriminatory statements obtained in violation of the statute at trial[.]').Of course, admission of a defendant's statement under OCGA § 24-8-824 is also subject to harmless-error review. See *Budhani v. State*, 306 Ga. 315, 328-329(2)(d), 830 S.E.2d 195 (2019). Moreover, 'a violation of OCGA § 24-8-824 is not *automatically* a federal [due process] violation too, because the tests for determining the voluntariness of a confession under the statute and under the Constitution are not the same.' (Emphasis in original.) Id. at 779(3)(b), 770 S.E.2d 808; see also *United States v. Lall*, 607 F.3d 1277, 1285(3) (11th Cir. 2010) (noting that 'a per se rule that would render a confession involuntary [as a matter of due process] if it was preceded by "any direct or implied promises, however slight," has been rejected by the Supreme Court.' (citing *Arizona v. Fulminante*, 499 U.S. 279, 284-285, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)). A similar distinction applies in the context of determining whether a juvenile defendant knowingly and voluntarily waived his rights under *Miranda* and *Riley*. Where, as Daniels did in this appeal, a juvenile defendant argues only that a custodial statement should be excluded under the federal constitutional requirements of *Miranda* and *Riley*, the court can consider whether the police provided a hope of benefit that induced his confession. Whether the police used aggressive interrogation methods, including providing a hope of benefit, is only one of the many factors that the courts consider under *Riley*. And as we have stated, no one factor is necessarily determinative in the *Riley* analysis." **Nahmias, joined by Boggs and Warren, criticizes the *Riley* test:** "I have doubts about how a trial court is to make, and an appellate court is to review, a ruling based on a *nine*-factor, totality-of-the-circumstances test," *citing* "David Kwok, *Is Vagueness Choking the White-Collar Statute?*, 53 Ga. L. Rev. 495, 523 (2019) ("Multifactor balancing tests incorporate a number of discrete elements, and the relationship between the elements is not transparent. An element might overlap significantly with another element, and it may be unclear how much weight any particular element carries. This

indeterminate relationship can create uncertainty. Multipart balancing tests may be useful [for] post-hoc explanation or justification of a decision, but they are less useful in providing future guidance." (footnotes omitted)); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1182 (1989) ("[A]t the point where an appellate judge says that the ... issue must be decided on the basis of the totality of the circumstances, or by a balancing of all the factors involved, he begins to resemble a finder of fact more than a determiner of law.... And to reiterate the unfortunate practical consequences of reaching such a pass when there still remains a good deal of judgment to be applied: equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.")."

VI. JURIES AND JURORS

A. *BATSON/J.E.B./McCOLLUM*

1. MISCELLANEOUS REASONS FOR STRIKES

Suggs v. State, 310 Ga. 762, 854 S.E.2d 674 (February 15, 2021). Malice murder and related convictions affirmed. "The State's proffered reason for striking Juror 33 – that she had photographs on her Facebook page showing her making gang signs and with marijuana – was race-neutral," although this was not a matter brought out in voir dire.

B. CHARGE

1. ACCOMPLICE TESTIMONY

Lofton v. State, 310 Ga. 770, 854 S.E.2d 690 (February 15, 2021). Malice murder and firearms convictions affirmed. Trial court properly declined to charge jury on necessity of corroboration of accomplice testimony; "it is not error to fail to give a requested jury instruction regarding the corroboration required for accomplice testimony where there is no evidence that the witness shared a common criminal intent with the defendant to commit the crimes charged. See *Yeomans v. State*, 229 Ga. 488, 493(5), 192 S.E.2d 362 (1972); *Parks v. State*, 294 Ga.App. 646, 651(7), 669 S.E.2d 684 (2008); see also *Thornton v. State*, 307 Ga. 121, 125(2)(c), 834 S.E.2d 814 (2019) (no obvious error in failing sua sponte to instruct the jury on corroboration of accomplice testimony where there was no evidence that a witness shared a common criminal intent with the defendant in shooting the murder victim); *Stripling v. State*, 304 Ga. 131, 136(2), 816 S.E.2d 663 (2018) (same). **Although there was evidence in this case that Eatmon shared a common criminal intent with Lofton for the drug deal to take place, there was no evidence that Eatmon shared a common criminal intent with Lofton for any of the crimes charged: murder, armed robbery, aggravated assault, and possession of a firearm.** There was no evidence that Eatmon even knew Lofton was armed and prepared to shoot Eatmon's associate, Walker. And Eatmon's conduct after the shooting did not aid or abet Lofton in the crimes charged; rather, Eatmon drove Walker to the hospital, and his cooperation with the detectives and with the prosecutors directly contributed to Lofton's apprehension and conviction. The trial court did not err in refusing to instruct the jury to determine whether Eatmon was an accomplice or in failing to charge the jury on the corroboration necessary for the testimony of an accomplice."

Martin v. State, 310 Ga. 658, 852 S.E.2d 834 (December 21, 2020). Malice murder and related convictions affirmed. **No plain error in giving jury charge on accomplice corroboration *before* charge on single-witness rule.** "These are proper concepts of law, irrespective of the order in which they were given. And, though it might have been preferable for the trial court to have given the charges in a different order, the charge, as a whole, was complete, and the defendants have provided no evidence that the jury was either misled or confused. As such, there was no plain error."

Stanbury v. State, 299 Ga. 125, 786 S.E.2d 672 (May 23, 2016). Murder and related convictions reversed; **"the trial court committed plain error by not providing a jury charge on the necessity of corroborating accomplice testimony," even though no such charge was requested by the defense, and even though there was sufficient (but not overwhelming) corroboration.** The error was compounded by giving an instruction "that particular facts could be established based on the testimony of a *single* witness, which would necessarily include accomplice testimony. Therefore, in essence, the jury received an instruction that it could believe the facts as described by [co-conspirator] McKenzie without corroboration—in direct contradiction to former OCGA § 24–4–8 [now OCGA § 24-14-8]. As McKenzie was the only witness to affirmatively establish Stanbury's participation in the commission of these crimes, the trial court committed plain error in omitting the accomplice corroboration charge." **"A trial court's failure to give an accomplice corroboration instruction when a defendant is affirmatively identified as the second participant and gunman in a murder based *solely* on accomplice testimony undermines the fairness of the proceedings, at least when coupled with the express authorization by the court for the jury to establish critical facts based solely on this testimony."** *Accord, Fisher v. State*, 299 Ga. 478, 788 S.E.2d 757 (July 8, 2016) (ineffective assistance for counsel not to request charge on the necessity of corroborating accomplice testimony in this context; but *Fisher* distinguished, see *Manner (December 11, 2017), above*); *State v. Johnson*, 305 Ga. 237, 824 S.E.2d 317 (February 18, 2019) (plain error); *Doyle v. State*, 307 Ga. 609, 837 S.E.2d 833 (January 13, 2020) (plain error); *Pindling v. State*, 311 Ga. 232, 857 S.E.2d 474 (April 5, 2021) (plain error). "Because almost all of the evidence incriminating Pindling came from [accomplice], and the jury was never told that her testimony may have required corroboration or instructed how to evaluate properly the other evidence in this context, the outcome of the proceedings was likely affected by the trial court's failure to instruct the jury on the accomplice-corroboration requirement."). *Stanbury distinguished, Robinson (March 15, 2018), above (failure to give accomplice corroboration charge not plain error where single-witness charge also not given, in light of quantum of evidence and other charges on burden of proof); Raines v. State*, 304 Ga. 582, 820 S.E.2d 679 (October 22, 2018) (same as Robinson); *Rice v. State*, 311 Ga. 620, 857 S.E.2d 230 (April 5, 2021) *(failure to give accomplice corroboration charge was clear error, but "likely did not affect the outcome of Rice's trial" because of "substantial and consistent" other evidence of defendant's guilt).*

2. OBJECTIONS/EXCEPTIONS, WAIVER AND PRESERVATION

Grullon v. State, 313 Ga. 40, 867 S.E.2d 95 (December 14, 2021). *Reversing* 357 Ga.App. 695, 849 S.E.2d 291 (2020). Following defendant's conviction for heroin trafficking, Court of Appeals erred in finding that defendant waived plain error review of alleged error in jury charge. At charge conference, State requested charge on deliberate ignorance; the trial court agreed to give the charge over defendant's objection. Following the charge, defense counsel stated that there were no exceptions to the charge. **Held**, "this does not necessarily establish 'affirmative waiver' of the error on appeal." "'Applying the standard articulated in *United States v. Olano*, 507 U.S. 725 (113 S.Ct. 1770, 123 L.Ed.2d 508) (1993), **we have contrasted such a waiver – the intentional relinquishment of a known right – with "forfeiture," which is the mere "failure to make the timely assertion of the right." An affirmative waiver may occur, for example, when a defendant requests a specific jury instruction but later withdraws such request; explicitly requests a jury instruction that he later argues on appeal should not have been given; or objects to a charge that he later argues on appeal should have been given. In such circumstances, the defendant has invited the alleged error, and it therefore provides no basis for reversal.'** *Vasquez v. State*, 306 Ga. 216, 229(2)(c) (830 S.E.2d 143) (2019) (citations and punctuation omitted)." Affirmative waiver may also be shown where the failure to object is a

tactical decision, as in *Vasquez*, but none shown here.

3. OTHER ACTS

Ary v. State, 359 Ga.App. 563, 859 S.E.2d 535 (May 25, 2021). Child molestation convictions affirmed. Jury charge limiting consideration of evidence under Rule 414 to intent and absence of mistake or accident "was erroneous because other acts evidence admitted under Rule 414 'may be considered for its bearing on any matter to which it is relevant.' OCGA § 24-4-414(a)." No plain error, however, because no showing that it probably affected defendant's substantial rights. Other parts of the charge instructed the jury on impeachment; and "the charge given by the trial court potentially benefited Ary by preventing the jury from considering the other acts evidence to show that Ary had a propensity to commit child molestation."

4. VERDICT/VERDICT FORM

Stewart v. State, 311 Ga. 471, 858 S.E.2d 456 (May 17, 2021). Felony murder conviction affirmed. No plain error in verdict form as it relates to defendant's complaint of a sequential charge, but "the language of the verdict form in this case is more limiting of the jury's consideration of the lesser offense.[fn] We reiterate that trial courts that elect to dictate the sequence in which a jury is to consider (deliberate about) possible verdicts must avoid any instruction, including on a verdict form, that directs the jury to consider the lesser offense only if it first unanimously finds the defendant not guilty of (reaches a verdict of not guilty on) the indicted greater offense." Verdict form read as follows: "If your verdict as to Count 1 and 2 for malice murder and felony murder is not guilty, then proceed to render verdict as to the lesser included offense of involuntary manslaughter. If your verdict as to Count 1 or Count 2 for malice murder or felony murder is guilty then skip to Count 3."

Atkins v. State, 310 Ga. 246, 850 S.E.2d 103 (October 19, 2020). Felony murder and related convictions affirmed; verdict form wasn't improper. For each count, the verdict form read, "We the Jury find the Defendant _____ of _____." "The court agreed to Atkins's request that the jury be instructed on the definition of involuntary manslaughter, but the court declined Atkins's request to include a separate line on the verdict form, after the lines for the numbered counts, 'We the Jury, as to the lesser included offense of involuntary manslaughter, find the Defendant _____.'" **"[I]t is not error to fail to expressly include lesser offenses on a verdict form, provided the court appropriately instructs the jury on the lesser offenses and how to fill in the verdict form."**

VII. PLEAS

A. NOLO CONTENDERE

Doe v. State, 362 Ga.App. 230, 867 S.E.2d 307 (December 17, 2021). Following defendant's nolo plea to misdemeanor habitual violator, trial court denial of motion to restrict criminal history reversed and remanded. Contrary to State's argument, trial court had authority to consider defendant's request under OCGA § 35-3-37(j)(4), because defendant's nolo plea counts as a "conviction." **"In this case, Doe pleaded nolo contendere to the misdemeanor of habitual violator, and the trial court concluded that a nolo contendere plea is not a conviction. On the contrary, it is well settled that a 'plea of nolo contendere constitute[s] a conviction.'** *State v. Pitts*, 199 Ga.App. 493, 494(2) (405 S.E.2d 115) (1991). See generally OCGA § 17-7-95 ('Plea of nolo contendere'). As we explained in *Pitts*: 'In *Wright v. State*, 75 Ga.App. 764(1) (44 S.E.2d 569)[(1947),] it was held that a plea of nolo contendere differs from a plea of guilty only in that it cannot be used against the defendant in any other court or proceedings as an admission of guilt, or otherwise, or for any purpose, and it is not a plea of guilty for the purpose of effecting civil

disqualifications. In other words, the plea itself cannot be used in another case as an admission of guilt. Nevertheless, in *Nelson v. State*, 87 Ga.App. 644, 648 (75 S.E.2d 39)[(1953),] a defendant sentenced under such a plea was held to have been adjudged guilty and convicted. This accords with general law that a sentence based on a plea of nolo contendere is a conviction but that the plea is technical only and does not constitute an admission of guilt in any other case, not even in a civil case involving the same act.' (Citations, punctuation, and emphasis omitted.) Id. at 493-494(2). See also *State v. Rocco*, 259 Ga. 463, 466-467(1) (384 S.E.2d 183) (1989) (indicating that plea of nolo contendere is a conviction). Because the trial court erred in concluding that a plea of nolo contendere is not a conviction under subsection (j)(4)(A), it did not proceed to apply the statutory balancing test. Accordingly, we reverse the trial court's denial of Doe's petition for record restriction under OCGA § 35-3-37(j)(4)(A), and remand the case back to the trial court to weigh the competing interests of the harm to Doe's privacy against the public's interest in access to Doe's criminal record. Compare *Doe* [*v. State*, 347 Ga.App. 246, 253(4), 819 S.E.2d 58 (September 6, 2018)]."

B. VOLUNTARINESS

Myers v. State, 313 Ga. 10, 867 S.E.2d 134 (December 14, 2021). Felony murder and related convictions affirmed. **Contrary to defendant's argument, a trial court is not "required as a matter of course to ensure that a defendant's decision to exercise his right to a jury trial by pleading not guilty is knowing, intelligent, and voluntary under the same standard as applies to the acceptance of a guilty plea**, and Myers cites no such authority. A defendant's not guilty plea, in contrast to a guilty plea, does not waive constitutionally protected rights; rather, it *invokes* the right to a jury trial and the right of confrontation." Defendant here claimed that the prosecutor misstated the minimum sentence he faced upon a guilty plea, causing him to reject the State's plea offer.

VIII. POST-CONVICTION RELIEF/APPEALS

A. APPEALS, OUT OF TIME

Cook v. State, S21A1270, ___ Ga. ___, ___ S.E.2d ___, 2022 WL 779746 (March 15, 2022). Following negotiated guilty pleas to felony murder and armed robbery, trial court's order denying out-of-time appeal vacated with instructions to instead dismiss the motion. **"[T]he trial court out-of-time appeal procedure is not a legally cognizable vehicle for a convicted defendant to seek relief for alleged constitutional violations,"** *overruling Rowland v. State*, 264 Ga. 872, 452 S.E.2d 756 (1995) and *disapproving King v. State*, 233 Ga. 630, 630-631, 212 S.E.2d 807 (1975); *Furgerson v. State*, 234 Ga. 594, 595-596, 216 S.E.2d 845 (1975) "and other decisions to the extent that they allowed out-of-time appeal claims to be litigated in trial courts without addressing the propriety of that procedure." "[P]ending and future motions for out-of-time appeals in trial courts should be dismissed, and trial court orders that have decided such motions on the merits—like the one in this case—should be vacated if direct review of the case remains pending or if the case is otherwise not final." *Based on criticisms in Collier (October 21, 2019), below, and Schoicket v. State*, 312 Ga. 825, 865 S.E.2d 170 (November 2, 2021). **Note, "[t]here is no dispute that an out-of-time appeal may still be sought as a remedy in a habeas corpus proceeding.** See, e.g., *Hall v. Jackson*, 310 Ga. 714, 724, 854 S.E.2d 539 (2021) (the appropriate remedy when a habeas court determines that appellate counsel provided ineffective assistance due to a conflict of interest "is to grant [the petitioner an] out-of-time appeal, which will allow him to start the post-conviction process anew with the assistance of conflict-free counsel"); *Trauth v. State*, 295 Ga. 874, 876, 763 S.E.2d 854 (2014) ('[W]here, as here, a pro se defendant has been improperly denied counsel for his first appeal, he is entitled to [habeas] relief in the form of having counsel appointed 'to determine if there is any justifiable ground for an appeal from the

original convictions, and if such determination is in the affirmative, file and prosecute a new direct appeal with the benefit of counsel.') (citation omitted). Peterson dissents, joined by Bethel and Ellington, agreeing that *Rowland* was wrongly decided, but would keep the out-of-time appeal based on stare decisis. *Accord, Rutledge v. State*, S21A1036, ___ Ga. ___, ___ S.E.2d ___, 2022 WL 779586 (March 15, 2022); *Lilly v. State*, A22A0564, ___ Ga.App. ___, ___ S.E.2d ___, 2022 WL 906553 (March 29, 2022); *Mobuary v. State*, A20A1922, ___ Ga.App. ___, ___ S.E.2d ___, 2022 WL 1113126 (April 14, 2022); *Johnson v. State*, A22A0047, ___ Ga.App. ___, ___ S.E.2d ___, 2022 WL 1160761 (April 19, 2022); *Polanco v. State*, S22A0174, ___ Ga. ___, ___ S.E.2d ___, 2022 WL 1143441 (April 19, 2022); *Taylor v. State*, A22A0409, ___ Ga.App. ___, ___ S.E.2d ___, 2022 WL 164070 (April 20, 2022); *Glover v. State*, A22A0729, ___ Ga.App. ___, ___ S.E.2d ___, 2022 WL 164080 (April 20, 2022); *Mostiler v. State*, A22A0806, ___ Ga.App. ___, ___ S.E.2d ___, 2022 WL 163469 (April 20, 2022); *Searles v. State*, A22A0424, ___ Ga.App. ___, ___ S.E.2d ___, 2022 WL 163448 (April 20, 2022).

B. NEW TRIAL

1. FILING, HEARING AND PROCEDURE

Bedford v. State, 311 Ga. 329, 857 S.E.2d 708 (April 19, 2021). Malice murder and related convictions affirmed; no error in denying defendant's "motion seeking leave to supplement his motion for new trial" after the court had already ruled on the original motion. "Although [co-defendant] Brooks is correct that the trial court retained jurisdiction over the case at that time, see *State v. Hood*, 295 Ga. 664, 664, 763 S.E.2d 487 (2014), the trial's court continuing jurisdiction does not answer whether Brooks was entitled to supplement his motion for new trial at that time. We conclude that he was not. **Under OCGA § 5-5-40(b), motions for new trial may only be amended as of right *before* the trial court rules on the motion.** See *Hinkson v. State*, 310 Ga. 388, 397-98(4), 850 S.E.2d 41 (2020) (defendant's purported second amended motion for new trial was untimely because it was filed after the trial court denied his motion for new trial). A motion for new trial may not be amended as of right *after* the trial court has ruled on it. *Haggard v. State*, 273 Ga.App. 295, 296, 614 S.E.2d 903 (2005). Here, because Brooks attempted to amend the motion for new trial after the trial court issued an order denying it, the trial court acted well within its discretion in declining to vacate the denial order sua sponte and accept the proposed supplemental motion unless a motion to vacate or motion to reconsider the denial was first filed and granted."

Flanders v. State, 310 Ga. 619, 852 S.E.2d 853 (December 21, 2020). *Reversing* unpublished opinion of Court of Appeals, and overruling *Matthews v. State*, 295 Ga.App. 752, 754(1), 673 S.E.2d 113 (2009). **Contrary to trial court's ruling, it had jurisdiction to consider grounds for new trial raised in amended motion, where original motion was timely filed but amended motion was filed outside term of conviction.** "'As explained in *United States v. Mayer*, 235 U.S. 55, 35 S.Ct. 16, 59 L.Ed. 129 (1914), the common-law rule provides that "[i]n the absence of [a] statute providing otherwise, the general principle obtains that a court cannot set aside or alter its final judgment after the expiration of the term at which it was entered, *unless the proceeding for that purpose was begun during that term.*" Id. at 671 [67](1) [35 S.Ct. 16] (emphasis supplied); see also *Miraglia v. Bryson*, 152 Ga. 828, 111 S.E. 655 (1922) (following *Mayer*).' *Gray v. State*, 310 Ga. 259, 262-263, 850 S.E.2d 36 (October 19, 2020). It should be clear from this language that **the act of filing a proper motion extends the court's inherent authority to modify the judgment during the pendency of the proceeding initiated by the motion.** In such circumstances, the court's inherent authority is not prescribed by or limited to the claims initially raised by the movant; rather, **the court's authority to revise, correct, revoke, modify, or vacate the judgment, even upon its own motion, is continued beyond the term of court by virtue of the motion having been filed.** [Cit.] Thus, once a *proceeding* has been

initiated by a timely motion to alter the judgment, the court's power extends to any matter pertinent to the judgment at issue in that proceeding, including any amendment to the initial motion, even though the amendment is made outside the term of court in which the judgment was entered and the initial motion filed." "FN6: We note, however, that an otherwise proper amended motion does not act to cure an initial motion that was untimely. See *White v. State*, 302 Ga. 315, 320 (3), 806 S.E.2d 489 (2017)." Remanded for consideration of defendant's motion for new trial, as amended.

IX. PROBATION

A. REVOCATION OF PROBATION

Ward v. Carlton, 313 Ga. 333, 868 S.E.2d 194 (January 19, 2022). Following guilty pleas to three counts of impersonating a public employee, defendant was sentenced "to serve five years in prison on Count 4, a consecutive split sentence of five years – one year to serve in prison and four years to serve on probation – on Count 6, and a consecutive five years to serve on probation on Count 7, for a total sentence of six years to serve in prison and nine years to serve on probation." Defendant here impersonated a DFCS worker and was accused, among other things, of burglary and interstate interference with custody. As a special condition of probation, defendant was ordered to "have no contact with his children unless an order from the Cobb County juvenile court allows it." Defendant's probation was later revoked based on violation of the no-contact provision, "by attempting to contact his children by telephone and mail on three occasions at their adoptive parents' residence" while he was still in prison, before commencement of his probation. Defendant then sought habeas relief, arguing (among other things) that the trial court lacked jurisdiction to revoke his probation before it had begun. **Held**, the habeas court erred by granting relief on that basis. Contrary to habeas court's ruling, **trial court properly ruled that it could revoke probation that hadn't started yet based on a violation, *citing* OCGA § 17-10-1(a)(1)(A) (probation may be revoked "when the defendant has violated any of the rules and regulations prescribed by the court, even before the probationary period has begun.");** *Postell v. Humphrey*, 278 Ga. 651, 604 S.E.2d 517 (October 25, 2004) (see note below); and *Layson v. Montgomery*, 251 Ga. 359, 360, 306 S.E.2d 245 (1983) (upholding "the revocation of the probated portion of a sentence based on a separate crime committed during the portion of the [split] sentence to be served in confinement").

X. PROCEDURE

A. DEAD DOCKET

Seals v. State, 311 Ga. 739, 860 S.E.2d 419 (June 18, 2021). Jury convicted defendant of child molestation, but deadlocked on a charge of rape. The court sentenced defendant on the conviction, declared a mistrial on the rape charge, and subsequently entered an order dead-docketing the rape count. Defendant then sought direct appeal of the child molestation conviction. **Held**, the Court of Appeals properly dismissed the appeal; because of the dead-docketed count, the case remained pending in the trial court, and defendant thus wasn't entitled to direct appeal. **"[D]ead-docketing, while a common and longstanding practice in Georgia courts, has almost no statutory authority and none that would allow different treatment here. And precedent from our Court of Appeals has for decades made clear that when a count is dead-docketed, the case remains pending in the trial court. Accordingly, we hold that dead-docketing a count leaves that count undecided and, thus, leaves the entire 'case pending in the court below.' Such a case cannot be appealed as a final judgment under OCGA § 5-6-34(a)(1);** instead, it requires a certificate of immediate review." "Dead docket" is a misnomer, inasmuch as a dead-docketed case remains pending. Rejects the argument that each count may be considered a separate "case." "Placing cases on the dead-docket is a procedural tool by which 'the

prosecution is postponed indefinitely but may be reinstated any time at the pleasure of the court.' *Beam v. State*, 265 Ga. 853, 855(3) n.3, 463 S.E.2d 347 (1995) (citation and punctuation omitted)." LaGrua, writing for Melton, dissents, expressing concern for the due process implications of defendants' inability to appeal in this situation. Both majority and dissent urge legislative amendment of OCGA § 5-6-34 to correct the problem.

B. DISMISSAL

Walker v. State, 312 Ga. 640, 864 S.E.2d 398 (October 19, 2021). *Reversing State v. Walker*, 356 Ga.App. 170, 846 S.E.2d 438 (2020). In DUI prosecution, trial court had the power to dismiss for want of prosecution where State's witness failed to appear for trial. Such a dismissal is without prejudice; the fact that a new accusation was barred by the statute of limitation is a "consequence [which] flows from the operation of the statute of limitation and not from the dismissal order." *Disapproving State v. Banks*, 348 Ga.App. 876, 825 S.E.2d 399 (2019).

XI. SEARCH AND SEIZURE

A. ARREST

1. WHAT CONSTITUTES

Torres v. Madrid, 19-292, ___ U.S. ___, 141 S.Ct. 989, 209 L.Ed.2d 190 (March 25, 2021). In civil § 1983 action, Tenth Circuit erroneously upheld summary judgment for defendant police officers. Plaintiff Torres contended that the officers used excessive force against her by shooting her as she fled an apartment complex; she contended that the shooting constituted an unreasonable seizure under the Fourth Amendment. District and Circuit Courts held that the shooting did not amount to a seizure because Torres was not apprehended; she successfully drove away and was only arrested later when she went to the hospital. Supreme Court holds, however, that **"the application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued."** *Based on California v. Hodari D.*, 499 U.S. 621, 624, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991) (explaining that the common law treated "the mere grasping or application of physical force with lawful authority" as an arrest, "whether or not it succeeded in subduing the arrestee."). **Common law recognized two manners of arresting someone, the application of force, as here, and "a show of authority, such as an order for a suspect to halt. The latter does not become an arrest unless and until the arrestee complies with the demand. As the Court explained in *Hodari D.*, '[a]n arrest requires *either* physical force ... *or*, where that is absent, *submission* to the assertion of authority.'** 499 U.S., at 626, 111 S.Ct. 1547 (emphasis in original). *Hodari D.* articulates two pertinent principles. First, common law arrests are Fourth Amendment seizures. And second, the common law considered the application of force to the body of a person with intent to restrain to be an arrest, no matter whether the arrestee escaped." "We stress, however, that the application of the common law rule does not transform every physical contact between a government employee and a member of the public into a Fourth Amendment seizure. A seizure requires the use of force *with intent to restrain*. Accidental force will not qualify. See *County of Sacramento v. Lewis*, 523 U.S. 833, 844, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). Nor will force intentionally applied for some other purpose satisfy this rule. In this opinion, we consider only force used to apprehend. … Moreover, the appropriate inquiry is whether the challenged conduct *objectively* manifests an intent to restrain, for we rarely probe the subjective motivations of police officers in the Fourth Amendment context." "The rule we announce today is narrow. In addition to the requirement of intent to restrain, a seizure by force—absent submission—lasts only as long as the application of force. That is to say that the Fourth Amendment does not recognize any "*continuing* arrest during the period of fugitivity." *Hodari D.*, 499 U.S., at 625, 111 S.Ct. 1547. **The fleeting nature of some seizures by force undoubtedly may inform what damages a civil plaintiff may recover,**

and what evidence a criminal defendant may exclude from trial. See, *e.g.*, *Utah* v. *Strieff*, 579 U. S. ___, ___, 136 S.Ct. 2056, 2060-61, 195 L.Ed.2d 400 (2016). But brief seizures are seizures all the same. Applying these principles to the facts viewed in the light most favorable to Torres, the officers' shooting applied physical force to her body and objectively manifested an intent to restrain her from driving away. We therefore conclude that the officers seized Torres for the instant that the bullets struck her." Gorsuch, writing for Thomas and Alito, dissents.

B. DETENTION BEYOND INITIAL STOP

Neely v. State, 362 Ga.App. 103, 866 S.E.2d 639 (November 30, 2021). Physical precedent only; convictions for trafficking in methamphetamines and related offenses reversed. Trial court erred by denying motion to suppress, as drug evidence was discovered due to traffic stop prolonged beyond articulable suspicion. After stopping defendant for a lane violation, "[a sheriff's] sergeant took Neely's driver's license and went back to the sheriff's vehicle to check the license while the deputy stayed beside Neely's car. After determining that Neely's license was valid and that there were no outstanding warrants for him, the sergeant returned to Neely's vehicle and ordered him to get out of his car. The sergeant directed Neely to stand by the rear of the car and asked him if there was anything in the car. Neely replied that he had just smoked. The sergeant then asked if there was anything else in the car, and Neely said that there were pills and a blunt in his car. The sergeant and deputy then searched Neely's car while another officer who had arrived at the scene detained Neely. Inside the car, the officers found, among other things, methamphetamine, marijuana, cocaine, over $3,000 in cash, a digital scale, and plastic baggies." **1.** Contrary to trial court's ruling, the fact that the driver "appeared overly nervous and had a freshly lit cigarette" did not support the extended detention. "'But as this [c]ourt has explained, **mere nervousness is not sufficient to support a reasonable articulable suspicion to extend a stop after completion of the original mission.'** *Weaver* [*v. State*, 357 Ga.App. 488, 491, 851 S.E.2d 125 (2020)]. Accord *Duncan* [*v. State*, 331 Ga.App. 254, 257, 770 S.E.2d 329 (2015)] (defendant's 'nervous behavior, even coupled with her looking away and shifting around — conduct consistent with nervousness — was not sufficient to constitute reasonable suspicion of other illegal activity'). And although the officer testified that smoking a cigarette 'can be used to mask the odor of an illegal substance, [cigarettes] are themselves legal substances that can be used for a legal purpose and thus do not justify the officer's further detention of [Neely] under the facts of this case.' *State v. Thompson*, 256 Ga.App. 188, 190, 569 S.E.2d 254 (2002) (officer did not have reasonable suspicion to prolong traffic stop based on defendant's extraordinary nervousness, defensiveness when asked about marijuana, and strong smell of laundry detergent or dryer sheets that can be used to mask odors of illegal drugs). See also *Matthews v. State*, 330 Ga.App. 53, 58, 766 S.E.2d 515 (2014) (conduct that was neither illegal nor sufficiently unusual did not provide reasonable basis for suspecting criminal activity)." **2. "We note that the trial court also found that '[t]he total stop only took three minutes before the defendant admitted that he had smoked and ultimately that there was still a "blunt" (jargon known to refer to the marijuana) inside of the vehicle.' But 'there is no bright-line rule for determining when the length of a detention becomes unreasonable[.]' *Nash v. State*, 323 Ga.App. 438, 442, 746 S.E.2d 918 (2013). And as stated above, 'even a short prolongation is unreasonable unless good cause has appeared in the meantime to justify a continuation of the detention to pursue a different investigation.'** *Weaver*, supra at 490, 851 S.E.2d 125 (citation omitted). Our Supreme Court has explained that 'the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's mission — to address the traffic violation that warranted the stop, and attend to related safety concerns.' *State v. Allen*, [298 Ga. 1, 4-5(2)(a), 779 S.E.2d 248 (2015)] (citation and punctuation omitted). So in this case, even the short prolongation of the stop was impermissible since the officer did not have reasonable suspicion to continue detaining Neely in order to pursue a different investigation unrelated to the traffic violation that had justified the initial stop. See id. at

11(2)(c), 779 S.E.2d 248 (absent reasonable suspicion of another crime, 'activities unrelated to the mission of the stop must not extend the time of the stop at all, and such a prolongation of the stop is not permissible'). Indeed, **the officer's '[a]uthority for the seizure ... end[ed] when tasks tied to the traffic infraction [were] — or reasonably should have been — completed.'** Id. at 15(2)(e), 779 S.E.2d 248 (citation, punctuation, and emphasis omitted). **Because the officer unreasonably prolonged the traffic stop after the mission of the stop was completed, it 'render[ed] the seizure at issue unlawful[, a]nd this is true even if that process added very little time to the stop.'** *Terry v. State*, 358 Ga.App. 195, 202(1), 854 S.E.2d 366 (2021) (citations and punctuation omitted). Accord *Heard v. State*, 325 Ga.App. 135, 139(1), 751 S.E.2d 918 (2013) (traffic stop prolonged by no more than four minutes was unlawful because it lasted longer than was necessary to effectuate the purpose of the stop)."

McNeil v. State, 362 Ga.App. 85, 866 S.E.2d 249 (November 19, 2021). In prosecution for trafficking heroin and other offenses, trial court erred by denying motion to suppress. Officer improperly extended the traffic stop by beginning a drug investigation with no articulable suspicion. **1.** Driver said that she was a candlemaker, but officer "testified that he found her story suspicious because, in his experience with drug interdiction, he had become aware of people concealing drugs inside candles and then melting off the wax." "[T]he sergeant clearly diverted from the task of issuing a written warning citation and abandoned the traffic investigation to instead pursue further questioning of the driver about her candle business, a matter entirely unrelated to the traffic stop. Accordingly, the traffic stop was prolonged beyond the time reasonably required to fulfill the mission of issuing the warning ticket for following too closely, and the trial court erred in concluding otherwise." "[T]he sergeant testified that he had personal experience with drugs being concealed inside candles, but he did not testify that this was a common occurrence or a widespread drug trafficking practice. Although the police undoubtedly have found drugs concealed inside candles and a wide variety of other common household objects, candles themselves are legal products that can be used for a legal purpose, and the driver and McNeil gave consistent statements that the driver had a candle-making business. 'The inference that all persons [traveling in] cars with [candles] are drug users or dealers is not ... a rational inference.' *Hameen v. State*, 246 Ga.App. 599, 599(1) (541 S.E.2d 668) (2000). Hence, the presence of candles and candle wax in the sedan did not justify the sergeant's further detention of the driver and McNeil for suspected drug activity." **2.** "[I]nconsistencies in answers to police questions do not give rise to reasonable articulable suspicion unless the inconsistencies in the car occupants' statements are meaningful. See *Migliore v. State*, 240 Ga.App. 783, 786 (525 S.E.2d 166) (1999). The driver and McNeil both told the sergeant that they had traveled to Atlanta and had come to Georgia for the driver's candle-making business. Given the consistencies in the driver and McNeil's accounts of their travel itinerary, the fact that they gave different times for when they left, without more, 'did not provide [the sergeant] with a basis for suspecting [that the driver and McNeil] possessed drugs.' *Watts v. State*, 334 Ga.App. 770, 779(1)(b) (780 S.E.2d 431) (2015)."

Gayton v. State, 361 Ga.App. 809, 865 S.E.2d 628 (November 3, 2021). Conviction for possession of a firearm by first offender probationer reversed; trial court erred by denying motion to suppress. Officers responding to a BOLO stopped defendant, who was not the suspect in question and who was not dressed as the suspect. Officer realized that defendant was not the suspect as he approached, but continued to investigate his identity and the gun he was wearing. Officers later determined his identity and probationary status and arrested him. Held, having determined that defendant wasn't the suspect they were looking for, officers lacked articulable suspicion to continue detaining him. **1.** The purpose of the stop was "determining whether Gayton was the suspect." "Gayton's detention was unreasonably prolonged after the purpose of the stop was effected and, therefore, that the stop as a whole was unreasonable." **2.** Stop was based solely

on physical appearance and location; **"n**othing in the record shows that Gayton resembled the suspect in any aspect besides race, gender, and hair color or that his behavior was otherwise suspicious." But defendant wasn't dressed as described in the BOLO. "Therefore, from the record before us, we must conclude that the obvious difference in attire, when viewed by an objective officer under the circumstances, dispelled any *reasonable* suspicion that Gayton was the suspect, and the trial court erred by finding that the officers were justified in continuing the detention after determining that Gayton's appearance did not match the suspect's." **3. "[R]easonable suspicion to justify prolonging a detention to pursue an unrelated investigation may not be based on facts learned *after* the suspicion justifying the initial detention is dispelled, see *Bodiford v. State*, 328 Ga.App. 258, 267(2) (761 S.E.2d 818) (2014) (Evidence obtained 'as a result of [an officer's] decision' to prolong an investigative detention 'beyond its original purpose … cannot serve as a basis for … continued detention.'). Gayton's admission about his prior conviction could not establish the reasonable suspicion necessary to justify prolonging the detention because the admission was obtained as a result of the detention being prolonged *after* its purpose had concluded."**

Hill v. State, 360 Ga.App. 683, 859 S.E.2d 891 (June 29, 2021). In drug prosecution, trial court erred by denying motion to suppress. Officer's detention of defendant extended beyond traffic stop without probable cause, and defendant's consent to search was therefore not voluntary. Officer stopped defendant for speeding, noted defendant's extreme nervousness, and called for backup. A sergeant arrived while the officer was writing the ticket. "Once [Officer] Young was finished writing the citation a few minutes later,[fn] he approached Hill's vehicle and asked him to exit and stand at the back of his vehicle. Hill complied, and Young patted him down to determine the presence of any weapons. Finding none, Young then explained the citation to Hill, advised him of his court date, and handed him the citation along with his license and registration. At that point, Young considered the traffic stop to be over, but he did not expressly tell Hill that he was free to leave. Immediately after handing Hill the citation and his license, Young asked Hill 'if there was anything illegal inside the vehicle.' Hill replied, 'no,' and then Young asked Hill if he could search Hill's vehicle, and Hill replied, 'go ahead.' Young searched Hill's vehicle and discovered a plastic bag containing approximately 28.3 grams of a white powder he suspected to be cocaine." **Held**, defendant's "consent to the search was not voluntarily given at a time when a reasonable person would have appreciated that the roadside encounter had become consensual." **1. While the officer was entitled to have defendant exit his vehicle, "it does inform the totality of the circumstances that ensued, particularly in light of the delayed timing of asking Hill to exit his vehicle, the pat-down, and the arrival and presence of a backup officer on the scene,"** *citing State v. Allen*, 298 Ga. 1, 10(2)(c), 779 S.E.2d 248 (2015) ("weighing the relative intrusiveness of waiting for a records check in a personal vehicle compared to being asked to exit the vehicle and noting that 'many people would find providing their identification to a police officer for a computer records check far less intrusive than being ordered out of the car to stand on the shoulder of a busy highway or on the side of a street in their neighborhood"). "Nothing up to that point indicated to Hill that the stop was de-escalating; instead, the circumstances objectively indicated the opposite." **2.** "Further, that Young's inquiry and request to search immediately followed the return of Hill's license does not require a different result because it is the unsupported additional detention to investigate other crimes and 'to request consent to search [that] violated his Fourth Amendment rights.' [*State v. Drake*, 355 Ga.App. 791, 794(1), 845 S.E.2d 765 (2020)], *citing Rodriguez* [*v. United States*, 575 U. S. 348, 356-357(II), 135 S.Ct. 1609, 191 L.Ed.2d 492 (2015)]. 'If an officer continues to detain an individual after the conclusion of the traffic stop and interrogates him or seeks consent to search without reasonable suspicion of criminal activity, the officer has exceeded the scope of a permissible investigation of the initial traffic stop.' (Punctuation omitted.) *Heard v. State*, 325 Ga.App. 135, 138(1), 751 S.E.2d 918 (2013)."

Terry v. State, 358 Ga.App. 195, 854 S.E.2d 366 (January 28, 2021). Drug and related convictions reversed; trial court erred by denying motion to suppress. Officer improperly extended traffic stop for drug dog sniff after passenger, who was to drive the vehicle away, denied consent to search. Driver (defendant) had already been arrested; officer had already checked passenger's id, "returned all of her belongings and believed he had 'no legal grounds to keep her.'" Officer then requested, and was denied, consent to search, but informed the passenger-now-driver "that a K-9 officer—who was already on the scene—was going to walk around the vehicle with his dog for a 'free air sniff,'" which resulted in the discovery of drugs. "[H]ere, the undisputed evidence shows that all tasks related to the mission of the traffic stop were completed *before* the free-air dog sniff was conducted. … Thus, the officers prolonged the traffic stop after the mission of the stop was completed in order to conduct an open-air dog sniff, which renders the seizure at issue unlawful.[fn] And this is true even if that process added 'very little time to stop.'" Officer here articulated no reasonable suspicion related to drugs.

Weaver v. State, 357 Ga.App. 488, 851 S.E.2d 125 (October 30, 2020). In prosecution for possession of methamphetamine, trial court erred by denying motion to suppress. Officer improperly extended detention beyond articulable suspicion. **After determining that he would only give a warning for defective taillight, but without telling them they were free to leave, "the officer continued to question Weaver and his passenger about multiple subjects unrelated to the purpose of the stop even after receiving an answer from dispatch regarding the legality of Weaver's license and registration. Even if the officer's continued questioning of Weaver and the passenger about the scrap metal did not constitute a unreasonable prolongation of the stop, the officer should have ended the stop after he finished his questions as to that matter.[**fn] Instead, the officer continued to question Weaver about a knife that was plainly visible for the first half of the stop, about other possible weapons, and finally about general criminal activity or drug possession. The only possible reason for suspicion about drug possession given by the officer is that Weaver was nervous during the stop. But as this Court has explained, mere nervousness is not sufficient to support a reasonable articulable suspicion to extend a stop after completion of the original mission.[fn] The officer did not provide, nor did the trial court find, any other facts to support a reasonable articulable suspicion. 'Accordingly, [the officer] had no basis for prolonging the traffic stop beyond the time reasonably required to complete his investigation of [Weaver]'s traffic violation. The search of [Weaver]'s car, therefore, resulted from an illegal detention,'" *quoting Bodiford v. State*, 328 Ga.App. 258, 267(2), 761 S.E.2d 818 (2014).

C. EXPECTATION OF PRIVACY

1. COMPUTERS, TELEPHONES, AND OTHER ELECTRONIC DEVICES

Lofton v. State, 310 Ga. 770, 854 S.E.2d 690 (February 15, 2021). Malice murder and firearms convictions affirmed; trial court properly denied motion to suppress defendant's cell phone records, voluntarily produced by his cell provider at detective's emergency request. **1.** At time of defendant's 2014 trial, prevailing authority held that a phone user/subscriber had no privacy interest in records kept by a service provider. **The Stored Communications Act (SCA) allowed service providers to voluntarily provide user information to law enforcement in emergency situations, 18 U.S.C. § 2702(c)(4), and *Registe v. State*, 292 Ga. 154, 734 S.E.2d 19 (2012) held that users/subscribers had no privacy interest in the records. 2.** In 2018, *Carpenter v. United States*, 16-402, ___ U.S. ___, 138 S.Ct. 2206, 201 L.Ed.2d 507, 2018 WL 3073916 (June 22, 2018), held that "'accessing seven days of [historical] CSLI constitutes a Fourth Amendment search.' *Carpenter*, ___ U.S. at ____ & n.3 (III), 138 S.Ct. at 2217. The Court **did not reach the**

question 'whether there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny, and if so, how long that period might be.' Id. In arguing for this Court to reverse the trial court's denial of Lofton's motion to suppress the first tranche of cell phone records, and evidence derived from those records, Lofton seeks an extension of the holding in *Carpenter*: from a government-compelled production of cell phone records under 18 USC § 2703(c)(1)(B) and (d) to a request under 18 USC § 2702(c)(4) for the voluntary disclosure of records to address an emergency, and from seven days of historical CSLI to four days of historical CSLI." **3. "[W]e** conclude that the detective's communications with MetroPCS supported a good faith belief that its voluntary disclosure of the requested records was authorized under the SCA and binding appellate precedent at the time." Thus, two good faith exceptions to the exclusionary rule apply. **A. Reliance on statute not obviously unconstitutional.** "In *Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987), the United States Supreme Court examined the admissibility of "evidence obtained by an officer acting in objectively reasonable reliance on a statute" that is later declared unconstitutional. Id. at 349(II)(B), 107 S.Ct. 1160." **B. Reliance on binding appellate authority.** "More recently, in *Davis* [*v. United States*, 564 U.S. 229, 231, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011)], the United States Supreme Court applied the same reasoning to searches conducted in objectively reasonable reliance on binding appellate precedent that is later overruled." "Because, at the time of Lofton's trial, a federal statute, 18 USC § 2702(c)(4), and binding appellate precedent, *Registe*, 292 Ga. at 157, 734 S.E.2d 19, authorized the investigatory conduct at issue, reversing the trial court's decision in this case would have little, if any, additional benefit in deterring future violations of the privacy interests recognized in *Carpenter*. We therefore affirm the trial court's ruling." *Accord, Swinson v. State*, 311 Ga. 48, 855 S.E.2d 629 (March 1, 2021); *Gialenios v. State*, 310 Ga. 869, 855 S.E.2d 559 (March 1, 2021) (exigent circumstances: officers knew suspect's name and cell number, but not his address, and feared that other potential victims might be targeted); *Outlaw v. State*, 311 Ga. 396, 858 S.E.2d 63 (May 3, 2021) (*disapproving Lofton, Swinson* and *Gialenios* to the extent they suggest that the law in effect at some time other than the search itself is pertinent to good-faith analysis).

D. FIRST TIER ENCOUNTERS – NO STOP/NO COERCION

Williams v. State, 359 Ga.App. 809, 860 S.E.2d 109 (June 16, 2021). Convictions for cocaine trafficking and marijuana possession reversed; trial court erred by denying motion to suppress. Officers lacked articulable suspicion for second-tier detention of defendant based on anonymous tip about drug sales from a hotel room. **"Here, when Officer Ridley initially approached Williams and asked to 'talk to [him] for a second,' he initiated a mere first-tier encounter.** *Black v. State*, 281 Ga.App. 40, 44(1), 635 S.E.2d 568 (2006) (first-tier encounter initiated when the police approached a person and asked if they could 'talk to him for a second[.]'). **Encounter escalated to second-tier, however, when "Officer Cowell came to back-up Officer Ridley, and together they backed Williams up against the wall.** See *Cutter v. State*, 274 Ga.App. 589, 592(1), 617 S.E.2d 588 (2005) ('Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would [include] the threatening presence of several officers[.]') (citation omitted); see also *In re: J.B.*, 314 Ga.App. 678, 681(1), 725 S.E.2d 810 (2012) (encounter between police and citizen was found in part to be a second-tier encounter when the officers blocked the exit and did not allow the citizen to leave). At that point, law enforcement had also taken possession of Williams' ID and hotel room key and had not returned his room key. See *State v. Connor*, 288 Ga.App. 517, 519, 654 S.E.2d 461 (2007) ('In looking to the totality of the circumstances to determine whether a reasonable person would have felt free to leave', [we have] given particular scrutiny [to] whether the [person's] documents have been returned to him.... It is clear that 'an encounter initiated by [the police] may not be deemed consensual unless the [person's] documents have been returned to him.'). Given the totality of the

circumstances, no reasonable person in Williams' position would have felt free to leave and terminate the encounter at that point, and therefore the officers' stop of Williams was a second-tier encounter that required the officers to have an articulable suspicion that Williams was involved in criminal activity."

State v. Copeland, 310 Ga. 345, 850 S.E.2d 736 (November 2, 2020). In prosecution of sheriff's deputies for felony murder and related offenses, man found walking along road could ignore officers' inquiries and orders where they had no articulable suspicion to stop him. "If Martin assumed a 'defensive stance' while the deputies were engaged only in a first-tier encounter, such behavior would be consistent with his right to decline any contact from the police at that point in the encounter. Such behavior by a citizen during a first-tier encounter, when there is no evidence that the citizen has committed or is committing a crime, does not provide a law enforcement officer with a reasonable articulable suspicion necessary to escalate the encounter to a *Terry* stop."

E. PLAIN VIEW/FEEL/SMELL

George v. State, 312 Ga. 801, 865 S.E.2d 127 (November 2, 2021). *Vacating and remanding* unpublished Court of Appeals opinion. In prosecution for child molestation and related offenses, trial court, and Court of Appeals, erred by applying wrong standard to motion to suppress evidence seized during execution of search warrant. In addition to electronic devices seized as described in search warrant, officers also seized "[n]otes, papers, and other materials." "[T]he [Court of Appeals] noted, 'The officers were not required to overlook related evidence just because it was not listed in the warrant,' citing *Allison v. State*, 299 Ga.App. 542, 545(1) (683 S.E.2d 104) (2009). **In effect, the Court of Appeals concluded that the State need only show that evidence was 'relevant' or 'related' to the matter under investigation to justify the seizure of evidence outside the scope of a search warrant." Instead, the court should have asked whether the seizure "compl[ied] with the well-established plain view doctrine," which requires that "the item be in plain view, [and] its incriminating character must also be 'immediately apparent,'"** *quoting Horton v. California*, 496 U.S. 128, 136-137(II) (110 S.Ct. 2301, 110 L.Ed.2d 112) (1990). "For the plain view exception to apply, the item in question must be clearly visible, and the officer may not manipulate or disturb it in order to acquire probable cause to believe the item is evidence of a crime." As to written materials and other documentary evidence, "the proper standard is whether the documents' evidentiary value is immediately apparent upon a mere glance or cursory inspection," *quoting Reaves v. State*, 284 Ga. 236, 238, 664 S.E.2d 207 (2008). "See also *Brown v. State*, 269 Ga. 830, 831(1) (504 S.E.2d 443) (1998) (plain view exception inapplicable when incriminating character of 'piece of paper' observed by officer not 'immediately apparent')." *Overruling* contrary Court of Appeals cases beginning with *McBee v. State*, 228 Ga.App. 16 (491 S.E.2d 97) (1997).

F. SEARCHES

1. COMMUNITY CARETAKING EXCEPTION

Caniglia v. Strom, 20-157, ___ U.S. ___, 141 S.Ct. 1596, 209 L.Ed.2d 604, 2021 WL 1951784 (May 17, 2021). In civil § 1983 action, First Circuit erroneously upheld summary judgment for defendant police officers. Plaintiff Caniglia sued officers who entered his home and took his guns after he agreed to go to the hospital for a psychiatric evaluation. There was no imminent danger to anyone, no consent, and no court order. First Circuit wrongly relied on the "community caretaking exception" to the warrant requirement mentioned in *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973) (warrantless search of an impounded vehicle for an unsecured firearm did not violate the Fourth Amendment). "*Cady* expressly contrasted its treatment of a vehicle already under police control with a search of a car 'parked adjacent to the

dwelling place of the owner.' *Id.*, at 446–448, 93 S.Ct. 2523 (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971))." Roberts, Alito, and Kavanaugh all write separately, pointing out that the decision doesn't eliminate police power to enter homes in exigent circumstances to help someone who may be injured or who has threatened suicide.

2. CURTILAGE

State v. Arroyo, 362 Ga.App. 207, 867 S.E.2d 607 (January 4, 2022). In prosecution for cocaine trafficking, trial court properly granted motion to suppress. Evidence supported finding that drug dog's open-air sniff outside defendant's apartment door occurred within the curtilage of the residence. The apartment complex was gated; defendant's apartment "was located on an upper floor, with three other apartments' doors opening onto the same open-air corridor 'inside the building.'" Notes "four factors to be considered in defining the extent of a curtilage," especially "in a multi-family dwelling in an urban area": ""[1] the proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by," *quoting Espinoza v. State*, 265 Ga. 171, 173(2), 454 S.E.2d 765 (1995) and *United States v. Dunn*, 480 U.S. 294, 301, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987). **"As to the first *Dunn* factor, proximity, the evidence supports a conclusion that the open-air sniff took place at or immediately in front of the apartment door and that this area was within the protected curtilage. [Cit.] As to the second *Dunn* factor, enclosure, some evidence showed that the apartment complex had an exterior gate that sometimes excluded the general public from the entire property, including the corridor in front of the apartment itself. [Cit.] The same evidence could also be construed as an attempt to limit 'the nature of the uses to which the area is put' to visits by tenants and their authorized guests."** "**FN4:** Our holding should not be read as establishing any broad rule that K-9 open-air searches of the hallways of multi-unit apartment buildings are constitutionally impermissible. On the contrary, each case will turn on its own facts, as developed (or not) in the record and as found by the trial court, subject to appellate review only for factual or legal error."

Lewis v. State, 358 Ga.App. 482, 855 S.E.2d 708 (February 22, 2021). Conviction for drug offenses reversed; trial court erred by denying motion to suppress evidence seized from his front porch without a warrant. Passing officer saw defendant apparently weighing drugs on a scale; approaching from an adjacent abandoned property, he saw marijuana and white powder residue on a scale. Defendant told the officers "not to come onto his property." Trial court found that the contraband was seized to prevent its destruction as an exigent circumstance. "But at the motion-to-suppress hearing, [Officer] Gratton testified that when the supervisor arrived, he was told to seize the contraband simply because it was in plain view from the neighboring abandoned property. And when Gratton was asked specifically why he did *not* get a warrant to retrieve the contraband, he responded simply, 'Plain view.' He further testified that Lewis was arrested *after* the contraband was seized. In short, there was *no* testimony suggesting that the officers entered Lewis's property under exigent circumstances. Indeed, at trial, Gratton testified regarding discussions about calling an assistant district attorney to get a search warrant for *inside* Lewis's house, but one was never obtained because officers decided to leave that task up to another department. But because officers considered obtaining a warrant for the inside of the house, the home's occupants were at one point detained outside to safeguard any evidence that might be inside. In light of the foregoing, the record does not support the trial court's finding that the officers were entitled to retrieve evidence from the curtilage of Lewis's property under exigent circumstances. To the contrary, the foregoing testimony by Gratton established that **the officers walked onto the property and retrieved the contraband from the curtilage of the home simply because it was in 'plain view,' not because they believed it was in danger of**

imminent destruction. Indeed, the officers' ability to successfully secure the house in anticipation of obtaining a warrant to search inside evinces the lack of exigent circumstances. And there is no evidence to suggest that the curtilage of the house could not be secured while a warrant was obtained."

3. DELAY

Nelson v. State, 312 Ga. 375, 863 S.E.2d 61 (September 8, 2021). Interlocutory appeal in murder prosecution. Trial court properly denied motion to suppress based on delay in searching cell phones for "more than two years between the date on which the electronic devices were seized." **1.** Applying analytical framework adopted in *Rosenbaum (March 11, 2019), below.* While two year delay here is extraordinarily long, **defendant's "possessory interest in the devices was greatly diminished by the combination of his incarceration for the entire period of the delay and his failure to request the devices' return."** "'Where individuals are incarcerated and cannot make use of seized property, their possessory interest in that property is reduced.' *United States v. Sullivan*, 797 F.3d 623, 633 (9th Cir. 2015) (citing *Segura v. United States*, 468 U.S. 796, 813, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984) (plurality opinion))." **2. "**Nelson argued to the trial court that his counsel's request for discovery of data contained on his phone was akin to requesting a return of the device. The trial court rejected that argument, saying that '[a] request for discovery and the subsequent disclosure of discoverable materials by the State does not result in the release of physical evidence.' We agree."

State v. Rosenbaum, 305 Ga. 442, 826 S.E.2d 18 (March 11, 2019). Interlocutory appeal in murder prosecution; trial court properly granted motion to suppress based on "the State's delay in obtaining search warrants for data contained in electronic devices when those devices were originally seized in a warrantless, but lawful, manner by police." Police seized defendants' computer and cell phones at or just before their arrest, but failed to examine the devices, or seek a search warrant, for 539 days, during which time defendants repeatedly asked for return of their devices. **1. Adopts analytical framework** developed by Eleventh Circuit in *United States v. Mitchell*, 565 F.3d 1347, 1350-1351 (11th Cir. 2009), and *United States v. Laist*, 702 F.3d 608, 613-614(II) (11th Cir. 2012). "In *Mitchell*, supra, the Eleventh Circuit considered unreasonable delay in obtaining a search warrant, using as its starting point the United States Supreme Court's holding in *United States v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984), that 'a seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on "unreasonable searches."' Id. at 124(III), 104 S.Ct. 1652, citing *United States v. Place*, 462 U.S. 696, 709(III), 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). … The Eleventh Circuit further elaborated on this analysis in *Laist*, supra, establishing a framework for balancing governmental and private interests under the 'totality of the circumstances': 'In the past, courts have identified several factors highly relevant to this inquiry: **first, the significance of the interference with the person's possessory interest; second, the duration of the delay; third, whether or not the person consented to the seizure; and fourth, the government's legitimate interest in holding the property as evidence.'** (Citations and parenthetical omitted.) 702 F.3d at 613-614(II). As the trial court noted, *Laist* and other decisions elaborate on these four factors, but '[g]iven the complex interactions of these factors, this balancing calculus is fact-intensive.' Id. at 614(II)." *Accord, Nelson (September 8, 2021), above.* **2. Application.** Here, the State concedes that defendants' possessory interest in the computer and phones is high; the duration of the delay is extensive, especially considering the defendants' repeated efforts to have their property returned; the defendants did not consent to the seizure; and the State legitimate interest in holding the evidence weighed "strongly" in the State's favor. Notably, the lengthy delay "did not result from the complexities of the case nor any overriding circumstances, but from oversights that

caused the State not to pursue their investigation into the contents of the devices with sufficient diligence." The trial court properly balanced the factors in favor of the defendants. **3. No good-faith exception applies** "to an unreasonable delay in obtaining a search warrant," *quoting United States v. Burgard*, 675 F.3d 1029, 1036(III) (7th Cir. 2012): "'[a] well-trained officer is presumed to be aware that a seizure must last no longer than reasonably necessary for the police, acting with diligence, to obtain a warrant. When police fail to act with such diligence, exclusion will typically be the appropriate remedy.' (Citation and punctuation omitted.) The Seventh Circuit also noted: 'Furthermore, removing this sort of police misconduct from the ambit of the exclusionary rule would have significant implications: it would eliminate the rule's deterrent effect on unreasonably long seizures. Police could seize any item—a phone, a computer, a briefcase, or even a house—for an unreasonably long time without concern for the consequences, evidentiary and otherwise.' Id. at 1035(III)."

4. EXIGENT CIRCUMSTANCES

Lange v. California, 20-18, ___ U.S. ___, 141 S.Ct. 2011, 210 L.Ed.2d 486, 2021 WL 2557068 (June 23, 2021). *Vacating and remanding* judgment of California Court of Appeals. In DUI prosecution, trial court erred in denying motion to suppress. **Facts:** Lange drove past a state trooper with horn blaring and loud music playing. The trooper followed him based on a noise violation. "The officer began to tail Lange, and soon afterward turned on his overhead lights to signal that Lange should pull over. By that time, though, Lange was only about a hundred feet (some four-seconds drive) from his home. Rather than stopping, Lange continued to his driveway and entered his attached garage. The officer followed Lange in and began questioning him." Lange performed poorly on field sobriety evaluations, and the trooper arrested him for DUI. **Held**, **the trial court erred by applying a categorical rule that pursuit of a suspected misdemeanant is always permissible under the exigent-circumstances exception to the warrant requirement of the Fourth Amendment. Rather, "[t]he flight of a suspected misdemeanant does not always justify a warrantless entry into a home. An officer must consider all the circumstances in a pursuit case to determine whether there is a law enforcement emergency. On many occasions, the officer will have good reason to enter—to prevent imminent harms of violence, destruction of evidence, or escape from the home. But when the officer has time to get a warrant, he must do so—even though the misdemeanant fled."** While the common law recognized a general rule allowing officers to enter a home to arrest a fleeing felon, no such rule existed as to misdemeanants. *Distinguishing United States* v. *Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976) (police could pursue fleeing felon into home). In contrast to felonies, misdemeanors "vary widely" and may be "minor" offenses such as traffic offenses or littering. Some, such as domestic violence offenses, are more serious, and may justify more urgent police action; but the wide range of misdemeanors makes a categorical rule inappropriate. "[T]he gravity of the underlying offense [is] an important factor to be considered when determining whether any exigency exists," *quoting Welsh* v. *Wisconsin*, 466 U.S. 740, 753, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984). "[A]pplication of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense," *Id.* at 753, such as, in *Welsh*, drunk driving. "We have no doubt that in a great many cases flight creates a need for police to act swiftly. A suspect may flee, for example, because he is intent on discarding evidence. Or his flight may show a willingness to flee yet again, while the police await a warrant. But no evidence suggests that every case of misdemeanor flight poses such dangers." **Applying case-by-case analysis "will in many, if not most, cases allow a warrantless home entry. When the totality of circumstances shows an emergency—such as imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home—the police may act without waiting. And those circumstances … include the flight itself**."

5. PROBABLE CAUSE

Gowen v. State, 360 Ga.App. 234, 860 S.E.2d 828 (June 25, 2021). Interlocutory appeal in prosecution for possession of methamphetamine; trial court properly denied motion to suppress. Officer searched defendant's van in part based on the odor of burnt marijuana. *Based on State v. Folk*, 238 Ga.App. 206, 208, 521 S.E.2d 194 (1999) ("[A] trained police officer's perception of the odor of burning marijuana, provided his ability to identify that odor is placed into evidence, constitutes sufficient probable cause to support the warrantless search of a vehicle.") and others. **1.** Defendant contends that the Georgia Hemp Farming Act, OCGA § 2-23-1, et seq. ("GHFA" or "the Act"), which went into effect on May 10, 2019, "requires that we overturn or modify this precedent. Specifically, Gowen argues that because hemp is now legal in Georgia, and in light of the testimony that hemp and marijuana are similar in smell and appearance, we should find that an officer's detection of an odor indicating the presence of marijuana cannot provide probable cause for the warrantless search of a vehicle. To prevail on this argument, however, Gowen would need to show that the GHFA permits the retail sale of raw hemp --- i.e., hemp in a form that resembles marijuana." But "the GHFA makes it unlawful for '[a]ny person to offer for sale at retail the unprocessed flower or leaves of the hemp plant[.]' OCGA § 2-23-4(a)(7). Accordingly, the Act does not allow the possession of raw hemp --- i.e., hemp that has not yet been processed into a different product --- by anyone other than a licensee or permitee of the Georgia Department of Agriculture. **The GHFA, therefore, does not authorize making hemp available to individual consumers in a form that resembles raw marijuana." "In light of the foregoing, we agree with the trial court that the smell of burnt marijuana in Gowen's van provided police with probable cause to search that vehicle." 2.** Also rejecting defendant's argument that, because of the GHFA, "it was not 'readily' or 'immediately' apparent that the item was an illegal substance." "Despite Gowen's assertions to the contrary, however, **'[t]here is no requirement that the officer know with certainty that the item is [contraband] at the time of the seizure, only that there be probable cause to believe that this is the case.'** (Citation and punctuation omitted.) *Miller v. State*, 261 Ga.App. 618, 620, 583 S.E.2d 481 (2003). And probable cause to believe that a substance is contraband requires only 'that the facts available to the officer would warrant a man of reasonable caution in the belief that [the item] may be contraband ...; it does not demand any showing that such a belief be correct or more likely true than false. A practical, non-technical probability that incriminating evidence is involved is all that is required.' (Citation and punctuation omitted). *Combs v. State*, 271 Ga.App. 276, 276, 609 S.E.2d 198 (2005)."

XII. SENTENCING

A. LIFE WITHOUT PAROLE

Moss v. State, 311 Ga. 123, 856 S.E.2d 280 (March 15, 2021). Felony murder and related convictions affirmed; trial court properly sentenced 17-year old defendant to life without parole under OCGA § 17-10-16(a). **1. The trial court properly applied requirement of** *Miller v. Alabama*, 567 U.S. 460, 472-473, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) that "'a trial court must make a "distinct determination" that the defendant is an "exceptionally rare" juvenile who is "irreparably corrupt" or "whose crimes reflect permanent incorrigibility" before sentencing a juvenile convicted of murder to life without parole,'" *quoting Raines v. State*, 309 Ga. 258, 261, 845 S.E.2d 613 (2020). "Indeed, the trial court offered ample support for its conclusion that Moss's 'behavior does not reflect an immature youth who merely makes impulsive and reckless decisions on occasion, or has an underdeveloped sense of responsibility; rather, it betrays one who is deliberate, malevolent, and exhibits a depraved heart' and that Moss's crimes do not reflect 'unfortunate yet transient immaturity.' (Citation and punctuation omitted.) It reviewed Moss's juvenile history, including (among other things) prior arrests for burglary and obstruction, prior possession of drugs, and admitted involvement with the 'Bloods' gang. It determined that

Moss—who was on probation when he shot Marin—shot a different person (Corado) the night before Marin's murder during a separate attempted robbery, and noted that Moss ultimately pleaded guilty to criminal attempt to commit murder for that offense. And it concluded that Moss's 'criminal behavior has escalated during the last several years,' that Moss '[s]how[ed] no hesitation, remorse, or reflection whatsoever' when he shot and killed Marin, and that Moss 'appeared to be shooting just for the sake of killing.' Based on these things, and after acknowledging that it must consider Moss's 'youth and its attendant characteristics, along with the nature of his crime,' *Miller*, 132 S.Ct. at 2460, the trial court resentenced Moss to LWOP, concluding that Moss's '*actions* reflect irreparable corruption' (emphasis in original), his 'behavior exhibits an irretrievable depravity which appears to foreclose any reasonable prospects for rehabilitation,' and '[h]e thus falls into that "rarest of juvenile offenders ... whose crimes reflect permanent incorrigibility; whose crimes reflect irreparable corruption ...."' (Quoting *Veal* [*v. State*, 298 Ga. 691, 702, 784 S.E.2d 403 (2016)]. It is true, as Moss points out, that at one point in its lengthy order the trial court also opined on the role of the 'Divine' in the ultimate judgment of a human being: 'This Court cannot find, in this case or in any other, that the Defendant *himself* is 'irretrievably corrupt' or 'permanently incorrigible.' And it is this Court's firm opinion that no court at any level is ever able to make such a determination; it is beyond human capacity. Only a Divine Judge could look into a person and determine that he is permanently and irretrievably corrupt; that he has reached a state from which there is no return, no hope of redemption, no hope of any restoration.' (Emphasis in original.) But we do not view *Miller* or *Montgomery* [*v. Lousiana*, 577 U.S. 190, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016)]—or cases from this Court applying *Miller* and *Montgomery*, such as *Veal*, *White* [*v. State*, 307 Ga. 601, 837 S.E.2d 838 (2020)] and *Raines* [*v. State*, 309 Ga. 258, 845 S.E.2d 613 (2020)]—as requiring the trial court to conduct a metaphysical assessment of a juvenile defendant. Given the express determinations contained in the trial court's order and summarized in part above, we cannot say that the trial court's additional observations about the metaphysical—especially when viewed in the full context of the court's order—somehow rendered the trial court's analysis erroneous." **2. OCGA § 17-10-16(a) does not prohibit imposition of a life without parole sentence on juveniles.** That code section reads in part: "Notwithstanding any other provision of law, a person who is convicted of an offense ... for which the death penalty may be imposed under the laws of this state may be sentenced to death, imprisonment for life without parole, or life imprisonment as provided in Article 2 of this chapter." Rejects defendant's argument "that the 'notwithstanding any other provision of law' portion of OCGA § 17-10-16(a) references, and indeed grafts into the statute, the United States Supreme Court's Eighth Amendment jurisprudence." "This interpretation, however, ignores the complete statutory text 'read ... in its most natural and reasonable way.' *Blackwell v. State*, 302 Ga. 820, 828, 809 S.E.2d 727 (2018) … To that end, OCGA § 17-10-16(a)'s reference to an offense 'for which the death penalty may be imposed *under the laws of this state*' (emphasis supplied) is most naturally understood to mean an offense for which the governing Georgia statute lists the death penalty as a sentencing option. See *Neal v. State*, 290 Ga. 563, 569, 722 S.E.2d 765 (2012) (Hunstein, C.J., concurring, joined by all other Justices) (interpreting constitutional language identifying cases in which a death sentence 'could be imposed' to include all life-imprisonment murder cases because, under the homicide statute, 'murder is clearly a crime in which a defendant, upon conviction, can be punished by death as compared to other crimes'); *Atlanta & W.P.R. Co. v. Hemmings*, 192 Ga. 724, 728, 16 S.E.2d 537 (1941) (interpreting phrase 'any law of the State' in a constitutional provision to mean a 'legislative enactment' and not a court decision). Applied here, we conclude that OCGA § 17-10-16(a) is satisfied because OCGA § 16-5-1(e)(1) enumerates death as a potential sentence for murder.[fn] To hold otherwise would import into a Georgia statute an evolving body of United States Supreme Court case law when the text says nothing about constitutional limitations in general or juveniles in particular."

Love v. State, 309 Ga. 833, 848 S.E.2d 882 (September 28, 2020). Following convictions for malice murder and related offenses, trial court properly sentenced 16-year old defendant to life without parole. **1.** Finding was supported by evidence of lengthy and escalating history or violent offenses. "With respect to the circumstances of the underlying crimes, the trial court noted that the unarmed victim was only trying to help Love when Love shot him without provocation in front of 12- and 13-year-old children, whom he then threatened to kill as well. Love was not under the influence of drugs or impaired, has never been diagnosed with a mental disorder, and had no motive to kill Trejo. And when Love later described killing the victim, he was flippant and disrespectful, showing no remorse. The trial court further found Love was not acting under sudden compulsion or immaturity and that there was no outside pressure or negative influence. Rather, the evidence showed that Love orchestrated and planned the murder in an isolated location and was the sole actor. Thus, the trial court concluded that Love had shown a consistent disrespect for authority; that rehabilitation was not a realistic expectation; that Love's crimes reflect that he is permanently incorrigible and irreparably corrupt; and that as a result, Love is in the narrow class of juvenile murderers for whom a life without parole sentence is proportional under the Eighth Amendment." **2.** "[A]lthough Love notes that the trial court did not rely on any expert or medical testimony to support its determination, **nothing in *Miller, Montgomery,* or *Veal* requires the use of an expert to aid a court in making a determination that a juvenile offender is irreparably corrupt." 3. "**To the extent that Love asserts that for policy reasons, life without parole sentences should not be permitted for juveniles, those types of considerations are best left to be weighed by our General Assembly."

B. MERGER

1. MERGER – FIREARMS/WEAPONS OFFENSES

Coates v. State, 304 Ga. 329, 818 S.E.2d 622 (August 27, 2018). ***Reversing*** 342 Ga.App. 148, 802 S.E.2d 65 (2017). OCGA § 16-11-131(b), prohibiting possession of firearms by a felon, permits only one prosecution and conviction for the simultaneous possession of multiple firearms. OCGA § 16-11-131(b) provides that a felon "who receives, possesses, or transports any firearm commits a felony." **"[T]he phrase 'any firearm,' as used in the statute under consideration, indicates that the quantity of firearms, whether one or many, is inconsequential." Defendant's four convictions thus should have merged.** *Accord, Harrell v. State,* 349 Ga.App. 725, 826 S.E.2d 684 (March 26, 2019); *Martin v. State,* 306 Ga. 538, 832 S.E.2d 402 (August 19, 2019) (possession, on two occasions, of a total of seven firearms = two possible convictions for possession by a convicted felon); *Edvalson v. State*, 310 Ga. 7, 849 S.E.2d 204 (September 29, 2020) (Multiple counts of sexual exploitation of children, based on possession of digital images of minors engaged in sexually explicit conduct, should have merged under OCGA § 16-12-100(b)(5), *citing Coates*); *Miller v. State*, 312 Ga. 702, 864 S.E.2d 451 (October 19, 2021) (one felon, one occasion, two firearms = one conviction).

2. MERGER – GENERAL PRINCIPLES

Johnson v. State, 313 Ga. 155, 868 S.E.2d 226 (January 19, 2022). *Vacating and remanding* unpublished Court of Appeals decision to apply proper test for merger of multiple theft charges. Defendant was convicted of stealing three Ford trucks and other items from a contracting business over a span of 5½ hours. The Court of Appeals affirmed, using the "actual evidence" test from *Braswell v. State*, 245 Ga.App. 602, 604, 538 S.E.2d 492 (2000). But that test was overruled by *Drinkard v. Walker*, 281 Ga. 211, 214-215, 636 S.E.2d 530 (2006), and only ever applied where the defendant was convicted of different offenses, not multiple counts of the same offense. "When a defendant enumerates a merger error after being convicted of multiple counts of the *same* crime, the correct merger analysis requires courts to ask whether those crimes arose from 'a single course of conduct' and, if so, whether the defendant can face multiple convictions and

sentences under a unit-of-prosecution analysis." **"Georgia's appellate courts have … explained that part of a course-of-conduct evaluation may involve examining whether the defendant acted with the same or differing intents, whether the crimes occurred at the same place, and whether the crimes occurred at the same time or were separated by some meaningful interval of time."**

Batchelor v. State, 358 Ga.App. 761, 856 S.E.2d 323 (March 5, 2021). Terroristic threats and aggravated assault convictions didn't merge. "Batchelor relies on the 'actual evidence' test set forth in *Drinkard v. Walker*, 281 Ga. 211, 636 S.E.2d 530 (2006), which provides that 'a single act may constitute an offense which violates more than one statute, and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.' (Punctuation omitted; emphasis supplied.) *Waits v. State*, 282 Ga. 1, 4(2), 644 S.E.2d 127 (2007). But **'the "required evidence" test addresses the culpability of "a single act" and does not apply unless the same conduct of the accused establishes the commission of multiple crimes.'** *Robertson v. State*, 306 Ga.App. 721, 725, 703 S.E.2d 343 (2010). Here, the offense of terroristic threats was proven by the evidence that Batchelor threatened to kill Martin, and the offense of aggravated assault was proven by the evidence that Batchelor assaulted Martin with a knife by stabbing him. 'Accordingly, the two counts did not merge.' Id."

3. MERGER – SEXUAL OFFENSES

Edvalson v. State, 310 Ga. 7, 849 S.E.2d 204 (September 29, 2020). *Reversing* unpublished Court of Appeals opinion. **Multiple counts of sexual exploitation of children, based on possession of digital images of minors engaged in sexually explicit conduct, should have merged.** OCGA § 16-12-100(b)(5) makes it "unlawful for any person knowingly to create, reproduce, publish, promote, sell, distribute, give, exhibit, or possess with intent to sell or distribute *any visual medium* which depicts a minor or a portion of a minor's body engaged in any sexually explicit conduct." "Here, the term 'any visual medium' in OCGA § 16-12-100(b)(5) must be read in light of the definition provided by the General Assembly in OCGA § 16-12-100(a)(5): '"Visual medium" means *any* film, photograph, negative, slide, magazine, or other visual medium.' (Emphasis supplied.) Accordingly, 'any visual medium' in subsection (b)(5) cannot refer to the qualitative sense of 'any,' as that meaning is provided by the definition in subsection (a)(1). Instead, 'any' in the phrase 'any visual medium' must be interpreted as a quantitative term, implying no specific quantity and having no limit. … [T]he offense is the possession of any prohibited 'visual medium' at all, whether one or one hundred.[fn] Accordingly, we conclude that OCGA § 16-12-100(b)(5) is unambiguous and permits only one prosecution and conviction for the simultaneous possession of multiple items of 'visual media.'" *Accord, McCurdy v. State*, 359 Ga.App. 885, 860 S.E.2d 172 (June 18, 2021) (55 counts of sexual exploitation based on possession of images merged for sentencing); *Macky v. State*, 360 Ga.App. 189, 860 S.E.2d 863 (June 25, 2021) (applying *Edvalson* to OCGA § 16-12-100(b)(8), which refers to "any material" rather than "any film, photograph, negative, slide, magazine, or other visual medium" under (b)(5)); *State v. Palacio-Gregorio*, 361 Ga.App. 339, 862 S.E.2d 605 (September 16, 2021) (same as *Macky*).

C. MODIFICATION

Murrell v. State, 359 Ga.App. 538, 859 S.E.2d 506 (May 20, 2021). Following defendant's convictions for child molestation and related offenses, trial court erred by granting State's "motion to clarify terms of sentence." The order, entered two years after the court finally adopted the remittitur from the Court of Appeals, attempted to make one count consecutive to the others;

however, the trial court's power and jurisdiction to modify a sentence is limited by OCGA § 17-10-1(f) to "one year of the date upon which the sentence is imposed, or within 120 days after receipt by the sentencing court of the remittitur upon affirmance of the judgment after direct appeal, whichever is later." Even then, the court may only "correct or reduce the sentence and to suspend or probate all or any part of the sentence imposed"; the order here had the effect of increasing defendant's sentence (which was concurrent, no other intention being stated, pursuant to OCGA § 17-10-10(a)).

1. RESENTENCING

Parrott v. State, 312 Ga. 580, 864 S.E.2d 80 (October 5, 2021). Following conviction for felony fleeing and eluding, no double jeopardy violation in resentencing. Defendant was originally sentenced to five years' probation plus a $5000 fine, but defendant properly pointed out that OCGA § 40-6-395(b)(5) does not allow the sentence to "be suspended, probated, deferred, or withheld." Trial court thus sentenced defendant to five years to serve. "[T]he trial court was authorized to correct the void sentence it previously imposed, including by resentencing Parrott on that count. And no double jeopardy violation because the defendant had no "'legitimate "expectation of finality in his [original] sentence."' **Contrary to defendant's argument, trial court has the discretion to vacate and resentence following a void sentence, rather than merely correcting the void portion, *distinguishing* cases remanded with direction to correct only the void portion,** e.g., *Humphrey v. State*, 297 Ga. 349, 351, 773 S.E.2d 760 (2015)." The Court has never "held that a particular approach was the exclusive approach a trial court must take to appropriately exercise the broad discretion it is generally afforded in resentencing. In that vein, we generally cannot say that a trial court abuses its discretion when it corrects a 'partially void' sentence on a particular count by vacating that sentence in its entirety and imposing a new sentence on that count within the statutory parameters." Note, "[w]e express no opinion as to whether the trial court could also resentence on other counts, for which the sentences are not void, to preserve an overall sentencing scheme."

D. RESTITUTION

1. HEARING/WRITTEN FINDINGS REQUIREMENTS

Martin v. State, 361 Ga.App. 511, 864 S.E.2d 693 (October 20, 2021). Aggravated assault and related convictions affirmed, but **sentence vacated and remanded to "adequately inquire into Martin's ability to pay the $5,000 attorney fees restitution award."** OCGA § 17-12-51(a) allows a court to order reimbursement of indigent defense costs, but requires that "the court shall consider the factors set forth in [OCGA §] 17-14-10," including financial resources, income, other obligations, and other factors. An application for appointed counsel or presentence investigation may provide the required information, *Miller v. State*, 221 Ga.App. 718, 721(2) (472 S.E.2d 697) (1996), but here, "the record does not include the trial court's conclusion concerning Martin's ability to pay a reimbursement award, any information in support of the conclusion, or any consideration of the factors outlined in OCGA § 17-14-10(a). *Miller*, 221 Ga.App. at 721(2). Rather, there is only the rote imposition of an attorney fee reimbursement without any inquiry. **While neither OCGA § 17-12-51(d), OCGA § 17-14-10(a), nor our cases require a hearing to evaluate an indigent defendant's ability to pay an attorney fee reimbursement award, such a hearing during sentencing is a preferred practice. Nevertheless, at a minimum, the trial court should note — on the record — whether an attorney fee reimbursement award would 'impose a financial hardship upon the defendant or the defendant's dependent or dependents,' OCGA § 17-12-51(d); any 'information to serve as an adequate basis for ordering reimbursement[,]' *Miller*, 221 Ga.App. at 721(2); and a consideration of the factors codified at OCGA § 17-14-10(a).** In view of the absence of these findings in this case, we vacate the trial court's attorney fees reimbursement condition of

probation and remand the case to the trial court for further proceedings consistent with this opinion."

In re N.T., 355 Ga.App. 205, 843 S.E.2d 877 (May 26, 2020). Following delinquency adjudication based on aggravated assault, juvenile court properly ordered restitution for victim's medical expenses. No abuse of discretion in determining juvenile's ability to pay. **1. "**While the psychological evaluation of N.T. reflects that he had dropped out of high school and that his full scale IQ is 69, the psychological evaluation did not conclude that N.T. was incapable of working or that any 'mental impairments ... would prevent [him] from working.' … N.T. was attending school while in DJJ custody, and, in fact, testified during the disposition hearing that he will do better in school, to which the juvenile judge replied, 'I believe there may be some truth to that.' N.T. testified at the restitution hearing that he has experience with computers, and that he had been looking for a job as a software engineer, repairing systems for schools, and that he wanted to do that kind of work 'now and [in the] future.' The juvenile court concluded that N.T. would be a legal adult soon, that he was currently in school, and that there was nothing preventing him from 'learn[ing] a number of different skills so that he can have a future and ... earning capacity.' Additionally, the juvenile court's statement during the disposition hearing reflects that the court found credible N.T.'s promise that he would do better; the psychological evaluation bolstered this determination, concluding that N.T. 'may be responding well to the structure of school' and that 'he desires to do better ... and wants to make his family proud of him in the future.'" **2. "As to N.T.'s claim that he does not have the future earning capacity to pay restitution, OCGA § 17-14-10 no longer requires the ordering authority to consider that factor.**[fn] Indeed, this Court has stated that consideration of this factor is not required: 'We find no law for the proposition that the court must determine in advance that the [juvenile's] net worth or financial resources projected over the intended years of repayment is mathematically sufficient to allow full payment of the amount of restitution ordered,'" *quoting In re W.J.F.*, 302 Ga.App. 361, 363, 691 S.E.2d 271 (2010). ***Casting doubt on Galimore v. State*, 321 Ga.App. 886, 887, 743 S.E.2d 545 (2013), and *In re E.W.*, 290 Ga.App. 95, 96(2), 97(3), 658 S.E.2d 854 (2008)** "to the extent they hold that the ordering authority must consider future earning capacity when determining the nature and amount of restitution under OCGA § 17-14-10. We also disapprove of the dicta in *Vaughn v. State*, 324 Ga.App. 289, 291, n.2, 750 S.E.2d 375 (2013), to the extent that it implies that a defendant's 'future financial position' is a required factor under the statute."

Wilson v. State, 355 Ga.App. 73, 842 S.E.2d 521 (April 29, 2020). Theft by taking conviction affirmed; no error in award of restitution. Defendant has not shown that the court "fail[ed] to consider the factors outlined in OCGA § 17-14-10(a) before ordering restitution." "Here, the state met its burden of proving the victim's loss by presenting evidence of the amount the victim had paid Wilson and the value of the work Wilson had completed. **Wilson presented no evidence as to his financial circumstances or his ability to pay. Given his failure to meet his burden, Wilson has not shown that the trial court erred."**

XIII. SPEEDY TRIAL

A. CONSTITUTIONAL RIGHT

Labbee v. State, 362 Ga.App. 558, 869 S.E.2d 520 (February 10, 2022). Interlocutory appeal in child molestation prosecution. Trial court properly denied plea in bar based on constitutional speedy trial claim. **Delay caused by the pandemic-related suspension of jury trials was properly held to be "truly neutral," not attributed to either party.** "While we agree with Labbee's general argument that the 'State' includes judges and that the duty is on the State to bring the defendant to trial**, the pandemic is a 'catastrophic and unique event beyond either party's control.'** *Callender v. Maryland*, No. 1070, 2021 WL 5371209, at *17, 2021 Md. App.

LEXIS 1010, at *45 (Md. Ct. Spec. App. Nov. 18, 2021). As one court considering the delay in jury trials caused by COVID-19 has explained, '[the defendant's] argument that pandemic-related delay should be weighed ... against the Government is unavailing. In *Barker*, the Supreme Court reasoned that a "more neutral reason [for delay] such as negligence or overcrowded courts" should weigh against the Government "since the ultimate responsibility for such circumstances must rest with the government." 407 U.S. at 531 [92 S.Ct. 2182][.] ... **In the case of the COVID-19 pandemic, [however,] the Government does not bear the ultimate responsibility for the pandemic; the pandemic is outside of the control of either the parties or the courts.'** (Emphasis omitted.) *United States v. Pair*, 522 F.Supp.3d 185, 194 (E.D. Va. 2021). Because 'neither party is responsible for the delays caused by the COVID-19 pandemic,' Labbee's argument is misplaced. *United States v. Mayer*, No. 19-CR-0096 (WMW/HB), 2021 WL 2686133, at *9, 2021 U.S. Dist. LEXIS 122205, at *26 (D. Minn. June 30, 2021). Furthermore, in some cases, a portion of the pretrial delay should not be weighed against the State because the delay is justified and appropriate. See *Kramer v. State*, 287 Ga.App. 796, 798(1), (652 S.E.2d 843) (2007) (noting that a portion of the delay 'was a justifiable and appropriate delay which cannot be weighted against the State'). See also *Barker*, 407 U.S. at 531(IV), 92 S.Ct. 2182 ('A valid reason, such as a missing witness, should serve to justify appropriate delay.'); *Perry*, 253 Ga. at 595, 322 S.E.2d 273 (indicating that the government in some cases can show a valid reason that justifies the delay). Here, the Chief Justice of the Georgia Supreme Court entered the judicial emergency order and its extensions in response to the pandemic in Georgia and the need for social distancing. And, notably, Labbee does not point to any evidence that the Chief Justice could have taken less drastic measures and avoided suspending jury trials as a result of the pandemic; does not point to any evidence that the statewide prohibition on jury trials could have been lifted sooner by the Chief Justice in a manner consistent with public health guidelines; and does not point to any evidence that jury trials could have resumed more quickly in Haralson County in particular. Under these circumstances, even if the State can be said to have caused the pandemic-related delay by suspending jury trials, the delay was justified and appropriate. See *Pair*, 522 F.Supp.3d at 194 (concluding that the 'delay caused by the pandemic is justified'); *State v. Jackson*, No. A21-0126, 968 N.W.2d 55, 61 (Minn. Ct. App. 2021) ('The Court's current and continued inability to hold trials in a way that does not put the public, the parties, court staff and counsel at serious risk is a good-faith and reasonable justification for the delay in this matter.') (citation and punctuation omitted)."

XIV. WITNESSES

A. OPINION TESTIMONY *See also subheading* EXPERTS, *above*

1. GENERALLY

Martinez-Arias v. State, 313 Ga. 276, 869 S.E.2d 501 (February 15, 2022). *Affirming* 356 Ga.App. 423, 846 S.E.2d 448 (2020), and defendant's convictions for child molestation and related offenses, but disagreeing on this issue. Trial court abused its discretion in admitting school counselor's testimony about Latino cultural norms as lay opinion, but harmless error. State failed to show that the evidence was relevant. State here offered the testimony for the purpose of "providing context for the several-year delay in the victim's outcry." Supreme Court, however, finds that the evidence "had no tendency to make the 'fact of consequence'—the State's theory that [victim] M.J.'s delayed outcry was not the result of fabrication—any more probable or less probable than it would have been without the testimony. See OCGA § 24-4-401. In other words, it indicated nothing at all about M.J.'s specific motivations about when and why she reported her abuse and provided no basis for the jury to make any reasonable inferences about M.J.'s behavior; the testimony bore no relationship to M.J. or her specific actions. [Cits.]" "[Witness] Escamilla's testimony about the ethnic and cultural attitudes she had experienced was so broad and generalized that we cannot say it would indicate to the jury whether those attitudes—even

assuming for the sake of argument their accuracy—applied to the members of M.J.'s household. **What is more, neither M.J. nor any member of her household testified about their own ethnic or cultural identity, and it is not clear to us that, just because M.J. and at least some members of her household had lived in Mexico at some point or had family living in Mexico, the jury reasonably could infer that the generalized characterizations Escamilla offered about Mexican or Latino culture applied to M.J. or the members of her household living in Georgia.[fn]** Given this lack of foundation, we do not see how a jury reasonably could infer from Escamilla's testimony that M.J.'s decision about the timing of her outcry—including that she allegedly suffered nearly three years of abuse before revealing it—was affected (let alone motivated) by the cultural attitudes Escamilla testified to having observed and studied," *citing,* among others, "*United States v. Street*, 548 F.3d 618, 631-633 (8th Cir. 2008) (detective's testimony about general gang culture and attitudes, including a purported 'tradition of misogynistic, hardened outlaws,' was not relevant, in part because this evidence had 'no discernible connection to the murder charges [the defendant] faced, and [the defendant] was not a gang member nor ever had been') and *Jinro America Inc. v. Secure Investments, Inc.*, 266 F.3d 993, 1011 (9th Cir. 2001) (Wallace, J., concurring) (in civil case, testimony about the behavior and attitudes of 'Korean businessmen' in general was not relevant 'to show that this particular Korean businessman (or company) is that type of a businessman or acted that way in this specific contractual arrangement'; 'it shed[ ] no light on [the defendant company's] activities in this case')." "[W]e caution that Georgia courts should assess the relevance of cultural or ethnic evidence based on the specific testimony in question and on the fact that such evidence is supposed to make more (or less) probable, viewing such evidence in the context of the record before the court in that particular case. See *Sprint/United Mgmt. Co. v. Mendelsohn,* 552 U.S. 379, 387, 128 S.Ct. 1140, 170 L.Ed.2d 1 (2008) (explaining that relevance under Rule 401 is 'determined in the context of the facts and arguments in a particular case, and thus [is] generally not amenable to broad *per se* rules') (italics in original); *United States v. Bradley*, 644 F.3d 1213, 1271 (11th Cir. 2011) ('[The] determination of whether the evidence is relevant under Federal Rule of Evidence 401 ... must turn on the facts of each specific case.'). Accordingly, **we express no opinion as to whether testimony referencing culture or ethnicity—including testimony that potentially could invoke cultural or ethnic stereotypes (whether positive or negative)—ever could be relevant or admissible in other cases; we conclude only that Escamilla's testimony about Mexican or Latino culture, when considered in the context of the other evidence presented at Martinez-Arias's trial, was not relevant and that the trial court abused its discretion by admitting it here."**