SUGGESTED PATTERN JURY INSTRUCTIONS

By the Council of Superior Court Judges of Georgia

Criminal Cases | Volume II

Council of Superior Court Judges of Georgia

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January 2020

To All Recipients of *Suggested Pattern Jury Instructions*:

The Council of Superior Court Judges of Georgia is pleased to present the January 2020 update to the *Suggested Pattern Jury Instructions,* Vol. II: Criminal Cases, 4th ed. (2007). The sections provided contain the changes; please replace the original sections in their entirety.

We encourage attorneys to submit pattern jury instructions to judges and to do so either by reproducing specific charges contained herein or by citing pages in these volumes.

The Council welcomes suggestions for revising or adding to the pattern instructions with regard to content, language, or format to promote the goal of providing pattern instructions that are accurate, understandable, and convenient. Please submit any suggestions to the Pattern Jury Instructions Committee of the Council at the above address.

List of Amended Charges

0.01.00	**Preliminary Jury Instructions (charge revised)**
1.32.23	**After Exercising Miranda Rights; Defendant Then Initiating Further Conversations (citations revised)**
1.36.15	**Silence (Pre-Miranda) as an Admission (note added)**
2.40.30	**Firearm during Commission of Crime; Possession of (charge revised and note added)**

Suggested Pattern Jury Instructions

Volume II: Criminal Cases
State of Georgia

Fourth Edition

By the Council of Superior Court Judges of Georgia

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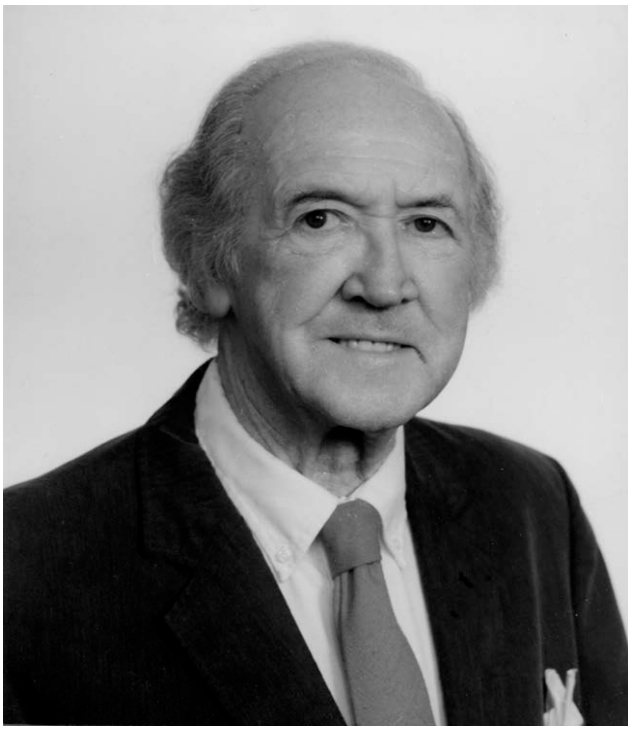

Dedication

Marcus B. Calhoun

Judge Marcus Calhoun was one of the moving forces in drafting and publishing standard, or "pattern," jury charges for use throughout Georgia. For many years, he was chair of the Pattern Jury Instructions Committee of the Council of Superior Court Judges of Georgia. The suggested pattern jury instructions have achieved widespread acceptance in large part because of the tireless efforts of Judge Calhoun.

Judge Marcus B. Calhoun was born on June 7, 1917, in Mt. Vernon, Georgia. His father, also named Marcus B. Calhoun, was an attorney in the private practice of law in Montgomery County, Georgia, until his death in 1934. His mother, the former Annie Griffith of Athens, Georgia, taught music at Brewton Parker College.

Judge Calhoun received an associate degree from Brewton Parker College in 1936. Further education was interrupted by the death of his father and the Great Depression, so he entered the Civilian Conservation Corps (CCC), where he worked clearing swamp land in southeastern Georgia. Upon leaving the CCC, he moved to Atlanta, where he secured employment as an investigator/adjuster for an insurance company while attending Atlanta Law School at night. Upon receiving his LL.B. from the Atlanta Law School, he was admitted to the practice of law in Georgia in 1939.

Judge Calhoun first used his law degree to join the Federal Bureau of Investigation (FBI), where he served from 1940 through 1945. During that time, he was assigned as a special agent in the Baltimore, New York, and Atlanta offices of the FBI. While he worked on all

types of matters handled by the Bureau, his primary focus during the war years was directed toward uncovering Nazi espionage.

In 1946, Judge Calhoun left the FBI and moved to Thomasville, Georgia, to join Frank L. Forester in what, for twenty-one years, would remain the two-man firm of Forester & Calhoun. Judge Calhoun was the trial lawyer in what was essentially a small-town general practice. During the 1950s, he was appointed solicitor for the City Court of Thomasville, a part-time position he retained until he was appointed district attorney of the Southern Judicial Circuit in 1967.

In April 1969, Judge Calhoun was appointed to the Superior Court Bench by Gov. Lester Maddox. He served in that capacity until accepting senior judge status on April 15, 1979. He continued to serve as a senior judge until his death in April 1998. During most of his tenure as a senior judge, he also remained active on the Pattern Jury Committee.

Judge Calhoun married the former Bernice Wolfe of Wilkes County, Georgia, on June 15, 1940. Mrs. Calhoun died in 1999. They had three sons and one daughter. All three sons are graduates of the University of Georgia School of Law: Marcus Benton Calhoun, Jr., is a practicing attorney with the Columbus, Georgia, firm of Page, Scrantom, Sprouse, Tucker & Ford; William M. Calhoun is a member of the faculty of the U.S. Navy War College, Providence, Rhode Island; and Samuel W. Calhoun is a professor of law at Washington and Lee University, Lexington, Virginia. Their daughter, Bernice Calhoun Freed, died in November 2000. She was a teacher, farmer, artist, and entrepreneur residing in Guatemala at the time. There are 12 Calhoun grandchildren and 2 great-grandchildren.

In Honor of

Frank Coxe Mills III

Judge Frank Coxe Mills III of Canton, Georgia, is the former Chief Judge of the Blue Ridge Judicial Circuit (Cherokee). He was born July 7, 1948, in DeKalb County, Georgia. He graduated from Emory University, BA 1970, and University of Georgia School of Law, JD 1973. Judge Mills was honorably discharged from the U.S. Army (Res.) with the rank of Captain.

He served as Chief Assistant District Attorney and District Attorney from February 1974 to February 1981. He received the Distinguished District Attorney Award from the Prosecuting Attorney's Council in 1979.

Judge Mills was appointed Superior Court Judge of the Blue Ridge Judicial Circuit on February 9, 1981. He served until his retirement from the active bench at the end of 2012.

Judge Mills chaired the Pattern Jury Instructions Committee for more than 17 years. He has worked tirelessly on behalf of his fellow judges and attorneys by drafting and revising jury charges based upon changes in the law.

Judge Mills has been an instructor at many continuing education seminars for District Attorneys, the Police Academy, and Superior Court Judges. He was elected and has served

on the Board of Governors of the State Bar of Georgia and as District Administrative Judge and member of Judicial Council. Judge Mills is a veteran of hundreds of civil and criminal jury trials as an attorney and judge.

Judge Mills is also active in community affairs, most notably the Boy Scouts of America. He also received the Whitney M. Young Award for distinguished service to rural or low-income urban youth, the Justice Robert Benham Public Service Award from the State Bar of Georgia, and the Jean Harris Rotarian Award.

On June 28, 1980, Judge Mills married Amanda L. Crouthers. They are the parents of one son, Army Captain Frank Crouthers Mills.

The Pattern Jury Instructions Committee takes pride in dedicating the criminal volume of the *Suggested Pattern Jury Instructions* to Judge Mills in honor of his long-standing service.

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PREFACE

> The art of charging a jury is one of the most refined duties of a trial judge. . . . [T]he trial judge in each case has the unique task of objectively and clearly explaining to the jury . . . the applicable law which governs the facts they find to be true. This must be done in such a manner that no harmful error is committed in stating or failing to state . . . the law, but more importantly, should be done in simple, straightforward, and understandable language for the layperson.
>
> Senior Judge James B. O'Connor,
> Oconee Judicial Circuit,
> Past Member, Pattern Jury Instructions Committee

The Pattern Jury Instructions Committee of the Council of Superior Court Judges of Georgia hopes these suggested jury instructions for criminal cases will be useful and informative in dealing with most of the issues that confront judges daily in the trial courts by making available accurate instructions in modern, lay language.

These instructions are submitted as suggestions *only*. They have not been submitted to or approved by the appellate courts of Georgia, although many have been approved in principle in specific cases. There are two basic problems with relying on any standard, or pattern, instruction:

1) No suggested charges can cover every situation, and the task will ever belong to the trial judge to "tailor" or adapt the charge material to the case on trial. Each judge must carefully adjust these charges, removing all language not applicable and making changes and additions required to fit the case on trial when necessary. At times, minor adjustments will suffice, but a careful rewriting of an entire suggested charge may be required.
2) The law is constantly changing, and new, possibly unanticipated facts may render a standard charge—even an otherwise correct one—inappropriate in certain circumstances. Although the committee meets frequently and stays in touch by various means of communication, it is possible that a change may occur before the committee can adequately respond with a caveat or revised charge.

Both the committee and the council recognize that the responsibility of instructing the jury rests solely with the trial judge. There is much greater danger in overcharging than in undercharging a jury, and judges are encouraged to charge only on the principles required and no others.

The language contained in these instructions is intended to be gender neutral to the extent feasible. There will be instances in which the judge will need to make adjustments for singular versus plural pronouns for defendants or victims. In those instances in which there is an option, the judge should select the appropriate pronoun. Where appropriate, substitute "accusation" for "indictment."

The committee has made some necessary changes for the sake of accuracy, clarity, and even safety; for the most part, however, there is little substantive change in the fourth edition. The main change regards format. The committee has reorganized and renumbered several sections of the publication in an effort to have each section flow in a more logical order.

The assistance of all Georgia judges is needed to keep these suggested instructions updated. It is requested that each trial judge carefully review this material and provide the committee with suggestions for additions or improvements to these instructions.

The judges listed below composed the Pattern Jury Instructions Committee for the fourth edition of *Suggested Pattern Jury Instructions, Volume II: Criminal Cases*, State of Georgia.

Frank C. Mills, III, Chair
David E. Barrett, Vice Chair
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J. Lee Parrott
Mary Staley
Brenda S. Weaver
Jon B. Wood

ACKNOWLEDGMENTS

Suggested Pattern Jury Instructions, by its nature, is and must be a work in progress. All members of the current Pattern Jury Instructions Committee contributed innumerable hours in reviewing, researching, revising, and editing. But to credit just the committee would be an egregious oversight. The current committee started with a product that was already highly "refined"; to paraphrase Sir Isaac Newton, we truly "stood on the shoulders of giants." In addition, many of the additions or corrections came not from the membership of the committee but from the many judges who have previously served on the committee or who have responded to our solicitation for input and assistance from the trial bench. In short, there are too many to adequately acknowledge.

Still, we would be remiss if we did not recognize the contributions of Judge Mary Staley of the Cobb Judicial Circuit and Judge David Barrett of the Enotah Judicial Circuit. Judge Staley, who chaired this most recent revision of the pattern jury instructions for criminal cases, through her tireless effort, devotion to the subject, and especially her sense of humor kept the committee on task and enabled completion of this revision. Judge Barrett is Vice Chairman of the Pattern Jury Instructions Committee of the Council of Superior Court Judges of Georgia. His contribution, not only to this effort but to the work of the committee as a whole for many years, has been invaluable. It is not too much to say that he is largely responsible for the quality of both the civil and criminal instructions.

Frank C. Mills III
Chief Judge, Blue Ridge Judicial Circuit, and
Chairman, Pattern Jury Instructions Committee

0.00.00 **Evidence; Note Regarding Changes Based upon New Evidence Code**

(*Introduction—Georgia Law 2011, p. 99, which adopted the new evidence code, (the Georgia version of the Federal Rules) included, in pertinent part, the following preamble:*

"It is the intent of the General Assembly in enacting this Act to adopt the Federal Rules of Evidence, as interpreted by the Supreme Court of the United States and the United States circuit courts of appeal as of January 1, 2013 to the extent that such interpretation is consistent with the Constitution of Georgia. Where conflicts were found to exist among the decisions of the various circuit courts of appeal interpreting the federal rules of evidence, the General Assembly considered the decisions of the 11th Circuit Court of Appeals. . . . The General Assembly is cognizant that there are many issues regarding evidence that are not covered by the Federal Rules of Evidence and in those situations the former provisions of Title 24 have been retained. Unless displaced by the particular provisions of this Act, the General Assembly intends that the substantive law of evidence in Georgia as it existed on December 31, 2012 be retained." [emphasis added]

Consistent with the foregoing, the Pattern Jury Instructions Committee has reviewed all old charges on evidence and made changes keeping in mind the new rules and added other refinements we felt were needed. Some old charges were retained even where underlying statutes have been repealed or replaced. In most such instances, it was felt the old charge could do no harm. The committee has also taken some charges from the 11th Circuit Pattern Jury Instructions we felt were clearer and complied with Georgia Law.

0.00.10 **Pre-Voir Dire Charge**

Trial of a case is generally begun by administering the "Voir Dire Oath, (O.C.G.A. § 15-12-132) reading the indictment and asking the "statutory questions" (O.C.G.A. § 15-12-164) and other qualifying questions (e.g., law enforcement, residence, etc.) with no other explanation of voir dire to the jury. The Committee thinks it advisable to give a brief charge BEFORE voir dire begins to preempt various recurring patterns of problems.

Voir Dire is the jury selection process whereby the parties or attorneys are given the opportunity to ask you questions, not for the purpose of prying into your personal affairs, but to allow these lawyers to explore any possible knowledge, leaning, or bias you may have

about the parties, the witnesses, the lawyers, or any issues or subject matter concerning this case.

You will be asked certain questions at the outset that are referred to as statutory questions. Those questions are specifically worded and required by state law to determine if a juror is disqualified. Listen carefully to the wording of those questions and if they apply to you, please let us know. But bear in mind that you will later be asked many more questions to more fully determine which jurors might best serve on the case on trial.

Sometimes these questions are misunderstood. Be aware that it is not a disqualification if you have a bias or prejudice against any crime charged in this indictment, and no one will ask you in this case to condone criminal conduct. It is bias or prejudice for or against a party or witness or your inability to apply the law for any reason that might result in disqualification.

[Read Indictment and ask STATUTORY VOIR DIRE QUESTIONS.]

Counsel may now ask you additional questions. They may ask about personal experiences you or your acquaintances may have had, work and family background, (any possible emotional reaction to the subject matter of the case) and the like. Answers to such questions do not necessarily result in disqualification but may help counsel in deciding how they should utilize their allotted strikes. You should be as truthful and candid and possible. Though it can lengthen the proceedings, the court can arrange for some questions to be asked outside the presence of other jurors and witnesses if you prefer. If this is the case, let me know.

("Can you be fair?")

One often misunderstood question is whether or not you can be fair, a rather vague term and one that is conducive to misunderstanding. Fairness in this context means that you will be able to properly evaluate the evidence as it is offered without any preconceived notion about the defendant, (the alleged victim,) or witnesses, and that you have no disagreement with the law that would prevent you from properly applying the law received from the court to the facts.

The confusion is sometimes compounded when lawyers ask whether you think criminal laws are too harsh or too lenient. This adds to the confusion because jurors may be led to believe they will be deciding a sentence, and this is not the case. You will merely be

called upon to decide guilt or innocence, not the sentence, and you are not even to consider the issue of sentencing in deciding your verdict. In fact, one of the charges you will receive at the end will be the following:

You are not to consider any possible penalty or punishment in your deliberations. Neither sympathy nor prejudice for or against the defendant should enter into your deliberations. In the event of a verdict of not guilty, that discharges you of any further responsibility concerning this case. Likewise, in the event of a verdict of guilty, that would discharge you of your responsibility, and it would then devolve upon the court to impose punishment within the limits as provided by law.

In other words, your sole duty lies in determining the truth of the case, and that is the innocence or guilt of the accused.

("Past Experiences")

Another general question that you will be asked is whether you, a family member, or a close personal friend [were a victim of a crime], [have had a bad experience with law enforcement/prosecutor/defense attorney], or [other experience]. The attorneys may ask you whether your, your family member's, or your friend's experiences as a [victim] [wrong treatment, etc.] affect your ability to be fair and impartial in this case. Now they are not asking you whether you like robbers, murderers, or molesters, or whether you could be fair to a robber, murderer, or molester. (Keep in mind that in our system of justice the defendant is presumed not guilty until proven guilty beyond a reasonable doubt.) The question is whether you can put aside that experience such that you can listen to the evidence and law given to you in this case and then make a decision as to whether the state has proven its case beyond a reasonable doubt. Put another way, the question is whether you can put aside, i.e., distinguish the previous experience from this case such that you can judge this case on its own merits. Or, is your mind set such that you cannot separate this case from the previous experience and, thus, could not be fair to one party or the other. The evidence or lack thereof should make a difference.

Second, this question is not asking whether you will have an emotional reaction to the evidence that you hear or observe. Although that is something the lawyers and the court may want to know, it is a different question. The fact that you cannot stand the sight of blood does not mean that you cannot be fair in judging the evidence. Nor does the fact that

graphic sexual testimony makes you uncomfortable or vulgar language is repugnant to you mean you cannot be fair.

("Sitting in Judgment")

Another question that is frequently asked and unfortunately worded is whether there is anything that would make you reluctant to sit in judgment of another person. The purpose of the question is to find out if you have any religious holding that would prevent you from voting your decision or conscience in the jury room. That is true for certain religious denominations and some people. However, as jurors, you are not being asked to judge someone or sit in judgment of someone in a religious sense. You are merely being asked to determine the truth of the facts of the case.

0.01.00 Preliminary Jury Instructions

(*After having administered the trial oath, give the following instructions.*)

This instruction is offered as a suggested guide only. The pattern jury instruction committee suggests that you review this instruction and tailor it to the legal culture of your jurisdiction.

Ladies and gentlemen, you have been sworn and empanelled, and you are about to try a criminal case, entitled the State of Georgia versus _____.

The defendant, _____, has been indicted by the Grand Jury of _____ County in an indictment composed of the following counts that I will read to you at this time. (*Read indictment.*)

To this indictment that I have just read to you, the defendant has pled not guilty and denies each and every allegation therein. This is what forms the issue that you have been selected, sworn, and empanelled to try.

(*Note: You may have already covered the foregoing instruction during* voir dire. *If so, you may omit repeating it here.*)

Before we begin the trial, I am going to give you some preliminary instructions on fundamental principles of criminal law. I will also instruct you on the role of the Judge, the jury, and the lawyers and give you an overview of the trial procedure. Many of you may have never served on a jury before. It is therefore necessary that these instructions be given

so that you have a general understanding of procedure in a criminal trial, what will be expected of you, and how you are to conduct yourself during the trial.

The defendant is charged in the indictment with a crime (crimes) that are (is a) violation(s) of (a) certain law(s) of the State of Georgia. I want to emphasize to you that the indictment, including all of the counts therein, and the plea of not guilty are the legal procedures by which the(se) criminal charge(s) are (is) brought against the defendant. The charges and plea of not guilty are not evidence of guilt, and you should not consider them as evidence or implication of guilt of any crime whatsoever. This defendant is presumed to be innocent until he/she is proven guilty. The defendant enters upon the trial of the case with a presumption of innocence in his/her favor, and this presumption remains with the defendant until it is overcome by the State with evidence that is sufficient to convince you beyond a reasonable doubt that the defendant is guilty of the crime or crimes charged.

No person shall be convicted of any crime unless and until each element of the crime is proven beyond a reasonable doubt. The burden of proof rests upon the State to prove every material allegation of the indictment and every essential element of the crime(s) charged beyond a reasonable doubt. However, the State is not required to prove the guilt of the accused beyond all doubt or to a mathematical certainty.

A reasonable doubt means just what it says. It is a doubt of a fair-minded, impartial juror honestly seeking the truth. It is a doubt based upon common sense and reason. It does not mean a vague or arbitrary doubt, but it is a doubt for which a reason can be given arising from a consideration of the evidence or lack of evidence, a conflict in the evidence, or any combination of these. There is no burden of proof upon the defendant whatsoever, and the burden never shifts to the defendant to prove his innocence.

If, after giving consideration to all of the facts and circumstances of this case, your minds are wavering, unsettled, or unsatisfied, then that is a doubt of the law, and you must acquit the defendant. But if no doubt exists in your minds about the guilt of the accused, then you will be authorized to convict the defendant. If the State fails to prove the defendant’s guilt beyond a reasonable doubt, it would be your duty to acquit the defendant.

Under our system, it is my duty as the trial judge to determine the law that applies to this case and to instruct you, the jury, on the specific rules of law that you must apply to the facts in arriving at a verdict. I am giving you some of those instructions now. I will give you

more detailed instructions after the evidence has been presented and the lawyers have made their closing arguments.

During the trial, I may be called upon to rule on motions or objections to evidence. Nothing I say in making these rulings or at any time during the trial is evidence and should not be considered as an indication that I have any leaning in this case whatsoever. My only interest in this case is to see that it is fairly tried according to the laws and the constitution of the State of Georgia and the Constitution of the United States.

As expected, the lawyers serve as advocates for their clients and are duty-bound to represent their clients to the best of their ability. The lawyers also serve as officers of this court, and as such are bound to follow applicable laws, trial procedure, and rules of evidence during the trial. If at any time the lawyers believe that any law, procedure, or rule of evidence is being violated, they may make motions regarding the conduct of the trial or objections to the admission of evidence. In making these motions or objections, the lawyers are simply seeking to fulfill their duties to their clients and to the court. Sometimes, these motions or objections may require the court to consider outside your presence the questions raised, and you will be excused to the jury room. We will try to minimize the number and length of these interruptions and ask for your patience in this regard.

Ladies and gentlemen, trial procedure in a criminal trial is generally as follows: first, the attorneys for both sides have the opportunity to make what is called an opening statement. This opening statement is not evidence. Remember that what the lawyers say is not evidence but is a preview or an outline of what they expect the evidence to be.

Following the opening statements, the evidence will be presented. Evidence can be in the form of testimony given by witnesses or physical evidence that will be labeled with exhibit numbers for identification.

After the presentation of all of the evidence, the attorneys have the opportunity to make what is called a closing argument, or summation. At this time, the attorneys may suggest which laws are applicable and how they should be considered in light of the evidence and point out to you certain parts of the evidence that they think are favorable to their position. The goal of a closing argument is to persuade you to decide the case in their favor. Following the closing arguments, I will charge you more specifically on the law that

applies to this case. I will then ask you to retire to the jury room to deliberate and reach your verdict.

The jury has a very important role. It is your duty to determine the facts of the case and to apply the law to those facts. I will instruct you on the laws that apply to this case, but you must determine the facts from the evidence.

Evidence, by definition, is the means by which any fact in issue is established or disproved. Evidence consists of two things: testimony and exhibits. Testimony is the testimony that you will hear under oath from those who take the witness stand. Exhibits are those documents, photographs, or other physical evidence that are admitted into evidence.

Ladies and gentlemen, the object of this trial is to discover the truth. During the trial, the admission of evidence will be governed by certain rules of evidence. Those rules were drafted with one prominent purpose in mind, and that purpose is the discovery of truth. Consequently, the rules of evidence seek to assure that only the best and highest evidence is admitted for your consideration.

During the trial, the attorneys have a right to object to the admission of evidence if they believe its admission would violate a rule of evidence. I will admit or exclude the evidence according to those rules. If I overrule an objection, this means that you are allowed to consider the evidence being offered. On the other hand, if I sustain an objection, this means you may not consider the evidence being offered. You should consider only that testimony and only those exhibits that are admitted, and you should draw no inferences and make no assumptions about the evidence objected to if the objection was sustained. In the event that you hear or see inadmissible evidence before an objection can be made and ruled upon, if the objection is sustained, I will instruct you to disregard it, and you should disregard that evidence entirely in your deliberations and in arriving at your verdict.

You, the jury, must determine the credibility and believability of the witnesses. It is for you to determine which witness or witnesses you will believe and which witness or witnesses you will not believe, if there are some whom you do not believe. In determining the credibility or believability of witnesses, you may consider all of the facts and circumstances of the case, the manner in which witnesses testify, [their intelligence], their interest or lack of interest in the case, their means and opportunity for knowing the facts about which they testify, the nature of the facts about which they testify, the probability or

improbability of their testimony, and the occurrences about which they testify. You may also consider their personal credibility insofar as it may appear to you from the trial of the case.

Ladies and gentlemen, it is important that you pay close attention to the evidence as it is presented during the trial. If at any time you are unable to hear or see any evidence being presented or if you are suffering from any discomfort that diverts your attention, please feel free to inform me, and I will do whatever is necessary to assure that you are able to hear and see the evidence being presented and give it your undivided attention. If you are in need of a recess at any time, please raise your hand and I will recognize you. It is vitally important that you are as comfortable as possible so that you can focus on the evidence being presented.

(Jurors are not permitted to question witnesses. However, if you have a question that you feel is vital to your duty as the fact finder, please put your question in writing and deliver it to the bailiff, who will then pass it to me for consideration. Please keep in mind, however, that if you have a question during the presentation of evidence, all of the evidence is not yet in, and your question may very well be answered by the time all of the evidence has been presented.)

Story v. State, 157 Ga. App. 490 (1981)

Eubanks v. State, 240 Ga. 544(2) (1978)

Matchett v. State, 257 Ga. 785(2) (1988)

Lance v. State, 275 Ga. 11 (2002)

CAVEAT *Steele v. Atlanta Maternal-Fetal Medicine*, 271 Ga. App. 622 (2) (2005)

(*imprudent to encourage jury questions*)

It is important that you view this evidence with an open mind at all times and reach no final conclusions until the trial is over. Do not jump to conclusions before all of the evidence is presented. Also, remember that during the course of this trial, it would be improper for you to discuss this case with anyone or to allow anyone to discuss the case with you or in your presence or hearing. This applies even to discussions among yourselves in the jury room or elsewhere before actual deliberations begin.

(*Note: Reiterate the importance of not speaking to lawyers, witnesses, or parties during the course of the trial.*)

(Regarding juror note taking: I have asked the bailiff to provide you with pencils and note pads for your use during the trial. You may take notes, but you are not required to do so. If you decide to take notes, please remember that note taking should not divert you from paying full attention to the evidence and evaluating witness credibility. Your observations of the witnesses during their testimony can be vital to your determination of the believability of their testimony. The notes that you take are for your use only and are not to be shared with anyone until you begin deliberation with your fellow jurors. Notes are not evidence, only memory aids, and should not take precedence over your recollection. It is the duty of each juror to recall the evidence, and while you may consider another juror's notes to refresh your memory, you should rely on your own recollection of the proceedings. Do not be influenced by the notes of other jurors, unless their notes help you in determining your own independent recollection. Notes are not entitled to any greater weight than the recollection or impression of each juror as to what the evidence may have been. After the trial is over, the notes will be collected and destroyed.)

U.S. v. Rhodes, 631 F.2d 43 (5th Cir.) (1980)
U.S. v. D.R. MacLean, 578 F.2d 64 (3rd Cir.) (1978)
Potts v. State, 259 Ga. 96 (1989)

I instruct you, ladies and gentlemen, that you must decide this case for yourself solely on the testimony you hear from the witness stand and the exhibits admitted into evidence.

You may not visit any scenes depicted by the evidence. You may not utilize any books or documents not in evidence during your deliberations. You may not read or listen to any accounts of the trial that might appear in the news media. You may not discuss this case with anyone other than your fellow jurors during deliberations.

That concludes my preliminary instructions, and we are now ready for the lawyers to give their opening statements.

Note: *Decker v. State*, 139 Ga. App. 707 (1976)
Bradham v. State, 148 Ga. App. 89(6) (1978)
Bridges v. State, 286 Ga. 535 (2010) (prelim. instr. approved)

0.01.10 Juror Use of Electronic Technology to Conduct Research on or Communicate about a Case

(Before Trial:)

To preserve the integrity of the jury system, you as finders of facts must decide this case solely upon evidence presented in this courtroom. This means that during the trial, you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials; search the internet, websites, or blogs; or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom—to include media of any sort or online legal research.

Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I hope that for all of you this case is interesting and noteworthy. I know that many of you use cell phones, Blackberries, the internet, and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter; through any blog or website; through any internet chat room; or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube.

(At the Close of the Case:)

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry, or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube, or Twitter to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.

INDICTMENT/ACCUSATION

1.10.10 Indictment/Accusation

You are considering the case of the State of Georgia versus _____.

The (grand jury has indicted) (district attorney has accused) the defendant with the offense of _____.

The indictment reads as follows:

(*Cover allegations of indictment. When necessary, insert "accusation" wherever the word "indictment" is found.*)

1.10.20 Issue and Plea of Not Guilty

The defendant has entered a plea of not guilty to this indictment. The indictment and the plea form the issue that you are to decide.

Neither the indictment nor the plea of not guilty should be considered as evidence.

Zilinman v. State, 234 Ga. 535, 537(5)

Morgan v. State, 275 Ga. 222(8)

PRESUMPTION; BURDEN; SUFFICIENCY

1.20.10 Presumption of Innocence; Burden of Proof; Reasonable Doubt

The defendant is presumed to be innocent until proven guilty. The defendant enters upon the trial of the case with a presumption of innocence in his/her favor. This presumption remains with the defendant until it is overcome by the State with evidence that is sufficient to convince you beyond a reasonable doubt that the defendant is guilty of the offense charged.

No person shall be convicted of any crime unless and until each element of the crime is proven beyond a reasonable doubt.

The burden of proof rests upon the State to prove every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt.

There is no burden of proof upon the defendant whatsoever, and the burden never shifts to the defendant to introduce evidence or to prove innocence. (When a defense (except insanity) is raised by the evidence, the burden is on the State to negate or disprove it beyond a reasonable doubt.)

However, the State is not required to prove the guilt of the accused beyond all doubt or to a mathematical certainty. A reasonable doubt means just what it says. A reasonable doubt is a doubt of a fair-minded, impartial juror honestly seeking the truth. A reasonable doubt is a doubt based upon common sense and reason. It does not mean a vague or arbitrary doubt but is a doubt for which a reason can be given, arising from a consideration of the evidence, a lack of evidence, or a conflict in the evidence.

After giving consideration to all of the facts and circumstances of this case, if your minds are wavering, unsettled, or unsatisfied, then that is a doubt of the law, and you must acquit the defendant. But, if that doubt does not exist in your minds as to the guilt of the accused, then you would be authorized to convict the defendant.

If the State fails to prove the defendant's guilt beyond a reasonable doubt, it would be your duty to acquit the defendant.

Note: Duty to convict OK Paschal v. State, *230 Ga. 859 (1973);* Noggle v. State, *256 Ga. 383, 385 (2) (1986); but see* Sutton v. State, *262 Ga. 181, 182 (1992);* Watkins v. State, *265 Ga. App. 54, 55-56 (2004).*

1.20.20 **Grave Suspicion**

Facts and circumstances that merely place upon the defendant a grave suspicion of the crime charged or that merely raise a speculation or conjecture of the defendant's guilt are not sufficient to authorize a conviction of the defendant.

Note: Unnecessary Walthour v. State, *196 App. 721(5);* Lowe v. State, *267 Ga. 180(2)*

1.20.30 **Jury; Judges of Law and Facts**

Members of the jury, it is my duty and responsibility to determine the law that applies to this case and to instruct you on that law. You are bound by these instructions. It is your responsibility to determine the facts of the case from all of the evidence presented. Then you must apply the law I give you in the charge to the facts as you find them to be.

Ga. Const. 1983, art. I, sec. 1, para. XI (a)

State v. Freeman, 264 Ga. 276 (1994)

EVIDENCE

1.30.10 Evidence; Generally

Your oath requires that you will decide this case based on the evidence. Evidence is the means by which any fact that is put in issue is established or disproved. Evidence includes all of the testimony of the witnesses (or the equivalent, such as depositions) and any exhibits admitted during the trial, (stipulations of the attorneys, that is, any facts to which the attorneys have agreed with approval by the court) (matters of which the court has taken judicial notice). Evidence does not include the indictment, the plea of not guilty, opening or closing remarks of the attorneys, or questions asked by the attorneys.

1.30.12 Stipulations

Note: There is ample Georgia and US authority to the effect that one cannot, by stipulating, deprive the state of the opportunity of proving a fact by a method of its choosing. See Floyd v. State, *233 Ga. 280, 285 (1974);* Redd v. State, *141 Ga. App. 888, 890;* State v. Dixon, *286 Ga. 706(2)(2010);*Old Chief v. US, *519 US 172, 186-187(1997).*

However, as pointed out by Professor Milich, that authority may not be absolute, particularly in utilizing the balancing test of O.C.G.A. §24-4-403. See Chynoweth v. State, *331 Ga. App. 123, 128 (2015);* US v. Beechum, *582 F2d 898, 914 (5th Cir. 1978). See also several cases such as* Bradshaw v. State, *296 Ga. 650 (2015) where admission of similar transactions was upheld "absent affirmative steps by the defendant to remove intent as an issue" to be proven by the State. This MAY be a not so subtle hint. For example, a defendant MAY, in some circumstances, defeat a state's proffer for similar transactions by offering to stipulate the issue for which the similar transaction was offered.*

When the Defense offers to stipulate, the judge should not automatically rely on previous authority, but should consider the offer in the balance.

Therefore, the charge on stipulations has been revised accordingly. Such a stipulation over the State's objection must be binding and as to facts of the case and not merely as to admissibility of documents or testimony. Any charge on the subject must unmistakably alert the jury to the difference between a stipulation as to facts versus a stipulation as to evidence, documents, etc.

The Committee has, therefore, revised the charge on stipulations accordingly. In order to accept a stipulation as to a material fact or element of the offense, such as intent, the judge should conduct a colloquy with the defendant in the nature of a plea as to knowing and voluntariness of any such stipulation.

The parties have entered into a stipulation that has been approved by the court about the following (facts) (testimony, documents, exhibits):
(specify _____)

Where parties **stipulate facts**, this is in the nature of evidence. You must take that fact or those facts as a given without the necessity of further proof. You make all decisions based on the evidence in this case.

Where parties **stipulate (testimony, documents, exhibits)** only, this is in the nature of evidence. You may take that testimony as if it were given in court, and you may rely on it if you find it credible; however, either party may dispute such testimony by other evidence. You make all decisions based on the evidence in this case.

1.30.14 **Judicial Notice**

I have taken **judicial notice** of certain facts or events. When the Court declares that it has taken **judicial notice** of some fact or event, you may, but are not required to, accept the Court's declaration as conclusive evidence and regard as proved the fact or event, which has been **judicially noticed**.

O.C.G.A. §24-2-201(g)(2)

1.30.20 **Direct and Circumstantial Evidence**

(To be safe, give the following charge in all cases in which there is circumstantial evidence. Although there may be exceptions, the Pattern Jury Instructions Committee feels it is a safer practice to give the circumstantial evidence charge in every case.)

(*See 1.30.30. Do not charge on "2 theories" but give charge on circumstantial evidence.)*

SHORT VERSION

Evidence may be either direct or circumstantial or both.

In considering the evidence, you may use reasoning and common sense to make deductions and reach conclusions. You should not be concerned about whether the evidence is direct or circumstantial. "Direct evidence" is the testimony of a person who asserts that he or she has actual knowledge of a fact (such as an eyewitness) (such as by personally observing or otherwise witnessing that fact). "Circumstantial evidence" is proof of a set of facts and circumstances that tend to prove or disprove another fact by inference (that is, by consistency with such fact or elimination of other facts). There is no legal difference in the weight you may give to either direct or circumstantial evidence.

11th Circuit PJI, p. 21, with slight alteration.

You would be authorized to convict only if the evidence [whether direct, circumstantial, or both] excludes all reasonable theories of innocence and proves the guilt of the accused beyond a reasonable doubt.

Mims v. State, 264 Ga. 271, 274 (1994) (C. J. Hunt, concurring, joined by Fletcher and Sears-Collins)

Note: Old O.C.G.A. §24-1-1(3) and (4) are repealed, yet O.C.G.A. §24-14-69 retains limits or cautions about convictions based on circumstantial evidence. If a charge is still required, definitions are probably necessary. The committee has extrapolated from old code definitions, old case law, and current preliminary 11th Circuit definitions given in preliminary instructions. See 11th Cir. PJI, p. 21.

LONG VERSION

Direct evidence is that which may be seen or heard or otherwise directly sensed, such as by smell or taste or touch. It may be brought into court in the form of exhibits or the testimony of direct witnesses to such matters. It is evidence that points immediately to the issue in question.

Old O.C.G.A. §24-1-1(3). *Note:* Roberson v. State, *214 Ga. App. 208, 212 (1994) (criticizes suggestion that exhibits are direct evidence, but the above is okay).*

When direct evidence, by inference, points to an obvious, likely, or reasonable conclusion—even though that conclusion was not directly seen, heard, smelled, tasted, or touched—that is said to be circumstantial (or indirect) evidence. Circumstantial evidence is the proof of facts or circumstances, by direct evidence, from which you may infer other related or connected facts that are reasonable and justified in light of your experience. It is evidence that only tends to establish a conclusion in question by its consistency with such conclusion or elimination of other conclusions. Sometimes circumstantial evidence may point to more than one conclusion.

O.C.G.A. §24-14-9 (new code section on inference)

To authorize a conviction (on circumstantial evidence), the proved facts must not only be consistent with the theory of guilt but also exclude every other reasonable theory other than the guilt of the accused.

O.C.G.A. §24-14-6

Carpenter v. State, 167 Ga. App. 634, 641–42(8) (1993)

Lowe v. State, 267 Ga. 180 (1) (1996)

The law does not require a higher or greater degree of certainty on the part of the jury to return a verdict based upon circumstantial evidence than upon direct evidence.

Cargile v. State, 136 Ga. 55, 56(3) (1911)

Wrisper v. State, 193 Ga. 157, 163 (1941)

White v. State, 210 Ga. 708 (1954)

Whether dependent upon direct evidence or circumstantial evidence or both, the true test is whether there is sufficient evidence or whether the evidence is sufficiently convincing to satisfy you beyond a reasonable doubt. If not, you must acquit; if so, you may convict.

O.C.G.A. §24-14-5

There is no rule that either circumstantial or direct evidence is stronger than the other if conflicting. The comparative weight of circumstantial evidence and direct evidence on any given issue is a question of fact for the jury to decide.

Steen v. State, 130 Ga. App. 632, 632 (1974) *(Relative weight of direct and circumstantial evidence is determined by the jury when there are inconsistencies.)*

Mims v. State, 264 Ga. 271 (1994) *(When the State introduces circumstantial evidence, a charge on the law of circumstantial evidence must be given.)*

1.30.30 Two Theories; Guilt and Innocence

(*This former charge was removed as a result of* Langston v. State, *208 Ga. App. 175 (1985).* ***However, a circumstantial evidence charge must be given as applicable. See 1.30.20.***)

1.31.00 Credibility of Witness and Impeachment: General Note to Changes

Though it has been upheld many times as "not unconstitutional," the "presumption of truthfulness" language of previous charges has been criticized by the Georgia Supreme Court as "misleading" and "of little positive value." The Court also recognized that most federal courts of appeals have disapproved the language in federal trial courts. Noggle v. State*, 256 Ga. 383(4). For that reason, the specific language was deleted from the Criminal Pattern Jury Instructions several years ago, but residual aspects have been retained in conflicts and other charges. There seems to be a trend toward de-emphasizing "mechanical rules." The removal of remaining aspects of that charge should help. At the same time, in the adoption of the new federal rules, the most mechanical rules of all—those concerning impeachment—have largely been rewritten. As you can see, they are MUCH less mechanical, and, indeed, the word "impeachment" has, by code revision, been removed except for one instance, probably inadvertent. It is not clear what effect these changes will have on jury charges. We all cringe at reversals for failure to give a mechanical charge on*

"impeachment" requested by the defense when the evidence itself should either have that effect on the jury or not without the judge "commenting" by telling them. Much of this is residual from a time when impeaching evidence was limited to just impeachment and not as "substantive evidence." That was remedied long ago in Gibbons v. State *248 Ga. 858, 862, and* Cuzzort v. State*, 254 Ga. 745, newly codified under O.C.G.A. §24-6-613. New code section O.C.G.A. §24-8-802 renders hearsay admissible and competent when there is no objection. Thus, the reason for some of the mechanical charges to balance limiting charges has largely disappeared. This has essentially been recognized by such cases as* Boyt v. State*, 286 Ga. App. 460, and* Stephens v. State*, 289 Ga. 758, wherein charges were criticized by the courts, suggesting that if the jury has heard the evidence, the judge should not tell members of the jury that they can consider it, and referring to the charges as, at best, unnecessary "truisms." Review of the 11th Circuit Pattern Jury Instructions reveal charges on the subject labeled "impeachment" that do not mention that word or even the concept. For these reasons, the charges on credibility have been substantially rewritten.*

1.31.10 **Credibility of Witnesses**

Note: The committee removed "Intelligence" as a credibility factor from the criminal charge on credibility of witnesses based on McKenzie v. State*, 293 Ga. App. 350(2) (2008); however, the federal rules re-codify it. O.C.G.A. §24-14-4. Query: What if the defense brings in a world-renowned DNA expert who is a certified genius, to testify versus a seeming bureaucratic "expert" for the state; and the defense requests the charge including intelligence. The cases "prohibiting the use of "intelligence" in charge are a seeming egalitarian knee-jerk against correlating intelligence and honesty. But credibility also may depend on competency. The charge is neutrally drawn and can be adequately argued by either side.*

The jury must determine the credibility of the witnesses. In deciding this, you may consider all of the facts and circumstances of the case, including the witnesses' manner of testifying, [their intelligence], their means and opportunity of knowing the facts about which

they testify, the nature of the facts about which they testify, the probability or improbability of their testimony, their interest or lack of interest in the outcome of the case, and their personal credibility as you observe it.

See O.C.G.A. §§24-14-4, 24-6-620

**Note: In a criminal case, use caution in giving if the defendant testifies.* McKenzie v. State, *293 Ga. App. 350 (2008).*

1.31.11 **Polygraph**

(*The following charge must be given on request if polygraph evidence is admitted.* Johnson v. State, *208 Ga. App. 87(1) (1993).*)

There has been certain evidence admitted during the trial concerning a polygraph test and the polygraph examiner's opinions and conclusions as to its results. Polygraph evidence is considered opinion evidence and is governed by the law concerning opinion evidence as has been/will be given to you.

A polygraph examiner's opinion can only be used to indicate whether, at the time of the polygraph examination, the defendant/witness believed that he/she was telling the whole truth. You are not bound by the polygraph examiner's conclusions, and the examiner's testimony is not controlling on the issues and may be entirely disregarded by you. It is for you to decide what weight, if any, should be given to the evidence concerning the polygraph test, its results, and the examiner's opinions and conclusions.

State v. Chambers, 240 Ga. 76, 80 (1977)

Note: Height v. State, *278 Ga. 592. Do not mechanically exclude Polygraph in DP case. Consider facts, etc.*

1.31.20 **Conflicts in Testimony**

There is no support for this former charge in current law. See Noggle v. State, *256 Ga. 383 (1986).*

1.31.30 **Expert Witness**

(*Use only if applicable.*)

Testimony has been given in this case by certain witnesses who are termed experts. Expert witnesses are those who because of their training and experience possess knowledge in a particular field that is not common knowledge or known to the average citizen. The law permits expert witnesses to give their opinions based upon that training and experience.

You are not required to accept the testimony of any witnesses, expert or otherwise. Testimony of an expert, like that of all witnesses, is to be given only such weight and credit as you think it is properly entitled to receive.

O.C.G.A. §§24-7-702–24-7-705, 24-7-707

McCoy v. State, 237 Ga. 118 (1976)

Columbia County v. Doolittle, 270 Ga. 490 (1999)

OR substitute 11th Cir. PJI, p. 33, as follows:

When scientific, technical, or other specialized knowledge might be helpful, a person who has special training or experience in that field is allowed to state an opinion about the matter. But that does not mean you must accept the witness's opinion. As with any other witness's testimony, you must decide for yourself whether to rely upon the opinion.

O.C.G.A. §§24-7-702–24-7-705, 24-7-707

1.31.40 **Witness, Attacked (old Impeached)**

In determining the credibility of witnesses and any testimony by them in court, you may consider, where applicable, evidence offered to [(attack) (cast doubt upon) (challenge) the credibility or believability of] [cause you to disbelieve] any such witness. This would include evidence of:

(Charge only those that apply.)

- Character for untruthfulness. Shown by (opinion of other witnesses), (reputation) (O.C.G.A. §24-6-608 (a)); or "Bad Acts" *(cross-examination only)*—Specific instances of conduct of the witness (in question), brought out on cross-examination of (that) (another) witness that may relate to (that) witness's (in question's) character for untruthfulness. O.C.G.A. §24-6-608(b)(1) and (2)

- Bias toward a party. Shown by "Bad Acts" *(extrinsic evidence or cross-examination)*—Specific instances of conduct of the witness (in question) that may relate to the witness's (in question's) bias toward a party. O.C.G.A. §24-6-608(b)

Felony conviction—Proof that the (witness) (defendant) has been convicted of the offense of _____. *[Admit and charge only those offenses punishable by one year or more of imprisonment and only where the judge finds that the probative value of admitting the evidence conviction outweighs prejudicial effect to the accused. O.C.G.A. §§24-6-609(a)(1), 24-4-403;* Quiroz v. State, *291 Ga. App. 423(2008)]*

Crime of Dishonesty conviction—Proof that the witness has been convicted of a crime involving (dishonesty) or (making a false statement). O.C.G.A. §24-6-609(a)(2) *[Note: Does not include misdemeanor theft.* Adams v. State, *284 Ga. App. 534 (2007).]*

Admissibility considerations*—(Considerations below are not hard and fast, and individual facts and circumstances MAY dictate a different result than that directed by this QUICK guide. In BALANCING, judge should make EXPRESS FINDINGS.* Quiroz v. State, *291 Ga. App. 423. Subject to balancing probative value versus prejudicial effect, WHICH TRUMPS ALL OTHER CONSIDERATIONS BELOW (O.C.G.A. §24-4-403 for ALL evidence and specifically for FELONY convictions [see* Clay v. State, *290 Ga. 822 for FIVE BALANCING FACTORS] and "Bad Acts" O.C.G.A. §§24-9-608(b), 24-9-609 (a)(1).)*

Admissible—Convictions less than 10 years from conviction or actual release from confinement *(O.C.G.A. §24-6-609(a)(1) and (2)). Note:* Allen v. State, *286 Ga. 392(2). Calculating 10 years—probation does NOT equal "confinement"—and end date is date of testimony or date conviction offered.* Clay v. State, *290, Ga. 822.*

SOME juvenile "convictions," *but not of the defendant (O.C.G.A. §24-6-609(d))*

Cases on appeal*, but the pendency of appeal is also admissible (O.C.G.A. §24-6-609(e))*

Inadmissible—Time Barred*—Over 10 years old from date of conviction or release from ACTUAL confinement, not probation (*Allen v. State*, 286 Ga. 392(2)). Calculating 10 years—probation does NOT equal "confinement"—to time of testifying, not time of offense, unless JUDGE BALANCES AND FINDS INTERESTS OF JUSTICE permit longer.* Clay v. State, *290 Ga. 822 BALANCING FACTORS.*

First offender and conditional discharge u**nadjudicated and pardoned offenses inadmissible (O.C.G.A. §§24-6-609(c), 24-6-622); **but remember Davis v. Alaska. *Also, present probation, even for first offender, is probably admissible against state witness as possibly illustrative of interest in testifying or state of feelings of witness. O.C.G.A. §24-6-622*

***Convictions based on pleas of nolo contendere and juvenile "convictions"** of defendant inadmissible (O.C.G.A. §24-6-609(d))*

****Limiting Instruction. See PJI Criminal 1.34.00 for a limiting instruction on the use of prior conviction to impeach a witness or defendant. Note:* Hulsey v. State, *281 Ga. 177; O.C.G.A. §24-1-105.*

1.31.42 **Witness, Supported**

(Evidence and charge authorized only where a witness has been attacked.)

In determining the credibility of any witness whose credibility has been (attacked) (cast doubt upon) (challenged) as I have described above and any testimony by him or her in court, you may consider, where applicable, evidence offered to support the credibility or believability of any such witness. This would include:

(Charge only those that apply.)

- Character for truthfulness. Shown by (opinion of other witnesses) or (reputation) (O.C.G.A. §24-6-608(a)); or "Truthful conduct" *(cross-examination only).* Specific instances of conduct of the witness (in question), brought out on cross-examination of (that) (another) witness, that may relate to (that) witness's (in question's) character for truthfulness; O.C.G.A. §24-6-608(b)(1) and (2)

- Lack of bias toward a party. “Truthful conduct” *(extrinsic evidence or cross-examination)*. Specific instances of conduct of the witness *(only after the witness has been attacked)* that may relate to the witness’s (in question’s) lack of bias toward a party. O.C.G.A. §24-6-608(b)

1.31.45 **Witness, Impeached**

(Only “IMPEACHMENT” statute retained)

To impeach a witness is to show that the witness is unworthy of belief. A witness may be impeached by disproving the facts to which the witness testified (O.C.G.A. § 24-6-621);

OR

The credibility of a witness may be attacked by disproving the facts to which the witness testified.

1.31.47 **Prior Statements**

Your assessment of a trial witness's credibility may be affected by comparing or contrasting that testimony to statements or testimony of that same witness before the trial started. It is for you to decide whether there is a reasonable explanation for any inconsistency in a witness's pre-trial statements and testimony when compared to the same witness's trial testimony. As with all issues of witness credibility, you the jury must apply your common sense and reason to decide what testimony you believe or do not believe.

O.C.G.A. §24-6-613

1.31.80 **Immunity or Leniency Granted Witness**

In assessing the credibility of a witness, you may consider any possible motive in testifying, if shown. In that regard you are authorized to consider any possible pending prosecutions, negotiated pleas, grants of immunity or leniency, or similar matters. You alone shall decide the believability of the witnesses.

Note: Adequately covered by general credibility charge. Lee v. State, *281 Ga. 776(3)*

1.31.90 **Single Witness; Corroboration**

(Optional in ANY case, but SHOULD be given to clarify or balance overall charge when some counts (e.g. Terroristic Threats, Statutory Rape) or some circumstances (e.g. accomplice testimony) DO require corroboration.)

The testimony of a single witness, if believed, is sufficient to establish a fact. Generally, there is no legal requirement of corroboration of a witness, provided you find the evidence to be sufficient.

Note: *Johnson v. State*, 296 Ga. App. 112(1) (2009) (except for cases of treason, perjury, statutory rape, and terroristic threats)

O.C.G.A. §24-14-8

1.31.92 **Accomplice; Corroboration**

(The following charge is not applicable to misdemeanors.)

An exception to this rule is made in the case of (specify felony charge), where the witness is an accomplice. The testimony of the accomplice alone is not sufficient to warrant a conviction. The accomplice's testimony must be supported by other evidence of some type, and that evidence must be such as would lead to the inference of the guilt of the accused independent of the testimony of the accomplice.

It is not required that supporting evidence be sufficient to warrant a conviction or that the testimony of the accomplice be supported in every material particular.

The supporting evidence must be more than that a crime was actually committed by someone. It must be sufficient to connect the accused with the criminal act and must be more than sufficient to merely cast upon the accused a grave suspicion of guilt.

Slight evidence from another source that connects the accused with the commission of the alleged crime and tends to show participation in it may be sufficient supporting evidence of the testimony of an accomplice. In order to convict, that evidence, when considered with all of the other evidence in the case, must be sufficient to satisfy you beyond a reasonable doubt that the accused is guilty.

(Insert here .93 or .94 charge(s) below only if applicable)

The sufficiency of the supporting evidence of an accomplice is a matter solely for you to determine.

Whether or not any witness in this case was an accomplice is a question for you to determine from the evidence in this case.

Geiger v. State, 129 Ga. App. 488, 495 (1973)

Brown v. State, 232 Ga. 838, 840 (1974) (slight evidence, another source)

Smith v. State, 236 Ga. 5 (1976)

Price v. State, 141 Ga. App. 335 (1977) (charge should remind of reasonable doubt standard)

Terrell v. State, 271 Ga. 783(4) (1999)

1.31.93(A) **Accomplice; Corroboration**

(Give only if applicable.)

(The testimony of one accomplice may be supported by the testimony of another accomplice. Whether or not the testimony of one accomplice does, in fact, support the testimony of another accomplice is a matter for you to determine.)

Berry v. State, 124 Ga. App. 31 (1971) (another accomplice)

1.31.93(B) **Statement by One Defendant at Joint Trial**

(Give only if applicable.)

Any out-of-court statement made by one of the defendants on trial in this case after the alleged criminal act has ended may be considered only against the person who made the statement and only if you find that such statement was freely and voluntarily made. If you find that an out-of-court statement was made to the police freely and voluntarily by a defendant on trial in this case, then you are to consider the statement only as against the particular defendant who made it.

(*Note: See 2.02.40, Admission of Coconspirator)*

1.31.94 **Coerced/Unknowing Participant Not Accomplice; No Corroboration**

However, a witness is not an accomplice if the participation by the witness in the criminal enterprise was (due to coercion) (unknowing). There is no legal requirement of corroboration of a witness whose participation was (coerced) (unknowing).

Mitchell v. State, 274 Ga. 768(2)

Whether or not any witness in this case was an accomplice is a question for you to determine from the evidence in this case.

(Note: Until we know more, the safer approach is to treat this as a "104(b) decision" about which the court must instruct the jury. O.C.G.A. §24-1-104(b).)

1.31.96 **Corroboration Required; Certain Offenses**

An exception to this rule is made for the offense of (statutory rape, where the witness is the alleged victim) (terroristic threats, where the witness is the person to whom the alleged threat was communicated) (perjury) (treason). The testimony of the (alleged victim) (person to whom the alleged threat was communicated) alone is not sufficient to warrant a conviction. The testimony must be supported by other evidence of some type that supports a finding that the offense was committed.

It is not required that supporting evidence be sufficient to warrant a conviction or that the testimony be supported in every material particular (nor as to the identity of the perpetrator).

Slight evidence from another source that the crime was committed may be sufficient supporting evidence of the testimony of the (alleged victim) (person to whom the alleged threat was communicated). In order to convict, that evidence, when considered with all of the other evidence in the case, must be sufficient to satisfy you beyond a reasonable doubt that the accused is guilty. The sufficiency of the supporting evidence of the testimony of the alleged victim to produce the conviction of the defendant's guilt is a matter solely for you to determine.

Worley v. State, 222 Ga. 319 (1966)

Chambers v. State, 141 Ga. App. 438 (1977)

Clemmons v. State, 233 Ga. 187 (1974) (rape case). ID need not be corroborated.

Byars v. State, 198 Ga. App. 793 (1991)

1.32.10 **Defendant's Choice Not to Testify**

(*Not required unless requested.*)

The defendant in a criminal case may take the stand and testify and be examined and cross-examined as any other witness. (You should evaluate such testimony as you would that of any other witness; *Boyd v. State*, 284 Ga. 46(3) (2008).)

However, the defendant does not have to (present any evidence) nor (testify). If the defendant chooses not to testify, you may not consider that in any way in making your decision.

O.C.G.A. §24-5-506

11th Cir. PJI, pp. 19, 27, 29, 30

Lakeside v. Oregon, 55 L. Ed.2d 319 (1978)

Rowe v. State, 162 Ga. App. 742 (1982)

1.32.15 **Statement of Defendant; Standard of Proof; Preliminary Findings**

(Note: Standard of proof before the trial court in Jackson v. Denno *hearing is by preponderance of evidence.* Lawrence v. State, *235 Ga. 216, 219 (1975).)*

(*The court makes a preliminary finding about these issues and should enter a WRITTEN order in the format suggested in* Berry v. State, *254 Ga. 101, 104–105 (1985). The issue must still be submitted to the jury for decision unless expressly waived. If the court determines the defendant is/was in custody, the court should give voluntariness and Miranda charges. If the court determines the defendant is/was not in custody, the court should give the voluntariness charges only. Additionally, the court does not have to give the voluntariness charges if the defendant stipulates the statement is admissible. When in doubt, give all.*)

1.32.16 **Statement of Defendant**

(Consider preceding with 1.34.50 Limiting Instructions/ Conditional Admissibility.)

A statement that the defendant allegedly made (while in custody) has been offered for your consideration. Before you may consider this as evidence for any purpose, you must determine whether the defendant's statement was voluntary (O.C.G.A. §24-8-824) (and, if the statement was given in custody, whether the defendant was properly advised of his/her constitutional rights.)

O.C.G.A. §24-1-104 (b)

1.32.17 **Voluntariness Defined**

To be voluntary, a statement must be freely and willingly given and without coercion, duress, threats, use of violence, fear of injury, or any suggestions or promises of leniency or reward. A statement induced by the slightest hope of benefit or the remotest fear of injury is not voluntary. To be voluntary, a statement must be the product of a free will and not under compulsion or any necessity imposed by others.

(In determining voluntariness, you may also consider to what extent defendant was informed of his or her rights as discussed below, if applicable.)

O.C.G.A. §24-8-824

1.32.18 **Circumstances of the Statements, etc.; Illegal Detention**

You may consider the (legality), duration, and conditions of detention as factors relevant to the question of whether or not a statement was freely and voluntarily made. (However, under the law, in order for a statement to be excluded because of illegal detention, it must be shown that the statement was, in fact, induced by such illegal detention.)

Wilson v. State, 229 Ga. 395 (1972)

Parham v. State, 135 Ga. App. 315 (1975)

1.32.19 **Burden of Proof as to Voluntariness**

The burden of proof is upon the State to establish that the statement was voluntary, that is, freely and willingly made. If you do not find that the statement was voluntary, you may not consider it for any purpose.

1.32.21 **Constitutional Rights**

If you find that the statement was made while in custody and as a result of police questioning, you must also determine whether the defendant was advised of his/her constitutional rights and whether the defendant clearly understood and knowingly gave up such rights.

The constitutional rights that law enforcement officers must explain and that the defendant must understand and voluntarily give up before any custodial statement is taken by law enforcement are as follows:

1) The defendant had a right to remain silent;
2) If the defendant chose not to remain silent, anything he/she (said) (wrote) (signed) could be used as evidence against the defendant in court;
3) The defendant had a right to consult a lawyer before any questioning and to have the lawyer present with him/her at all times during any questions; and
4) If the defendant did not have money for a lawyer, a lawyer would have been provided for him/her to represent him/her before any questioning and to be present with him/her during any questioning.

1.32.22 **Constitutional Rights (Juvenile)**

(*Note: Charge the following, if requested, only if the defendant is a juvenile.*)

In considering whether a statement by a juvenile defendant was made with a knowing and intelligent waiver of his/her constitutional rights, you are to consider the totality of the circumstances. Factors you may consider to determine whether the defendant has made a knowing and intelligent waiver include but are not limited to

1) the age of the defendant,
2) the education of the defendant,
3) the knowledge of the defendant as to the substance of the charge and nature of his/her rights to consult an attorney,
4) whether the defendant was allowed to consult with relatives or an attorney,

5) whether the defendant was interrogated before or after formal charges had been filed,
6) methods used in questioning,
7) length of questioning,
8) whether the defendant refused to voluntarily give statements on prior occasions, and
9) whether the defendant withdrew or denied making the statement at a later date.

Henry v. State, 264 Ga. 861 (1995)
McKoon v. State, 266 Ga. 149 (1996)

1.32.23 After Exercising Miranda Rights; Defendant Then Initiating Further Conversations

If the defendant exercises any of these rights, such as requesting an attorney, the police cannot question the defendant any further without an attorney being present.

If the police initiate (or continue) conversation with the defendant after the defendant exercises such right, then any statement made to the police by the defendant after he/she exercises such right would (not be voluntary) (would be in violation of defendant's rights), and you must disregard it entirely and completely in reaching your verdict in this case. (Except for purpose of attacking the witness's credibility (impeachment).)

Edwards v. Arizona, 451 U.S. 77 (1981)

(In the event the defendant testifies, however, any voluntary statement may be used for purposes of attacking the credibility of such witness (impeachment).)

Harris v. New York, 401 U.S. 222 (1971)

Beckwith v. State, 183 Ga. 871(4) (1936)

James v. Illinois, 493 U.S. 307, 312 II (1990)

Delarosa v. State, 304 Ga. App. 4 (3) (2010)

US v. Havens, 446 U.S. 620, 627-628 II (1980)

(However, if the defendant, solely on his/her own initiative after exercising such rights, freely and voluntarily requests and initiates further conversation with the police without an attorney and without any request, instigation, coercion, duress, fear, or hope of

benefit or reward or other action on the part of the police, then you would be authorized to consider it, provided you find from the evidence and the court's instructions that any such conversation or statement was otherwise freely and voluntarily given by the defendant.)

Edwards v. Arizona, 451 U.S. 77 (1981)

1.32.40 **Burden of Proof as to Rights**

The burden of proof is upon the State to establish that the warnings of all rights mentioned were given, that they were understood and knowingly given up by the defendant.

1.32.50 **Conditions Precedent to Consideration of Statement**

If you find, as mentioned above, that the defendant's statement was voluntary and that all of the warnings as to the defendant's constitutional rights were given, that the defendant did understand the meaning of what was said and knowingly gave up such rights, then you may consider it as evidence. If so, then you must apply the general rules for testing the believability of witnesses and decide what weight, if any, you will give to all or any part of such evidence. If you fail to find defendant was properly informed of these rights and that he/she understood and gave up those rights, you must disregard the statement entirely and give it no consideration in reaching your verdict (except for purposes of attacking the credibility of the witness) (impeachment).

Harris v. New York, 401 U.S. 222 (1971)
Beckwith v. State, 183 Ga. 871(4) (1936)

1.32.60 **Credibility of Statement**

(*Note: As a result of* McKenzie v. State*, 293 Ga. App. 350 (2008), this charge was omitted because it is adequately covered by the previous charges.*)

1.32.70 **Corroboration; Defendant's Statement**

(*Note: There is no necessity to give a charge on the subject without specific request.* Welch v. State*, 235 Ga. 243, 246 (1975).*)

(You should consider with great care and caution the evidence of any out-of-court statement allegedly made by the defendant offered by the state. The jury may believe any such statement in whole or in part, believing that which you find to be true and rejecting that which you find to be untrue. You alone have the duty to apply the general rules for testing the believability of witnesses and to decide what weight should be given to all or any part of such evidence.)

A defendant's out-of-court statement that is not supported by any other evidence is not sufficient to justify a conviction, even if you believe the unsupported statement.

However, proof by other evidence beyond a reasonable doubt that the crime alleged has been committed may constitute supporting evidence of a defendant's statement, if any, should you so find. The law does not fix the amount of supporting evidence necessary. You must determine whether or not other evidence sufficiently supports a defendant's statement so as to justify a conviction. If you find that there was a statement made by the defendant that was supported by other evidence, the degree of proof necessary to convict is that you be satisfied of the guilt of the defendant beyond any reasonable doubt.

(*Note: Standard of proof before the trial court in* Jackson v. Denno *hearing is a preponderance of the evidence.* Lawrence v. State, *235 Ga. 216, 219 (1975).*)

O.C.G.A. §24-8-823

1.34.00 **Limiting Instructions/ Purpose, Parties, Counts**

Sometimes evidence is admitted (for a limited purpose) or (against some parties and not others) or (for some counts and not others). Such evidence may be considered by the jury (for the sole issue or purpose) (against that/those party(ies)) (only for the counts) for which the evidence is limited and not for any other purpose.

(*Note*: *"[A]lthough a trial judge is not required in the absence of a request to give a limiting instruction when . . . evidence [or related acts] is admitted, it would be better for the trial judge to do so."* State v. Belt, *269 Ga. 763 (1998). Charge should be given prior to admission of such evidence and repeated in final charge.* Chisholm v. State, *231 Ga. App. 835 (1998).)*

(Note: NEW code section requires the judge to give limiting instructions, when applicable, ON REQUEST. Probably better to give, if applicable, whether requested or not.

O.C.G.A. §24-1-105

EXAMPLES OF WHEN GIVEN: Similar Transactions; Convictions or "Bad Acts" to attack credibility; felony for possession of firearm offense.)

1.34.10 **Other Crimes, Wrongs, Acts (formerly Similar Transactions)**

Be sure to precede with 1.34.00 Limiting Instructions/ Purpose, Parties, Counts.
See 1.34.12 and O.C.G.A. 24-4-414(a) in child molestation cases.

(*Note*: *In instructing the jury, name only the specific issue(s) to which the evidence such pertains and is limited in the case on trial, not the entire "laundry list" of all reasons that might be appropriate in any case.* Watson v. State, *230 Ga. App. 79, 82(5);* Hall v. State, *230 Ga. App. 741, 742.*)

In order to prove its case (in Count(s) _____), the State

- (must show (knowledge) (intent) (participation in a conspiracy, plan, preparation));
- (must show identity of the perpetrator);
- (must negate or disprove (mistake) (accident) (duress) (coercion) (entrapment));
- (may show (motive) (opportunity)).

To do so, the State has offered evidence of other (crimes) (wrongs) (acts) allegedly committed by the accused. You are permitted to consider that evidence only insofar as it may relate to (that/those) issue(s) and not for any other purpose.

You may not infer from such evidence that the defendant is of a character that would commit such crimes.

The evidence may be considered only to the extent that it may show the _____ (element(s)) (issue(s)) that the state is (required) (authorized) to prove in the crime(s) charged in the case now on trial. Such evidence, if any, may not be considered by you for any other purpose.

(*Note: Other permitted issues: (extent of participation in a conspiracy) (predisposition, i.e., to negate entrapment) (negate accident) see* Simmons v. State, *266 Ga.*

223, 224–226.)

(Note: Bent of mind and course of conduct have been eliminated from the new Evidence Code. Brooks v. State, *298 Ga. 722, 727 (2016).)*

The defendant is on trial for the offense(s) charged in this bill of indictment only and not for any other acts (even though such acts may incidentally be criminal [and may have resulted in conviction]).

Before you may consider any other alleged acts for the limited purpose(s) stated, you must first determine whether it is more likely than not that the accused committed the other alleged acts.

Lingo v. State, 329 Ga. App. 528 OCGA 24-4-403

If so, you must then determine whether the act(s) shed(s) any light on the (elements of the offense) (issue(s)) for which the act was admitted in the crime(s) charged in the indictment in this trial. Remember to keep in mind the limited use and the prohibited use of this evidence about other acts of the defendant.

By giving this instruction, the Court in no way suggests to you that the defendant has or has not committed any other acts, nor whether such acts, if committed, prove anything; this is solely a matter for your determination.

O.C.G.A. §24-4-404 (b)

(U.S.C.R. 31.3. Notice of Prosecution's Intent to Present Evidence of Similar Transactions — no longer in effect, but a new rule is needed. See Carlson on Evidence 3 pp. 21–25, 28 encouraging pre-trial rulings on such matters.)

U.S. v. Edouard, 485 F.3rd 1324, 1344 (11th Cir. 2007) for new test of admissibility, replacing *Williams v. State* 251 Ga. 749 (1983) (similar but not the same); see also O.C.G.A. §24-4-403; *Bradshaw v. State*, 296 Ga. 615 (3) (2015)

11th Circuit Test:

1. The evidence must be relevant to an issue other than the defendant's character;
2. There must be sufficient proof to enable a jury (but judge decides) to find that it more likely than not (preponderance) that the defendant committed the acts in question;
3. The probative value of the evidence cannot be substantially outweighed by undue

prejudice and the evidence must satisfy Rule 403:

- whether it appeared at commencement of trial that defendant would contest the issue of intent;
- the overall similarity of the charged and extrinsic offenses; and
- the temporal proximity between he charged and extrinsic offenses.

Stephens v. State, 261 Ga. 467, 468–469(6) (1991) (drug sale; proof required at trial of similarity; certified copy of conviction normally insufficient)

Sheppard v. State, 205 Ga. App. 373, 374(2) (1992) (predisposition; rebut defense of entrapment)
Bradford v. State, 261 Ga. 833, 834 (1992) (corroboration of accomplice testimony connecting party to crime)
Rash v. State, 207 Ga. App. 585, 586–587(3) (1993) (corroboration of victim testimony in sex crime)

1.34.12 Other Crimes, Wrongs, Acts (formerly Similar Transactions) Sexual Assault and Child Molestation Cases

Note: Generally, where the jury has heard evidence, the court need not and sometimes it may be harmful for the court to instruct the jury that they may or how they may consider evidence. It is, at best, a "truism" that is usually best left to the lawyers to argue. See Stephens v. State*, 289 Ga. 758 (1);* Boyt v. State*, 289 Ga. App. 466 (dealing with prior consistent statements).*

Therefore, when evidence is admitted under O.C.G.A. § 24-4-413 or 414, it would come in without limiting instructions and " . . . may be considered for its bearing on any matter to which it is relevant." In a pure case, the judge MAY not need to comment at all.

However, many cases are not "pure," and even in the ordinary one-count case, with no facts as above, it MAY be that the court should give some limiting instructions because:

- *the statute has no appellate record, and unlike other federal rules, there is no*

outside authority;

- *the phrase ". . . may be considered for its bearing on any matter to which it is relevant" may yet imply that the court must make that determination as to what issue it is relevant and limit accordingly;*
- *even if the statute does not so imply, the court has discretion to do so under O.C.G.A. § 24-4-403 by finding that if the evidence is admitted without limitation, its prejudicial effect would outweigh its probative value;*
- *if a charge is given, it MAY be easier and less prone to error to tell the jury what the evidence MAY be considered for as opposed to what it may not.*

Also, consider the following circumstances which would likely REQUIRE limiting instructions:

1. *Prior conviction above offered in a multi-count indictment, only one count of which is sexual assault or child molestation;*
2. *Prior conviction for sexual assault offered in a multi-count indictment which includes sexual assault and child molestation. It appears the sexual assault is admissible "without limitation" for the sexual assault count but not for child molestation or other counts;*
3. *Prior VERY SIMILAR conviction above offered in either type case; facts of extraneous crimes are within the venue and within the statute of limitations, maybe even within the same family. There is a good chance the jury, without some instructions on the subject, might convict based on the extraneous facts, not the case on trial, or at least appear to do so;*
4. *Prior non-sex crime conviction admitted WITH limitation and instructions under O.C.G.A. § 24-4-404(b) but additional sex crime offense offered under O.C.G.A. § 24-4-413 or 414 "without limitation." — Clarifying instructions needed.*

Therefore, the easiest approach and the one less prone to error, and most in keeping with the KISS principle, is to use the 1.34.10 charge for limited evidence. The judge would insert the issues to which the evidence is relevant and therefore limited, but not be bound to limit to only the same issues permitted under O.C.G.A. § 24-4-413 or 414. Furthermore, the judge may eliminate from that charge the sentence "You may not infer from such evidence

that the defendant is of a character that would commit such crimes" if the above procedure is not satisfactory to the judge.

(*Consider preceding with §1.34.00 Limiting Instructions/ Purpose, Parties, Counts.*)

(*Note: In instructing the jury, name only the specific issue(s) to which the judge finds the evidence is relevant and is limited in the case on trial, not the entire "laundry list" of all reasons that might be appropriate in any case.* Watson v. State*, 230 Ga. App. 79, 82(5);* Hall v. State*, 230 Ga. App. 741, 742.) However, the issues are not limited by O.C.G.A. §24-4-404(b).)*

(See Jackson v State*, 342 Ga. App. 689 (2017) ((Trial court required to balance probative value of evidence of uncharged acts of molestation against danger of unfair prejudice, confusion of issues, or misleading jury pursuant to O.C.G.A. §24-4-403 and §24-4-414).)*

In order to prove its case (in Count(s) or (child molestation*)(sexual battery**) the State

- (must show (knowledge), (intent) (participation in a conspiracy, plan, preparation) (identity of the perpetrator);
- (must negate or disprove (mistake)(accident)(duress)(coercion)(entrapment));
- (may show (motive)(opportunity) (other factors named by the judge _____).

To do so, the state has offered evidence of (an)other offense(s) of (child molestation*)(sexual battery**) allegedly committed by the accused.

You are permitted to consider that evidence (for its bearing on any matter to which it is relevant) (only insofar as it may relate to (that/those issue(s) and not for any other purpose.

The defendant is on trial for the offense(s) charged in this bill of indictment only and not for any other acts (even though such acts may incidentally be criminal [and may have resulted in conviction]).

Before you may consider any other alleged acts you must first determine whether the accused committed the other alleged acts and such act was in fact an act of (child molestation*)(sexual battery**).

If so, you must then determine whether the act(s) shed(s) any light on the (elements of the offense) (issue(s)) for which it was admitted in the crime(s) charged in the indictment in this trial.) Such evidence is, at most, supporting evidence of some issues and may not, by itself, be the basis of conviction for the case on trial.

By giving this instruction, the Court in no way suggests to you that the defendant has or has not committed any other acts, nor whether such acts, if committed, prove anything; this is solely a matter for your determination.

O.C.G.A. 24-4-404 (b)

** Child molestation for this code section is NOT the same definition as that of the criminal offense of child molestation but is an amalgamation of several code sections. It is probably not necessary to define for the jury "child molestation" of the evidence code if the evidence of the crime offered is a conviction based on a guilty (not nolo contendere) plea and the judge determines as a matter of law that it meets the evidence code definition. However, if the evidence is witness testimony without a conviction based on a plea of guilty, then the judge must also define the offense of child molestation suggested by the evidence offered.*

*** Sexual Battery . . . same as above.*

1.34.15 **Habit; Routine Practice**

(The following is a new rule of evidence for Georgia. The code makes such evidence admissible, but that does not mean it is necessary for the court to comment or explain. However, where the court has given limiting instructions for "other acts," it MAY be necessary to give this instruction in SOME cases to prevent the jury from being misled.)

(Notwithstanding the previous charge on other acts,) you may consider evidence of habit of the (witness) (defendant) if shown, insofar as it may show, if it does, that the conduct of such person at the time in question may have been in keeping with such habit.

O.C.G.A. §24-4-406

1.34.20 **Prior Difficulties between Parties (Witness) (or lack thereof)**

Evidence of prior difficulties (or lack thereof) between the defendant and (the alleged victim) (a witness) has been admitted for the sole purpose of illustrating, if it does, the state

of feeling between the defendant and the (alleged victim) (witness); (the reasonableness of any alleged fears by defendant or alleged victim).

Whether this evidence illustrates such matters is a matter solely for you, the jury, to determine, but you are not to consider such evidence for any other purpose.

O.C.G.A. §24-6-622

White v. State, 242 Ga. 21(4) (1978)

Wall v. State, 269 Ga. 506, 509(2) (1998) (*U.S.C.R. 31.1 and 31.3 not applicable*)

Note: Sedlak v. State, 275 Ga. 746(2)(f)

1.34.30 **Prior Convictions; Limited Purpose**

Note: It will no longer be mandatory to present a certified copy of the record of conviction in order to impeach a witness under O.C.G.A. §24-6-609.

Precede with 1.34.00

You have received in evidence of (a) prior conviction(s) of (the defendant) (a witness). You may consider this evidence only insofar as it may relate to (attacking the credibility of the (witness) (defendant)) (the required element of "conviction of a felony" for the offense in count _____) and not for any other purpose (or count).

O.C.G.A. §24-6-609

Holsey v. State, 281 Ga. 177 (2006)

Head v. State, 253 Ga. 429 (1984)

1.34.50 **Limiting Instructions/ Conditional Admissibility**

(*Consider preceding with §1.34.00 Limiting Instructions/ Purpose, Parties, Counts.*)
Sometimes evidence is admitted conditionally; that is, although you have been permitted to hear the evidence, it is only admitted and you may only consider it if you also find certain required (but disputed) predicate facts which allow you to consider such evidence.

If you do not find the conditions necessary in order to allow you to consider the evidence, then you must disregard it completely even though you have heard the evidence.
O.C.G.A. §24-1-104 (b)

In that connection, I charge you:

Statements of the accused 1.32.16

Admissions by Conduct 1.36.00 including

Flight or similar acts 1.36.10

Silence 1.36.15

1.35.10 **Identification; Reliability**

Identity is a question of fact for you to determine. Your determination of identity is dependent upon the credibility of the witness or witnesses offered for this purpose. You should consider all of the factors previously charged you regarding credibility of witnesses.

Some, but not all, of the factors you may consider in assessing reliability of identification are

1) the opportunity of the witness to view the alleged perpetrator at the time of the alleged incident,
2) the witness's degree of attention toward the alleged perpetrator at the time of the alleged incident,
3) the possibility of mistaken identity,
4) whether the witness's identification may have been influenced by factors other than the view that the witness claimed to have,
5) whether the witness on any prior occasion did not identify the defendant in this case as the alleged perpetrator, and
6) the length of the time between the crime and the out-of-court identification. *Lowe v. State*, 264 Ga. 757 (1994)

Neil v. Biggers, 409 U.S. 188, 198, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)
Brodes v. State, 279 Ga. 435 (2005)

1.35.11 **Identification; Burden of Proof**

It is for you to say whether, under the evidence in this case, the testimony of the witnesses and the facts and circumstances of the case sufficiently identify this defendant beyond a reasonable doubt as the perpetrator of the alleged crime (or that the defendant was a party to it). It is not necessary that the defendant show that another person committed the alleged offense.

Note: Charge OK Jones v. State*, 282 Ga. 306(3*)

If you do not believe that the defendant has been sufficiently identified as the person who committed the alleged crime (or was a party to it), or if you have any reasonable doubt about such, then it would be your duty to acquit the defendant.

The burden of proof rests upon the State to prove, beyond a reasonable doubt, the identity of this defendant as the person who committed the crime alleged in this bill of indictment.

Strickland v. M. & Council, City of Athens, 111 Ga. App. 280, 281(2) (1965) and citations (*identification of a witness,* viz., *corroboration*)

Hightower v. State, 225 Ga. 681, 682–83(2) (1969); *Shepard v. State*, 234 Ga. 75, 77 (1975) (*identification of defendant*)

Berry v. State, 10 Ga. 511–29 (1851) (*Identification by a witness of a person or thing is necessarily a matter of opinion, and when accompanied with the facts on which it is founded, it is always admissible.*)

U.S. v. Wade, 18 L. Ed.2d 1149 (1967)

Baier v. State, 124 Ga. App. 334 (1971)

Neil v. Biggers, 409 U.S. 188 (1972)

Heyward v. State, 236 Ga. 526, 528

Mallory v. State, 271 Ga. 150(4)

Woodward v. State, 278 Ga. 827

1.35.20 **Fingerprints**

(Admissibility may be ruled on by court under O.C.G.A. §24-1-104(b).)

Certain evidence of fingerprint comparison has been admitted by the court for your possible consideration.

Identification by fingerprint comparison is opinion evidence and is dependent upon the credibility (or believability) and accuracy of the expert witness(es) called for that purpose as well as the following factors:

1) the validity of the theory of identification by fingerprint comparison,
2) the credibility of the witness who performs other necessary functions in making the comparison such as inked finger impressions and latent lifts, and
3) the accuracy of procedures in identifying, preserving, recording, and maintaining integrity of the physical evidence, all of which are questions for the jury.

Fingerprint evidence is also governed by the rules on circumstantial evidence.

If you believe that fingerprints corresponding to those of the accused were found and identified, their evidentiary value, if any, would be diminished to the extent that they could reasonably have been left (at the scene) (on the article(s) alleged) at a time or under circumstances that would be consistent with innocence.

A verdict of guilty may not rest upon fingerprint identification alone, unless you are satisfied beyond a reasonable doubt that fingerprints left by the accused were in fact found and that they could only have been impressed by the accused (at the scene of the crime) (on the weapon, etc.) at the time of the commission of the crime and that such identification under all of the facts and circumstances of the case is sufficient to satisfy your mind of the guilt of the accused to the exclusion of any other reasonable theory and beyond a reasonable doubt.

Note: Testimony as to percentage of cases when fingerprints not found—at most harmless. *Barbee v. State*, 308 Ga. App. 322 (2); *Key v. State*, 146 Ga. App. 536(3)

1.35.30 **DNA**

(Admissibility may be ruled on by court under O.C.G.A. §24-1-104(b).)

Evidence relating to DNA comparison has been admitted for your consideration.

Identification by DNA comparison is considered opinion evidence and is governed by the law concerning opinion testimony as has been given to you.

As opinion testimony, evidence relating to DNA comparison is dependent upon many factors. Among the factors are the credibility (or believability) and accuracy of the

witnesses who were involved with the process of obtaining, identifying, preserving, recording, and maintaining the physical evidence and upon the accuracy and validity of the testing procedures themselves that were used to form such opinions. All of these issues are matters for you to consider and determine.

It is for you to determine what weight, if any, you will give to the evidence relating to DNA comparison in your decision in this case.

Caldwell v. State, 260 Ga. 278 (1990)

1.35.40 **Alibi**

(*See 3.30.10, Alibi.*)

1.36.00 **Admissions by Conduct**

(This is a new area of Georgia Law with little or no appellate record. It M AY not be necessary to give an instruction (see note preceding Other Crimes section). Some jurisdictions do not recognize such evidence, some recognize and require instruction, and some recognize but do not require instruction. If an instruction is contemplated, consider preceding with 1.34.00 Limiting Instructions/ Purpose, Parties, Counts and 1.34.50 Limiting Instructions/ Conditional Admissibility and the following:)

1.36.10 **Flight**

(*Note: After January 10, 1991, it has been reversible error to charge the jury on flight.* Renner v. State, *260 Ga. 515 (1990).*) See also *Harris v. State,* 273 Ga. 608, 609–610 Particularization.

However, with the advent of the new rules, authority from the 11th Circuit and other published legal authority suggest that such MAY no longer be the case. Moreover, it MAY be advisable to give such instruction if requested by defense counsel as a LIMITING INSTRUCTION as follows:)

Evidence of alleged (flight) or (similar acts, e.g. escape, bribery, intimidation of witnesses,

etc.) has been introduced. Such evidence is governed by the rules concerning circumstantial evidence you have already been given. Furthermore, you may only consider it if you find more likely than not that the defendant actually committed such act, and that the reason was to evade the charge now on trial.

1.36.15 **Silence (Pre-Miranda) as an Admission**

O.C.G.A. § 24-8-801 (d)(2)(b). This is probably an admissibility issue to be decided by the judge pursuant to Rule 104 (a) and needs no charge to the jury. However, if defense (or party opposing evidence) requests a limiting instruction, consider the following:

Silence in the face of a question or accusation may be considered for what it may show only if from all the evidence you find that

- the (defendant) (person in question) (heard) (received) the question, accusation, or communication;
- a reasonable person would normally be induced to respond;
- there was an opportunity to respond; and
- the (defendant) (such person) remained silent or did not respond.

(The court is advised to read State v. Orr*, 305 Ga. 729 (2019) prior to giving this charge.)*

1.36.20 **Dying Declaration**

Hearsay exception — O.C.G.A. §24-8-804 (b)(2)

O.C.G.A. §24-1-104(a) issue for judge, no charge necessary

1.37.10 **Good Character of Defendant**

You have heard evidence of the (character of the defendant) (character of the defendant for a particular trait, more specifically _____) in an effort to show that the defendant likely acted in keeping with such character or trait at pertinent times or with reference to issues in this case. This evidence has been offered in the form of (opinion of (an)other witness(es)) (reputation) (specific instances of conduct of the defendant showing such trait). You should consider any such evidence along with all the other evidence in deciding whether or not you have a reasonable doubt about the guilt of the defendant.

O.C.G.A. §§24-4-401(a)(1), 24-4-404, 24-4-405

Note: The committee feels the above charge is complete and adequate for the principle of Good Character. However, in view of State v. Hobbs, 288 Ga. 551 *(pre–new evidence code), in order to be safe, consider adding the following:*

(Good character is not just a witness credibility issue, nor is it an excuse for crime. However, you may consider it as weighing on the issue of whether or not the defendant is guilty of the charges in the indictment.)

DEFINITION OF CRIME

1.40.10 Definition of Crime

This defendant is charged with a crime against the laws of this state. A crime is a violation of a statute of this state in which there is a joint operation of an act (or omission to act) and intention (or criminal negligence).

O.C.G.A. §16-2-1

See 1.41.40 (Criminal Negligence)

1.41.10 Intent

Intent is an essential element of any crime and must be proved by the State beyond a reasonable doubt.

Intent may be shown in many ways, provided you, the jury, believe that it existed from the proven facts before you. It may be inferred from the proven circumstances or by acts and conduct, or it may be, in your discretion, inferred when it is the natural and necessary consequence of the act. Whether or not you draw such an inference is a matter solely within your discretion.

Griffin v. State, 230 Ga. 449, 452, 453 (1973)
Sandstrom v. Montana, 61 L. Ed.2d 39 (1978)

(*Use the following charge with caution in cases involving "specific intent."*)

Criminal intent does not mean an intention to violate the law or to violate a penal statute but means simply the intention to commit the act that is prohibited by a statute.

Howard v. State, 222 Ga. 525 (1966)
Kennedy v. State, 46 Ga. App. 42 (1932)
Balark v. State, 81 Ga. App. 649 (1950)

1.41.11 **No Presumption of Criminal Intent**

This defendant will not be presumed to have acted with criminal intent, but you may find such intention (or the absence of it) upon a consideration of words, conduct, demeanor, motive, and other circumstances connected with the act for which the accused is being prosecuted.

O.C.G.A. §16-2-6

1.41.12 **Presumptions and Inferences**

Every person is presumed to be of sound mind and discretion, but this presumption may be rebutted.

O.C.G.A. §16-2-3

Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L. Ed.2d 281 (1977)

You may infer, if you wish to do so, that

1) the acts of a person of sound mind and discretion are the product of that person's will (O.C.G.A. §16-2-4), and
2) a person of sound mind and discretion intends the natural and probable consequences of those acts (O.C.G.A. §16-2-5).

Whether or not you make any such inference or inferences is a matter solely within the discretion of the jury.

Sandstrom v. Montana, 61 L. Ed.2d 39 (1978)

Pollard v. State, 249 Ga. 21(2) (1982)

Lawrence v. State, 165 Ga. App. 151 (1983)

1.41.13 **Intoxication**

(*See 3.60.10* et seq., *Intoxication*)

1.41.20 **Intent; Transferred**

If one intentionally commits an unlawful act, yet the act harmed a victim other than the one intended, it is not a defense that the defendant did not intend to harm the actual person injured.

Chelsey v. State, 121 Ga. 340, 343 (1904)

Montgomery v. State, 78 Ga. App. 258 (1948)

James v. State, 83 Ga. App. 847, 852 (1951)

Bentley v. State, 131 Ga. App. 425, 430(9) (1974)

Towns v. State, 26 Ga. 423 (1990) (*felony murder*)

1.41.30 **Accident**

No person shall be found guilty of any crime committed by misfortune or accident in which there was no criminal scheme, undertaking, or intention (or criminal negligence).

An accident is an event that takes place without one's foresight or expectation, that takes place, or begins to exist, without design.

If you find from the evidence in this case that the incident that is the subject matter of this case occurred as a result of misfortune or accident and not as a result of a criminal undertaking or criminal negligence, then it would be your duty to acquit the defendant.

When the issue of accident is raised, the burden is on the State to negate or disprove it beyond a reasonable doubt. Any evidence as to misfortune or accident should be considered by you in connection with all of the other evidence in the case. If in doing so, you should entertain a reasonable doubt as to the guilt of the accused, it would be your duty to acquit. On the other hand, should you believe from the evidence as a whole that the defendant is guilty beyond a reasonable doubt, you may convict.

O.C.G.A. §1-3-3(2)

O.C.G.A. §16-2-2

Allen v. State, 137 Ga. App. 302, 304 (1976)

Bruce v. Smith, 274 Ga. 432 (2001)

1.41.40 **Criminal Negligence**

Criminal negligence is an (act/or a failure to act) which demonstrates a willful, wanton, or reckless disregard for the safety of others who might reasonably be expected to be injured thereby.

O.C.G.A. §16-2-1

1.41.50 **Mistake of Fact**

A person shall not be found guilty of a crime if the act (or omission to act) constituting the crime was induced by a misapprehension of fact that, if true, would have justified the act or omission.

1.42.10 **Parties to Crime**

Every party to a crime may be charged with and convicted of commission of the crime.

A person is a party to a crime only if that person

a) directly commits the crime;
b) intentionally helps in the commission of the crime;
c) intentionally advises, encourages, hires, counsels, or procures another to commit the crime; or
d) intentionally causes some other person to commit the crime under such circumstances that the other person is not guilty of any crime either in fact or because of legal incapacity.

O.C.G.A. §16-2-20

1.42.11 **Principal, Failure to Prosecute; Other Involved Persons**

Any party to a crime who did not directly commit the crime may be prosecuted for commission of the crime upon proof that the crime was committed and that the person was a party to it, even though the person alleged to have directly committed the crime has not been prosecuted or convicted, has been convicted of a different crime or degree of crime, is not amenable to justice, or has been acquitted.

O.C.G.A. §16-2-21

1.43.10 **Knowledge**

Knowledge on the part of the defendant that the crime of _____ was being committed and that the defendant knowingly and intentionally participated in or helped in the commission of such crime must be proved by the State beyond a reasonable doubt.

If you find from the evidence in this case that the defendant had no knowledge that a crime was being committed or that the defendant did not knowingly and intentionally commit, participate, or help in the commission of (and was not a conspirator in) the alleged offense, then it would be your duty to acquit the defendant.

On the other hand, should you find, beyond a reasonable doubt, that the defendant had knowledge that the crime of _____ was being committed and that the defendant knowingly and intentionally participated or helped in the commission of it, then you would be authorized to convict the defendant.

Eckman v. State, 274 Ga. 63 (2001)

1.43.20 **Conspiracy; Culpability**

(*See 2.02.20, Conspiracy (Additional Instructions) (Culpability)*)

1.43.30 **Mere Presence; Guilt by**

A jury is not authorized to find a person who was merely present at the scene of the commission of a crime at the time of its perpetration guilty of consent in and concurrence in the commission of the crime, unless the evidence shows, beyond a reasonable doubt, that such person committed the alleged crime, helped in the actual perpetration of the crime, or participated in the criminal endeavor.

Brooks v. State, 128 Ga. 261 (1907)

Tanner v. State, 161 Ga. 199 (1925)

1.43.31 **Mere Association; Guilt by**

A jury is not authorized to find a person who was merely associated with other persons involved in the commission of a crime guilty of consent in or concurrence in the commission of the crime, unless the evidence shows, beyond a reasonable doubt, that such person helped in the actual perpetration of the crime or participated in the criminal endeavor.

JURISDICTIONAL ISSUES

1.50.10 Statute of Limitations

Members of the jury, the law of our state sets a time limit upon the State in starting prosecution of most criminal offenses.

The accused is on trial for the offense of (*insert offense*).

Under Georgia law, prosecution for this offense must begin within (*insert number*) years after the offense has been committed.

If you find from the evidence that the indictment or accusation in this case was not filed within (*insert number*) years after the offense was committed, it would be your duty to acquit this defendant.

O.C.G.A. §17-3-1

1.50.11 Statute of Limitations; Tolling

In calculating this period of time, you should exclude from your calculation any period of time during which the evidence shows that

a) the accused has absconded with intent to avoid prosecution;

Danuel v. State, 262 Ga. 349 (1992)

b) (the person committing) the crime was unknown;
c) the accused was a government officer or employee, and the crime charged is a theft by conversion of public property while the accused was such an officer or employee; or
d) the accused was a guardian or trustee, and the crime charged is theft by conversion of property of the ward or beneficiary.

O.C.G.A. §17-3-2

(*See also O.C.G.A. §17-3-2.1 for youthful victims, certain crimes.*)

1.50.12 Statute of Limitations; Burden of Proof

When statue of limitations is raised, the burden is on the State to prove that the offense occurred within the statute of limitations (or occurred within an exception) beyond a reasonable doubt.

1.51.10 **Venue; Generally**

(*Give appropriate venue instruction in every case.* Lynne v. State, *275 Ga. 288(3) (2002),* Graham v. State, *275 Ga. 290(3) (2002).*)

(*Note: O.C.G.A. §17-2-2(c) and (h) are potentially burden shifting and should not be quoted verbatim. See* Napier v. State, Halley v. State, *276 Ga. 769 (2003) for suggested language.*)

(*Use "indicted," below, where venue has been changed.*)

The law provides that criminal actions shall be (tried) (indicted) in the county in which the crime was committed (except as otherwise provided by law). In a prosecution in any case in which it cannot be determined in what county the crime was committed, venue is proper and may be proved in any county in which the evidence shows beyond a reasonable doubt that it might have been committed.

Venue (that is, the crime was committed in _____ County) is a jurisdictional fact that must be proved by the State beyond a reasonable doubt (as to each crime charged in the indictment) just as any element of the offense(s). Venue must be proved by direct or circumstantial evidence, or both.

O.C.G.A. §17-2-2

Jones v. State, 272 Ga. 900 (2000)

1.51.11 **Venue; Theft**

In a prosecution for the offense of _____ (O.C.G.A. §§16-8-2–16-8-9, 16-8-13–16-8-15), venue is proper and may be proved in any county in which the accused exercised control over the property that was the subject of the alleged theft.

O.C.G.A. §16-8-11

1.51.12 **Venue; Extortion**

O.C.G.A. §16-8-16

1.51.13 **Venue; Computer-Related Offenses**

O.C.G.A. §16-9-94

1.51.14 **Venue; R.I.C.O.**

O.C.G.A. §16-14-11

1.51.15 **Venue; Conspiracy to Commit a Crime (Separate Offense)**

(*Note: See O.C.G.A. §16-4-8.*)

In a prosecution for the (separate) offense of conspiracy to commit the crime of _____, as alleged in this indictment, venue is proper and may be proved in any county in which an overt act was committed to further the conspiracy.

Caldwell v. State, 142 Ga. App. 831 (1977)

Jones v. State, 135 Ga. App. 893(7) (1975)

In a prosecution for an offense as alleged in this indictment on the theory of (parties to a crime and/or conspiracy) as I have instructed you, it is not necessary in order to establish venue that the State prove that the defendant ever entered _____ County, provided you find beyond a reasonable doubt that the substantive offense was committed in this county and you further find beyond a reasonable doubt that the defendant was a party to it (and/or conspirator in the crime).

Osborn v. State, 161 Ga. App. 132 (1982)

1.51.16 **Venue; Crime Committed by Mail or Telephone**

Venue of a crime committed (by mail) (by telephone) shall be in the county in which the (matter) (conversation) transmitted is delivered or received and takes effect.

Rose v. State, 4 Ga. App. 588(2)(c) (1908)

Overcash v. State, 111 Ga. App. 549 (1965)

Bowler v. State, 145 Ga. App. 633 (1978) (*may not be applicable out of state; see* R. M. Rose Co. v. State*, 133 Ga. 353 (1909)*)

1.51.17 **Venue; Securities Violation**

O.C.G.A. §10-5-15

1.51.18 **Venue; Abandonment**

In a prosecution for the offense of abandonment of a dependent child, venue shall be in the county in which the child resides at the time of the swearing out of the warrant.

(*Define domicile. See O.C.G.A. §19-2-1.*)

O.C.G.A. §19-10-1

1.51.19 **Venue; Specialized Land Transactions**

O.C.G.A. §44-3-138

1.51.20 **Venue; Special Circumstances**

Crime committed on the boundary line of two counties. If a crime is committed on, or immediately adjacent to, the boundary line between two counties, venue is proper and may be proved in either county.

Criminal homicide. Criminal homicide shall be considered as having been committed in the county in which the cause of death was inflicted. If it cannot be determined in which county the cause of death was inflicted, venue is proper and may be proved in the county in which the death occurred. If a dead body is discovered in this state and it cannot be readily determined in what county the cause of death was inflicted, venue is proper and may be proved in the county in which the dead body was discovered.

Crime commenced outside the state. If the commission of a crime under the laws of this state commenced outside the state is consummated within this state, venue is proper and may be proved in the county where it is consummated.

Crime committed while in transit. If a crime is committed upon any railroad car, vehicle, watercraft, or aircraft traveling within this state and it cannot readily be determined in which county the crime was committed, venue is proper and may be proved in any county in which the crime could have been committed through which the railroad car, vehicle, watercraft, or aircraft has traveled.

Crime committed on water boundaries of two counties. Whenever a stream or body of water is the boundary between two counties, the jurisdiction of each county shall extend to the center of the main channel of the stream or the center of the body of water; and, if a crime is committed on the stream or body of water and it cannot be readily determined in which county the crime was committed, venue is proper and may be proved in either county.

Crime committed on water boundaries of two states. Whenever a crime is committed on any river or body of water which forms a boundary between this state and another state, the accused shall be tried in the county of this state which is situated opposite the point where the crime is committed. If it cannot be readily determined on which side of the line a crime

was committed between two counties which border the river or body of water, venue is proper and may be proved in either county.

Crime in more than one county. If in any case it cannot be determined in what county a crime was committed, venue is proper and may be proved in any county in which the evidence shows beyond a reasonable doubt that it might have been committed.

JURY—DUTY, DELIBERATIONS, AND VERDICT

1.60.10 **Verdict; Generally**

(*Make appropriate adjustments for multiple counts and multiple defendants.*)
(*See* Walker v. State, *293 Ga. 709 (2013) on "mutually exclusive verdicts"—criminal negligence and vehicular homicide.*)

If, after considering the testimony and evidence presented to you, together with the charge of the court, you should find and believe beyond a reasonable doubt that the defendant in _____ County, Georgia, did on or about (*read date*) commit the offense of as alleged in the indictment, you would be authorized to find the defendant guilty. In that event, the form of your verdict would be, "We, the jury, find the defendant guilty."

If you do not believe that the defendant is guilty (of either of these offenses), or if you have any reasonable doubt as to the defendant's guilt, then it would be your duty to acquit the defendant, in which event the form of your verdict would be, "We, the jury, find the defendant not guilty."

1.60.11 **Lesser Offense**

If you do not believe beyond a reasonable doubt that the defendant is guilty of (*indicted crime*), but do believe beyond a reasonable doubt that the defendant is guilty of _____, then you would be authorized to find the defendant guilty of _____, and the form of your verdict in that event would be, "We, the jury, find the defendant guilty of _____."

State v. Stonaker, 236 Ga. 1 (1976)

1.60.12 **Multiple Defendants**

(*The following charge should be given in every case, even without a request, when there are multiple defendants on trial.*)

Though you may consider all of the evidence as a whole, conviction of one defendant does not necessarily require conviction of another (or all). You, the jury, must determine the guilt or innocence of each defendant separately.

Porter v. State, 182 Ga. App. 624(1) (1987)

Jones v. State, 207 Ga. App. 46(3) (1993)

Nicholson v. State, 265 Ga. 711(3), 713 (1995)

1.62.00 **Sentencing; Aggravation** (*for judge only*)

Where applicable (i.e., defendant is properly indicted and there is supporting evidence), the judge must

1) *charge the jury on the applicable aggravating factor(s),*
2) *charge the jury on the State's burden, and*
3) *obtain a special finding in the verdict (preferably by submitted form).*

Apprendi v. New Jersey, *530 US 466; 120 S. Ct. 2348 (2000)*

EXAMPLE—If you find the defendant guilty, you should further specify in your verdict in the place provided whether you do or do not find that (EXAMPLE: the defendant was acting in a fiduciary capacity; the victim was age 65 or older at the time of the offense, etc.).

As to this issue, the State, likewise, has the burden of proof beyond a reasonable doubt.

The Pattern Jury Instructions Committee is aware of the following instances in which the holding of Apprendi *may apply, though there may be more.*

2.22.10 **Battery; Simple**. If a victim falls into one of several categories listed in O.C.G.A. §16-5-23(c)–(h), the offense is increased from a misdemeanor to a misdemeanor of a high and aggravated nature. (O.C.G.A. §16-5-23)

2.24.10 **Terroristic Threats and Acts**. If the victim suffers serious physical injury as a direct result of the act giving rise to conviction, the fine increases to $250,000 and imprisonment from 5 to 40 years. (O.C.G.A. §16-11-37)

2.36.10 *et seq*. **Statutory Rape**. If the defendant is 21 years of age or older, the penalty changes from 1 to 20 years to 10 to 20 years. Also, if the victim is at least 14 years of age and the defendant is no more than three years older, the offense is a misdemeanor. (O.C.G.A. §16-6-3)

2.60.10 *et seq*. **Robbery**. If the victim is over 65 years of age, punishment increases from 1 to 20 to 5 to 20 years, but the maximum sentence does not change. (O.C.G.A. §16-8-40)

2.64.10 *et seq*. **Theft**. The value distinction is covered in the present charge; however, there are other facts that could enhance punishment such as

a) any amount of anhydrous ammonia;
b) property taken in breach of fiduciary obligation (1 to 15 years);
c) if the property was a memorial to the dead or any ornamentation, flower, tree, or shrub placed on, adjacent to, or within any enclosure of a memorial to the dead (1 to 3 years);
d) shoplifting—over $300 is a felony;
    1) In cases where the offense is alleged to have occurred before July 1, 2012, over $300 is a felony. In cases where the offense is alleged to have occurred on or after July 1, 2012, over $500 is a felony.

    Apply the following provisions only when the State makes date a material element of the charged offense and presents evidence proving it:

    2) A person convicted of the offense of shoplifting when the property which was the subject of the theft is taken from three separate stores or retail establishments within one county during a period of seven days or less and when the aggregate value of the property which was the subject of each theft exceeds ($100 in value if offense is alleged to have occurred before July 1, 2012) ($500 if offense is alleged to have occurred on or after July 1, 2012) commits a felony and shall be punished by imprisonment for not less than 1 nor more than 10 years. O.C.G.A. §16-8-14 (b)(3); or
    3) For cases in which the thefts are alleged to have occurred on or after July 1, 2012, a person convicted of the offense of shoplifting when the property which was the subject of the theft is taken during a period of 180 days and when the aggregate value of the property which was the subject of each theft exceeds $500 in value commits a felony and shall be punished by

imprisonment for not less than 1 nor more than 10 years. O.C.G.A. § 16-8-14(b)(4)

e) theft of motor vehicle or vehicle part. For cases where the offense is alleged to have occurred before July 1, 2012 (1 to 10 years); for cases where the offense is alleged to have occurred on or after July 1, 2012, there is no enhancement;
f) while engaged in telemarketing conduct (1 to 10 years); or
g) theft of destructive device, explosive, or firearm (1 to 10 years). (O.C.G.A. §16-8-12)

Other offenses not covered in Suggested Pattern Jury Instructions *that may be affected by the holding in* Apprendi *include the following*:

Contributing to the delinquency of a minor. If the offense results in serious bodily injury or death of a child, the offense becomes a felony. (O.C.G.A. §16-12-1)

Fleeing or attempting to elude an officer. The act becomes a felony if, in fleeing the officer, the defendant operates his vehicle in excess of 30 miles per hour above the posted speed limit, strikes or collides with another vehicle or a pedestrian, flees in traffic conditions that place the general public at risk of receiving serious injury, or leaves the state. (O.C.G.A. §40-6-395(b))

"**Hate crimes**." If the defendant intentionally selected any victim or property of the victim because of bias or prejudice, the statute directs increases for fines and extending the sentence. (O.C.G.A. §17-10-17)

1.70.10 Court Has No Interest in Case

By no ruling or comment that the court has made during the progress of the trial has the court intended to express any opinion upon the facts of this case, upon the credibility of the witnesses, upon the evidence, or upon the guilt or innocence of the defendant.

1.70.11 **Sympathy**

Your verdict should be a true verdict based upon your opinion of the evidence according to the laws given you in this charge. You are not to show favor or sympathy to one party or the other. It is your duty to consider the facts objectively without favor, affection, or sympathy to either party.

O.C.G.A. §15-12-138

In deciding this case, you should not be influenced by sympathy or prejudice (because of race, creed, color, religion, national origin, sexual preference, local or remote residence, economic (or corporate) status) for or against either party.

O.C.G.A. §15-12-138

1.70.20 **Sentencing; Responsibility for**

(*Note: Do not give this charge in the sentencing phase of death penalty or life without parole cases.*)

You are only concerned with the guilt or innocence of the defendant. You are not to concern yourselves with punishment.

Wilson v. State, 233 Ga. 479 (1975)

1.70.30 **Deliberations**

One of your first duties in the jury room will be to select one of your number to act as foreperson, who will preside over your deliberations and who will sign the verdict to which all twelve of you freely and voluntarily agree.

You should start your deliberations with an open mind. Consult with one another and consider each other's views. Each of you must decide this case for yourself, but you should do so only after a discussion and consideration of the case with your fellow jurors. Do not hesitate to change an opinion if you are convinced that it is wrong. However, you should never surrender an honest opinion in order to be congenial or to reach a verdict solely because of the opinions of the other jurors.

1.70.40 **Unanimous Verdict**

Whatever your verdict is, it must be unanimous (that is, agreed to by all). The verdict must be in writing and signed by one of your members as foreperson, dated, and returned to be published in open court.

1.70.45 **Closing Language** *(for judge only)*

The following is the required procedure for jury communication to the court from outside the courtroom:

1) *Any jury communication to the court must be in writing.*
2) *Parties must be informed of the communication's content, and the writing must be marked as an exhibit and entered into the record.*
3) *The court must allow counsel to suggest an appropriate response.*
4) *The court must inform counsel of the court's intended response.*
5) *The court must allow the opportunity for counsel to respond.*

Lowery v. State, *282 Ga. 68 (4)(b)(ii), 646 S.E. 2d 67 (2007)*

Dowda v. State, *341 Ga. App. 295 (2017)*

1.70.50 **Alternate Jurors**

(*Give appropriate instructions.*)

1.70.60 **Retire to Jury Room**

You may now retire to the jury room, but do not begin your deliberations until you receive the indictment and any evidence that has been admitted in the case.

Bailiff, escort the jury to the jury room.

1.70.70 **Jury (Hung)**

(*Note: Read* Humphreys v. State, *287 Ga. 63, 79-82 (2010), prior to giving this charge in the penalty phase of a death penalty case.*)

You have now been deliberating upon this case for a considerable period of time, and the court deems it proper to advise you further in regard to the desirability of agreement, if

possible. The case has been exhaustively and carefully tried by both sides and has been submitted to you for decision and verdict, if possible, and not for disagreement. It is the law that a unanimous verdict is required. While this verdict must be the conclusion of each juror and not a mere acquiescence of the jurors in order to reach an agreement, it is nevertheless necessary for all of the jurors to examine the issues and questions submitted to them with candor and fairness and with a proper regard for and deference to the opinion of each other. A proper regard for the judgment of others will greatly aid us in forming our own judgment.

Each juror should listen to the arguments of other jurors with a disposition to be convinced by them. If the members of the jury differ in their view of the evidence, the difference of opinion should cause them all to scrutinize the evidence more closely and to reexamine the grounds of their opinion. Your duty is to decide the issues that have been submitted to you if you can conscientiously do so. In conferring, you should lay aside all mere pride of opinion and should bear in mind that the jury room is no place for taking up and maintaining, in a spirit of controversy, either side of a cause. You should bear in mind at all times that, as jurors, you should not be advocates for either side. You should keep in mind the truth as it appears from the evidence, examined in the light of the instructions of the court. You may again retire to your room for a reasonable time and examine your differences in a spirit of fairness and candor and try to arrive at a verdict.

Ratcliff v. Ratcliff, 219 Ga. 545 (1964)
Spaulding v. State, 232 Ga. 411, 413 (1974)
Anderson v. State, 247 Ga. 397, 400 (1981)
(*See* Sanders v. State, *162 Ga. App. 75 (1982);* Romine v. State, *256 Ga. 521(1) (1986); and discussion.*)
Burchette v. State, 278 Ga. 1 (2004)

1.70.80 **Jury: Concluding Charge**

(*Caution: Do not thank jurors for verdict.*)

Ladies and Gentlemen, you have now concluded your service on the jury. You are no longer subject to those instructions I have given you about not talking to anyone about the case. You are free to talk to anyone you like about the case and the decision your jury has reached. By the same token, you are not required to speak to anyone about the case.

Sometimes jurors may be contacted about their deliberations well after the case has been decided. That can happen years after the case has been decided.

You are free to refuse to speak to anyone about the case. That is your decision.

Should anyone make contact with you who causes you any concern, or should anyone try to speak to you after you have declined to speak to them, you should feel free to contact the Sheriff's Office in that regard.

(Criminal Cases: The court has set sentencing in this case (immediately following your discharge/for _____ date). You are free to attend if you like.

The Clerk will (mail/give) you a check for your days of service on the jury this week. ([Attached to that check you will find a stub that shows the dates you have been here] [the clerk will give you a certificate from all the judges of this circuit showing your dates of jury service] for your employer's information.) Should you need further assistance in regard to your service on the jury, please feel free to contact (the Office of the Clerk of Superior Court) (Superior Court Administration).

Thank you again for your service. You are discharged.

SPECIFIC OFFENSES

2.01.10 Attempt; Statutory Definition

A person commits criminal attempt to commit (*name offense*) when, with intent to commit _____, that person performs any act that constitutes a substantial step toward the commission of the crime of _____.

(*Define crime attempted.*)

O.C.G.A. §16-4-1

2.01.11 Attempt; Commission of Crime as Affecting

A person may be convicted of criminal attempt if the crime attempted was actually committed in carrying out the attempt but may not be convicted of both criminal attempt and the completed crime.

2.01.12 Attempt; Crime Includes

A person charged with commission of a crime may be convicted of criminal attempt as to that crime without being specifically charged with the criminal attempt in the accusation, indictment, or presentment.

2.01.20 Attempt; Abandonment of; Generally

When a person's conduct would otherwise constitute an attempt to commit a crime, it would be a defense that the person abandoned efforts to commit the crime or in any other manner prevented its commission under circumstances showing a voluntary and complete abandonment of that person's criminal purpose.

Any abandonment of criminal purpose is not voluntary and complete if it results from

a) a belief that circumstances exist that increase the probability of being discovered or caught or that make more difficult the doing of the crime or
b) a decision to postpone the criminal conduct until another time.

If there is any evidence of abandonment, the burden of proof is on the State to establish beyond a reasonable doubt that the attempt was not abandoned.

O.C.G.A. §16-4-5

2.01.21 **Attempt; Impossibility Not a Defense**

It is no defense to a charge of criminal attempt that the crime the accused is charged with attempting was, under the attendant circumstances, factually or legally impossible of commission if such crime could have been committed had the attendant circumstances been as the accused believed them to be.

O.C.G.A. §16-4-4

2.02.10 **Conspiracy; Offense of; Definition**

(Note: There cannot be a conspiracy consisting of nothing more than buyer and seller-see* Darville v. State*, 289 Ga. 698 (2011).)

A person commits conspiracy to commit a crime when that person, together with one or more other persons, conspires to commit any crime and any one or more of such persons does any overt act to bring about the object of the conspiracy.

O.C.G.A. §16-4-8

(*Define crime subject of alleged conspiracy.*)

2.02.20 **Conspiracy (Additional Instructions) (Culpability)**

(Note: There cannot be a conspiracy consisting of nothing more than buyer and seller-see* Darville v. State*, 289 Ga. 698 (2011).)

(*Charge on culpability by conspiracy is okay even when defendant is not indicted for conspiracy.* Edge v. State, *275 Ga. 311(6) (2002).)*

A conspiracy is an agreement between two or more persons to do an unlawful act, and the existence of a conspiracy may be established by proof of acts and conduct, as well as by proof of an express agreement. When persons associate themselves in an unlawful enterprise, any act done by any party to the conspiracy to further the unlawful enterprise is considered to be the act of all the conspirators. However, each person is responsible for the acts of others

only insofar as such acts are naturally or necessarily done to further the conspiracy.

Whether or not a conspiracy existed in this case is a matter for you to determine.

2.02.25 **Criminal Gang Activity**

The Defendant is charged with the offense of Violation of Street Gang Terrorism and Prevention Act. That offense is defined as follows:

A person commits the offense of Violation of Georgia Street Gang Terrorism Prevention Act when that person, while employed by or associated with a criminal street gang, participates in criminal gang activity through the commission of any criminal offense in the State of Georgia, any other state, or the United States that constitutes Criminal Gang Activity under O.C.G.A. § 16-15-3.

"Criminal gang activity" means, among other things not relevant to this case, the commission, attempted commission, conspiracy to commit, or solicitation, coercion, or intimidation of another person to commit any criminal offense in the State of Georgia, any other state, or the United States that involves violence, possession of a weapon, or use of a weapon.

In order to prove a violation of the Georgia Street Gang Terrorism and Prevention Act, the State must prove beyond a reasonable doubt four elements:

First, the State must prove that there is a criminal street gang.

Second, the State must prove that the Defendant is associated with that criminal street gang. It is not necessary though that the State prove that the Defendant is a member of the gang.

Third, the State must prove that the Defendant conducted or participated in the alleged predicate act.

Lastly, the State must prove that there is a nexus between the crime committed and the gang, that the crime was committed to further the interests of the gang; meaning proof that the crime committed was the sort of crime that the gang does.

DEFINITION OF "PARTICIPATE"

For purposes of the offense of Violation of Georgia Street Gang Terrorism Prevention Act, the term "participate" can, but does not have to be, defined as:

1. To take part in something; and/or

2. To share in something.

DEFINITION OF "CRIMINAL STREET GANG"

Under Georgia law, a "criminal street gang," means any organization, association, or group of three or more persons associated in fact, whether formal or informal, which engages in criminal gang activity. The term "criminal street gang" shall not include three or more persons, associated in fact, whether formal or informal, who are not engaged in criminal gang activity.

(*TAILOR CHARGE TO INDICTMENT)*

As charged in this case, criminal gang activity means _____ (*crimes in indictment*).

(See 1.42.10 Parties to a Crime; 2.02.10 Conspiracy; Offense of; Definition; and 2.02.20 Conspiracy (Additional Instructions) (Culpability))

The existence of a criminal street gang may be established by evidence of a common name or common identifying signs, symbols, tattoos, graffiti, or attire or other distinguishing characteristics, including, but not limited to, common activities, customs, or behaviors.

The term "criminal street gang," however, does not include three or more persons, associated in fact, whether formal or informal, who are not engaged in criminal gang activity.

Whether a criminal street gang exists in this case is for you, the jury, to decide.

CONSIDERATION OF CRIMINAL GANG ACTIVITY TO ESTABLISH CRIMINAL STREET GANG

The commission of any offense that would constitute criminal gang activity by any member or associate of an alleged criminal street gang may be considered by you to determine whether the State has proven beyond a reasonable doubt the existence of the criminal street gang and criminal gang activity.

2.02.30 **Conduct and Presence of Parties**

Presence, companionship, and conduct before and after the commission of the alleged offense may be considered by you in determining whether or not such circumstances, if any, give rise to an inference of the existence of a conspiracy.

(*Note: See 1.43.30, Mere Presence; Guilt by, and 1.43.31, Mere Association; Guilt by.*)

Turner v. State, 275 Ga. 343(2) (2002)

Thornton v. State, 119 Ga. 437, 439 (1904)

2.02.31 **Mere Presence; Guilt by**

(*See 1.43.30, Mere Presence; Guilt by*)

2.02.32 **Mere Association; Guilt by**

(*See 1.43.31, Mere Association; Guilt by*)

2.02.40 **Admission of Coconspirator**

The admission of coconspirator admissions is no longer a jury issue but is decided by the trial judge under O.C.G.A. §*24-1-104(a). See* U.S. v. Noe, *821 F.2d 604, 609 (11th Cir. 1987).*

2.02.50 **Renunciation and Abandonment of Criminal Enterprise**

If you believe that the defendant conspired with one or more other persons to commit the crime alleged in this indictment, but that before the overt act occurred the defendant withdrew agreement to commit the crime and the defendant voluntarily and completely renounced and abandoned all participation in the criminal endeavor prior to the commission of the offense, if any, then the defendant would not be guilty of the offense alleged, and it would be your duty to acquit the defendant.

O.C.G.A. §16-4-5

O.C.G.A. §16-4-9

2.02.60 **Solicitation, Criminal; Statutory Definition**

A person commits criminal solicitation when, with intent that another person engage in conduct constituting a felony, that person solicits, requests, commands, urges, or otherwise attempts to cause the other person to engage in such conduct and creates a clear and present danger that the other person will engage in such conduct constituting a felony.

(*Define the crime that is the subject of the alleged solicitation.*)

O.C.G.A. §16-4-7

State v. Davis, 246 Ga. 761, 762 (1980)

2.02.61 Solicitation; Findings Necessary for Guilty Verdict

If you believe beyond a reasonable doubt that the defendant committed the offense of criminal solicitation as, when, and in the manner alleged in this indictment, and if you further believe beyond a reasonable doubt that the words used by the defendant, if any, were used in such circumstances and were of such a nature as to create a "clear and present danger" that they would bring about the commission of the felony alleged, then you would be authorized to find the defendant guilty. If you do not find such beyond a reasonable doubt, then it would be your duty to acquit the defendant.

HOMICIDE

(*Charge only the appropriate language; adapt parentheticals to the indictment and evidence.*)

2.10.10 **Malice Murder; Defined**

A person commits murder when that person unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of another human being, which is shown by external circumstances capable of proof. Malice may, but need not, be implied when no considerable provocation appears and when all of the circumstances of the killing show an abandoned and malignant heart. It is for the jury to decide whether or not the facts and circumstances of this case show malice.

O.C.G.A. §16-5-1(a)(b)

To constitute murder, the homicide must have been committed with malice. Legal malice is not necessarily ill will or hatred, but it is the unlawful intention to kill without justification, excuse, or mitigation.

If a killing is done with malice, no matter how short a time the malicious intent may have existed, such killing constitutes murder.

Roberts v. State, 3 Ga. 310, 325 (1847)
Brown v. State, 190 Ga. 169 (1940)
Walker v. State, 240 Ga. 608 (1978)

Georgia law does not require premeditation, and no particular length of time is required for malice to be generated in the mind of a person. It may be formed in a moment, and instantly a mortal wound may be inflicted. Yet, if malice is in the mind of the accused at the time of the doing of the act or killing and moves the accused to do it, such is sufficient to constitute the homicide as murder.

Wright v. State, 255 Ga. 109, 113 (1985)
Stephens v. State, 259 Ga. 820 (1990)
Carswell v. State, 268 Ga. 531 (1997)

(*Note:* See Seabolt v. Norris, *298 Ga. 583, 586 (2016), trial court erred in failing to give the requested charge on involuntary manslaughter as a lesser included offense of malice murder, and not just as lesser included offense of felony murder.)*

2.10.11 **Premeditation; Defined**

(*This charge should be given only if a definition of premeditation is requested by the jury.*)

Premeditation, as the term is usually used, means a prior determination or plan to commit an act. Premeditation is not an element of the offense of murder and therefore need not be proven by the State to establish malice aforethought. However, any evidence of premeditation, or lack of it, may be considered by you insofar as it relates to the existence, or nonexistence, of malice at the time of the alleged killing.

Parks v. State, 254 Ga. 403 (1985)
Hubbert v. State, 254 Ga. 429 (1985)

2.10.12 **Motive**

Proof of particular motive is not essential to constitute the crime of murder. Evidence of motive, if any, is admitted for your determination as to whether or not it establishes the state of the defendant's mind at the time of the alleged homicide.

Johnson v. State, 130 Ga. 22 (1908)
Hunter v. State, 188 Ga. 215, 218(2) (1939)
Cone v. State, 193 Ga. 420(4) (1942)
Pulliam v. State, 199 Ga. 709, 713 (1945)
Spencer v. State, 231 Ga. 705, 708 (1974)
Johnson v. State, 260 Ga. 457 (1990)
Earnest v. State, 262 Ga. 495 (1992)

2.10.13 **Adultery**

(*Do not give the phrase in parentheses unless justification is a defense.*)

(Adultery is not a forcible felony, therefore) To kill either a spouse or the spouse's lover for past acts of adultery or to prevent the apparent commission or the completion of an act of adultery in progress between them is not justified.

You may consider whether adultery amounts to provocation, which would mitigate the killing. If the evidence shows that the defendant killed the alleged victim(s) without malice and not in a spirit of revenge but under a violent, sudden impulse of passion created in the defendant's mind by ongoing adultery or the recent discovery of past adultery on the part of the victim(s), you would be authorized to consider whether or not the defendant is guilty of voluntary manslaughter as I will define it.

(*Define voluntary manslaughter; see 2.10.41.*)

What circumstances will present a situation so as to excite such passion is a matter for the jury to decide. As always, the State has the burden of proving guilt beyond a reasonable doubt. As between murder and voluntary manslaughter, the State has that same burden of proving that the killing is not mitigated to voluntary manslaughter.

Burger v. State, 238 Ga. 171 (1977)

See *Shields v. State*, 285 Ga. 372 (2009) (see controversy)

2.10.14 **Weapon; Inference Drawn from Use**

(*Note: Ruled improper in* Harris v. State, *273 Ga. 608 (2001).*)

2.10.20 **Felony Murder; Defined**

(*See 2.10.60, Homicide; Contributing to the Death of Another and* State v. Jackson, *287 Ga. 646 (2010)*)

A person (also) commits the crime of murder when, in the commission of a felony, that person causes the death of another human being (with or without malice.)* Under the laws of Georgia, (*name offense*) is a felony and is defined as follows:

(*Give the statutory definition of that felony.*)

* (*Note: In cases not involving malice murder, omit the words in parentheses;* Lee v. State, *265 Ga. 112, 454 S.E.2d. 761 (1995).*)

O.C.G.A. §16-5-1(c)

(*Note: Felony murder should not be charged when the indictment alleges only malice murder, unless the indictment also alleges facts showing how the murder was committed sufficient to put the defendant on notice of the underlying felony.* McCrary v. State*, 252 Ga. 521 (1984).*)

(*Note: If both malice murder and felony murder are charged in one count, you must instruct the jury to make its verdict clear as to whether they are finding the defendant "guilty of malice murder" or "guilty of felony murder." See* Walker v. State*, 254 Ga. 149, at 161 (1985).*)

(*Note:* See Seabolt v. Norris*, 298 Ga. 583, 586 (2016), trial court erred in failing to give the requested charge on involuntary manslaughter as a lesser included offense of malice murder, and not just as lesser included offense of felony murder.)*

(*The following is a suggested charge to be used after charging both malice murder and felony murder.*)

If you find and believe beyond a reasonable doubt, under all of the evidence and the court's instructions, that the defendant is guilty of the offense of murder with malice aforethought, then you must specify such in your verdict, and the form of your verdict in that event would be, "We, the jury, find the defendant guilty of malice murder."

If you find and believe beyond a reasonable doubt, under all of the evidence and the court's instructions, that the defendant is guilty of the offense of felony murder, then you must specify such in your verdict, and the form of your verdict in that event would be, "We, the jury, find the defendant guilty of felony murder."

2.10.30 **Murder; Felony, during Commission of**

(*The alleged felony in which the defendant was engaged must be charged.*)

If you find and believe beyond a reasonable doubt that the defendant committed the homicide alleged in this bill of indictment at the time the defendant was engaged in the commission of the felony of (*name offense*),* then you would be authorized to find the defendant guilty of murder, whether the homicide was intended or not. A person commits (*specific felony*) when (*define specific felony*). In order for a homicide to have been done in the commission of this particular felony, there must be some connection between the felony

and the homicide. The homicide must have been done in carrying out the unlawful act and not collateral to it. It is not enough that the homicide occurred soon or presently after the felony was attempted or committed. (There must be such a legal relationship between the homicide and the felony so as to cause you to find that the homicide occurred before the felony was at an end or before any attempt to avoid conviction or arrest for the felony.) The felony must have a legal relationship to the homicide, be at least concurrent with it in part, and be a part of it in an actual and material sense. A homicide is committed in the carrying out of a felony when it is committed by the accused while engaged in the performance of any act required for the full execution of the felony.

40 C.J.S. 21, 870

* (*Caution: See* Ford v. State, *262 Ga. 602, not applicable to "nondangerous felonies" unless "attendant circumstances create a foreseeable risk of death";* Hulme v. State, *273 Ga. 676 (2001);* Mosely v. State, *272 Ga. 881 (2000); but see* Woodard v. State, *296 Ga. 803 n.3 (2015).*)

* (*Caution: Be sure to recharge on the issue of mitigation by provocation in the context of felony murder, not just malice murder, where applicable.* Wallace v. State, *294 Ga. 257, 260-263 (2013)(J. Melton, concurring).*)

Baker v. State, 236 Ga. 754 (1976)
Llewellyn v. State, 241 Ga. 192, 196 (1978)
Edge v. State, 261 Ga. 865 (1992)
Gore v. State, 246 Ga. 575 (1980)
Smith v. State, 272 Ga. 874 (2000)

2.10.40 **Lesser Offense**

(*The following charge may not be required in malice murder cases.*)

McGill v. State, 263 Ga. 81 (1993)
Terry v. State, 263 Ga. 294 (1993)

After consideration of all of the evidence, before you would be authorized to return a verdict of guilty of (malice murder) (felony murder), you must first determine

whether mitigating circumstances, if any, would cause the offense to be reduced to voluntary manslaughter.

Edge v. State, 261 Ga. 865 (1992)

2.10.41 **Voluntary Manslaughter; Statutory Definition**

A person commits voluntary manslaughter when that person causes the death of another human being under circumstances that would otherwise be murder if that person acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person. (If there should have been an interval between the provocation and the killing sufficient for the voice of reason and humanity to be heard, which the jury in all cases shall decide, the killing may be attributed to revenge and be punished as for murder.)

In that connection, I charge you that the burden of proof is upon the State to prove beyond a reasonable doubt that the offense is not so mitigated.

O.C.G.A. §16-5-2

2.10.42 **Provocation by Words Alone**

Provocation by words alone will, in no case, justify such excitement of passion sufficient to free the accused from the crime of murder or to reduce the offense to manslaughter when the killing is done solely in resentment of such provoking words.

Words accompanied by menaces, though the menaces do not amount to an actual assault, may in some instances be sufficient provocation to excite a sudden, violent, and irresistible passion in a reasonable person, and if a person acts from such passion (and not from malice)* or any spirit of revenge, then such would constitute voluntary manslaughter. In all cases, the motive is for determination by the jury.

Moore v. State, 228 Ga. 662 (1972)
Brooks v. State, 249 Ga. 583 (1982)
Aguilar v. State, 240 Ga. 830, 833 (1978)
Mack v. State, 272 Ga. 415 (2000)
Todd v. State, 274 Ga. 98 (2001)

* (*Note: In cases not involving malice murder, omit the words in parentheses;* Lee v. State, *265 Ga. 112, 454 S.E.2d. 761 (1995).*)

2.10.43 **Murder; Mutual Combat**

If you find from the evidence that there was between the defendant and the deceased a mutual combat (that is, a mutual intent or mutual agreement to fight), then you will consider the rules of law concerning mutual combat and apply them to the evidence. But if you find from the evidence that there was no mutual combat, you will not consider this law.

Mutual combat occurs when there is combat between two persons as a result of a sudden quarrel or such circumstances as indicate a purpose, willingness, and intent on the part of both to engage mutually in a fight. (It is not essential to constitute mutual combat that blows be struck or shots be fired.) There must be a mutual intent to fight or engage in combat. The existence of intent to engage in mutual combat may be established by proof of acts and conduct, as well as by proof of an express agreement.

If you find that there was a mutual intention on the part of both the deceased and the defendant to enter into a fight or mutual combat and that under these circumstances the defendant killed the deceased, then ordinarily such killing would be voluntary manslaughter, regardless of which party (struck the first blow) (fired the first shot).

Under some circumstances, such killing may be murder, or it may be justifiable.

If you find that the killing was done with malice, express or implied, and with a felonious intent to take the life of the person killed, and the killing was accomplished as a result of mutual combat, such killing would be murder.

The killing as a result of mutual combat may be justifiable, and you may find it to be so if it appears that the defendant reasonably believed at the time of the killing that the force the defendant used was necessary to prevent death or great bodily injury to the defendant (or a third person) or to prevent the commission of a forcible felony, and if it further appears that the deceased was the aggressor. If it appears that the deceased was not the aggressor but that the defendant was the aggressor, then in order for the killing to be justified, if such killing was the result of mutual combat, it must further appear that the defendant withdrew from the encounter and effectively communicated to the deceased the intent to do so, and the deceased, notwithstanding, continued or threatened to continue the use of unlawful force.

If you should believe from all of the evidence in this case that there was no mutual intent to fight or mutual combat between the defendant and the deceased, then you may determine whether or not the deceased used words, threats, menaces, or contemptuous gestures toward and against the defendant and, if so, whether or not they were sufficient to cause the defendant to reasonably believe that the force the defendant used, if any, was necessary to prevent death or great bodily injury to the defendant (or a third person) or to prevent the commission of a forcible felony. Such words, threats, menaces, or contemptuous gestures may or may not be sufficient to cause such reasonable belief on the part of the defendant, it being solely a question for you, the jury, to determine from a consideration of the evidence in this case.

Freeman v. State, 130 Ga. App. 718, 720 (1974)
Strickland v. State, 137 Ga. App. 419 (1976)
McCord v. State, 176 Ga. App. 505 (1985)
Forley v. State, 265 Ga. 622 (1995)
Carreker v. State, 273 Ga. 371 (2001)
Smith v. State, 267 Ga. 372, at 375 (1996)

2.10.44 **Involuntary Manslaughter; Statutory Definition**

A person commits involuntary manslaughter when that person causes the death of another human being without any intention to do so by the commission of the offense of (*specify offense, which must be a misdemeanor*). In that connection, I charge you that the offense of (*specify offense, which must be a misdemeanor*) is defined as follows: (*define the misdemeanor*).

O.C.G.A. §16-5-3(a)
Johnson v. State, 261 Ga. 236 (1991)

(*Note:* See Seabolt v. Norris, *298 Ga. 583, 586 (2016), trial court erred in failing to give the requested charge on involuntary manslaughter as a lesser included offense of malice murder, and not just as lesser included offense of felony murder.)*

2.10.50 Homicide by Vehicle

(*See 2.82.10, Homicide by Vehicle in the First Degree and 2.82.20, Homicide by Vehicle in the Second Degree; Misdemeanor*)

2.10.60 Homicide; Contributing to Death

Where one inflicts an unlawful injury upon the person of another, such injury may be found to be the cause of the death of the person injured whenever it shall be made to appear that the injury

a) itself constituted the cause of death or
b) directly and materially contributed to the happening of a secondary or consequential cause of death or
c) materially sped up the death, although the death would have eventually occurred anyway.

The burden of proof rests upon the State to prove beyond a reasonable doubt that the injury inflicted by the defendant, if any, upon the deceased was the cause of death, as I have previously instructed you. If the State has failed to prove such beyond a reasonable doubt, then you must acquit the defendant.

Cook v. State, 134 Ga. App. 357, 359 (1975)
Ward v. State, 238 Ga. 367, 369 (1977)
Larkin v. State, 247 Ga. 586 (1981)
Durden v. State, 250 Ga. 325 (1982)
James v. State, 250 Ga. 655, 656 (1983)
Green v. State, 266 Ga. 758 (1996)

2.10.70 Concealing Death; Statutory Definition

(*See O.C.G.A. §16-10-31*)

2.10.80 Justification; Defense of Habitation; Force, Use of; Statutory Provisions and Exceptions

(*See 3.01.10* et seq., *Defenses; Justification*)

DEATH PENALTY

2.15.10 **Death Penalty Charge** *(for judge only)*

(*Note: Simple kidnapping is not a capital felony. Kidnapping for ransom or resulting in bodily injury is a capital felony for purposes of statutory aggravating circumstances nos. 1 and 2.*)

***In cases arising prior to April 29, 2009**, a sentence of life without parole cannot be imposed except as an alternative to a sentence of death. Therefore, do not charge the jury on life without parole in non–death penalty cases **arising prior to April 29, 2009**. (See* State v. Ingram*, 266 Ga. 324 (1996))*

Where a statutory aggravating circumstance refers to another crime or capital offense, give the statutory definition of that specified crime or capital offense.

On sentence retrial only, do not give charge 2.15.20, Two-Stage Trial. Begin with charge 2.15.30, Determination of Punishment. In addition, give charges

1) *1.20.10, Definition of Reasonable Doubt (beginning "A reasonable doubt means just what it says . . ." and through remainder of that paragraph);*
2) *1.31.10, Credibility of Witnesses;*
3) *1.31.20, Conflicts in Testimony; and*
4) *1.30.10 and 1.30.20 (except last two paragraphs), Evidence, Direct and Circumstantial. (See* Finney v. State*, 253 Ga. 346, 349 (1984))*

2.15.20 **Death Penalty; Two-Stage Trial**

Members of the jury, under the procedure followed in Georgia, criminal trials are conducted in two stages in certain felony cases. In the first stage, the jury determines the guilt or innocence of the accused. If the jury determines that the accused is guilty, then the State and the accused both have a right to submit additional evidence in aggravation or in extenuation and mitigation of the punishment to be imposed. After hearing any such evidence and argument of counsel, if any, the jury then retires to again consider the sentence and determine the punishment to be imposed. The penalty set must, of course, be within the limits set by law and that I will give you at the appropriate time.

Does the State have any additional evidence to offer in this stage of the proceedings?

Does the Defense have any additional evidence to offer in this stage of the proceedings?

State has the opening argument.

Defense has the closing argument.

2.15.30 Death Penalty; Determination of Punishment

Members of the jury, the defendant in this case, (*insert defendant's name*), has been found guilty of the offense of (*insert offense*), and it now becomes your duty to determine, within the limits prescribed by law, what punishment will be imposed for this offense.

In arriving at this determination, you are authorized to consider all of the evidence received here in court (in both stages of this proceeding), presented by the State and the defendant throughout the trial before you, unless the court has previously instructed you to consider certain evidence introduced by the State for a limited purpose, in which event such evidence shall not be considered by you in determining punishment. You shall also consider the facts and circumstances, if any, in extenuation, mitigation, or aggravation of punishment.

Mitigating or extenuating facts or circumstances are those that you, the jury, find do not constitute a justification or excuse for the offense in question but that, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame.

Aggravating circumstances are those that you, the jury, find increase the guilt or enormity of the offense or add to its injurious consequences.

Bowen v. State, 244 Ga. 495, 496(2) (1979)

Duhart v. State, 237 Ga. 426, 431 (1976)

Romine v. State, 251 Ga. 208(10) (1983)

Gissendaner v. State, 272 Ga. 704 (2000)

Members of the jury, under the laws of this state, a person found guilty of murder shall be punished by

a) death or
b) life imprisonment without parole* or
c) life imprisonment.

* (*Note: Pertains to cases arising on or after May 1, 1993.*)

Under Georgia law, a sentence of death or life imprisonment without parole shall not be imposed unless the jury first finds beyond a reasonable doubt and designates in its verdict in writing at least one or more statutory aggravating circumstances. It then fixes the sentence of death or life imprisonment without parole in its verdict.

Under the law of this state, the following may constitute statutory aggravating circumstances (O.C.G.A. §17-10-30). (*Charge only the sections that are applicable, and define any crime specified in the section.*)

1) Where the offense of murder was committed by a person with a prior record of conviction for a capital felony. In this connection, I charge you that the offense of _____ is a capital felony under Georgia law (O.C.G.A. §17-10-30(b)(1)).
2) Where the offense of murder was committed while the defendant was engaged in the commission of another capital felony (or aggravated battery). In this connection, I charge you that the offense of _____ is a capital felony under Georgia law (O.C.G.A. §17-1030(b)(2)).
3) Where the offense of murder was committed while the defendant was engaged in the commission of a burglary or arson in the first degree (O.C.G.A. §17-10-30(b)(2));
4) Where the defendant, by the act of murder, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device that would normally be hazardous to the lives of more than one person (O.C.G.A. §17-10-30(b)(3)).
5) Where the defendant committed the offense of murder for himself/herself or another for the purpose of receiving money or any other thing of monetary value (O.C.G.A. §17-1030(b)(4)).
6) Where the murder is of a judicial officer, former judicial officer, district attorney or solicitor, or former district attorney or solicitor during, or because of, the exercise of official duty (O.C.G.A. §17-10-30(b)(5)).
7) Where the defendant caused or directed another to commit murder or committed murder as an employee of another person (O.C.G.A. §17-10-30(b)(6)).
8) Where the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved

a) depravity of mind or
b) torture of the victim prior to the death of the victim or
c) aggravated battery of the victim prior to the death of the victim (O.C.G.A. §17-1030(b)(7)).

The State contends that the offense of murder in this case was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or aggravated battery of the victim. The State has the burden of proving this statutory aggravating circumstance beyond a reasonable doubt. The State must prove to your satisfaction and beyond a reasonable doubt that the torture, depravity of mind, or aggravated battery of the victim was of such a nature that the murder was outrageously or wantonly vile, horrible, or inhuman.

Aggravated battery occurs when a person maliciously causes bodily harm to another by depriving that person of a part of his/her body, by rendering a part of the person's body useless, or by seriously disfiguring the person's body or a body part. In order to find that the offense of murder involved aggravated battery, you must find that the bodily harm to the victim occurred before death.

Torture occurs when a living person is subjected to the unnecessary and wanton infliction of severe physical or mental pain, agony, or anguish. Besides serious physical abuse, torture includes serious sexual abuse or the serious psychological abuse of a victim resulting in the severe mental anguish of the victim in anticipation of serious physical harm. You would not be authorized to find that the offense of murder involved torture simply because the victim suffered pain or briefly anticipated the prospect of death. Nor would acts committed upon the body of a deceased victim support a finding of torture. In order to find that the offense of murder involved torture, you must find that the defendant intentionally, unnecessarily, and wantonly inflicted severe physical or mental pain, agony, or anguish upon a living victim.

Depravity of mind refers to an utterly corrupt, perverted, or immoral state of mind. In determining whether the offense of murder in this case involved depravity of mind on the part of the defendant, you may consider the age and physical characteristics of the victim and you may consider the actions of the defendant prior to and after the commission of the murder. In order to find that the offense of murder involved depravity of mind, you must find that the defendant, as the result of utter corruption, perversion, or immorality, committed aggravated battery or torture upon a living person or subjected the body of a deceased victim to mutilation or serious disfigurement or sexual abuse.

You would not be authorized to return a finding of this statutory aggravating circumstance unless you are convinced beyond a reasonable doubt not only that the murder involved torture, depravity of mind, or aggravated battery of the victim, but that the murder was also outrageously or wantonly vile, horrible, or inhuman. Should you be convinced beyond a reasonable doubt of the existence of this statutory aggravating circumstance, then your verdict should reflect your finding, if you so find, that the murder was outrageously or wantonly vile, horrible, or inhuman. Your verdict should also reflect your finding, if you so find, that the murder involved at least one of the following: torture, depravity of mind, or aggravated battery of the victim. Your verdict should specify which of these was involved in the murder.

Corn v. State, 240 Ga. 130, 141 (1977)
Fair v. State, 245 Ga. 868 (1980)
West v. State, 252 Ga. 156, 161 (1984)
Lucas v. State, 274 Ga. 640 (2001)

9) Where the offense of murder was committed against any

   a) peace officer,
   b) corrections employee, or
   c) fireman

while engaged in the performance of official duties (O.C.G.A. §17-10-30(b)(8)).

10) Where the offense of murder was committed by a person

    a) in the lawful custody of a peace officer,
    b) in a place of lawful confinement, or
    c) who has escaped from

        i) the lawful custody of a peace officer or
        ii) a place of lawful confinement (O.C.G.A. §17-10-30(b)(9)).

11) Where the murder was committed for the purpose of avoiding, interfering with, or preventing

    a) a lawful arrest or
    b) custody in a place of lawful confinement of the defendant or another person (O.C.G.A. §17-10-30(b)(10)).

Whether or not any one or more of the statutory aggravating circumstances that I have just given you in charge exist beyond a reasonable doubt in this case is a matter solely for you, the jury, to decide and determine from the evidence in this case. When you retire to begin your deliberations as to the penalty to be imposed in this case, you will be given a written copy of these statutory instructions regarding statutory aggravating circumstances to be used by you during your deliberations. I caution and instruct you, however, that such written instructions are not evidence and are not to be considered by you as evidence in this case. They are merely and solely for the purpose of aiding you in remembering these statutory instructions that the court has given you in charge and are sent out with you for that purpose alone and no other

(*Use the following when more than one person participated in the crime.*)

I further charge you that the sentence of life imprisonment without parole or death shall not, and cannot, be imposed unless you find beyond a reasonable doubt that the defendant

a) committed the murder or
b) attempted to kill the victim or
c) intended that deadly force be used by another to accomplish the criminal enterprise.

Enmund v. Florida, 458 U.S. 782; 73 L. Ed.2d 1140 (1982)

2.15.40 **Death Penalty; Victim Impact Evidence**

The prosecution has introduced what is known as victim impact evidence. Victim impact evidence is not the same as evidence of a statutory aggravating circumstance. Introduction of victim impact evidence does not relieve the State of its burden to prove beyond a reasonable doubt the existence of a statutory aggravating circumstance. This evidence is simply another method of informing you about the alleged harm caused by the crime in question. To the extent that you find that this evidence reflects on the defendant's culpability, you may consider it, but you may not use it as a substitute for proof beyond a reasonable doubt of the existence of a statutory aggravating circumstance.

Turner v. State, 268 Ga. 213 (1997)

2.15.50 **Death Penalty; May Fix Penalty at Life Imprisonment for Any Reason**

You may set the penalty to be imposed at life imprisonment.

It is not required, and it is not necessary, that you find any extenuating or mitigating fact or circumstance in order for you to return a verdict setting the penalty to be imposed at life imprisonment. Whether or not you find any extenuating or mitigating facts or circumstances, you are authorized to fix the penalty in this case at life imprisonment.

If you find from the evidence, beyond a reasonable doubt, the existence in this case of one or more statutory aggravating circumstances as given you in charge by the court, then you would be authorized to recommend the imposition of a sentence of life imprisonment without parole or a sentence of death, but you would not be required to do so.

If you should find from the evidence in this case, beyond a reasonable doubt, the existence of one or more statutory aggravating circumstances as given you in charge by the court, you would also be authorized to sentence the defendant to life imprisonment. You may fix the penalty at life imprisonment, if you see fit to do so, for any reason satisfactory to you or without any reason.

Hawes v. State, 240 Ga. 327 (1977)
Fleming v. State, 240 Ga. 142 (1977)
Davis v. State, 241 Ga. 376(8) (1978)

Romine v. State, 251 Ga. 208(10) (1983)

McPherson v. State, 274 Ga. 444 (2001)

2.15.60 **Death Penalty; Forms of Verdict**

Members of the jury, you may return any one of three verdicts as to penalty in this case: life imprisonment, life imprisonment without parole, or death.

O.C.G.A. §17-10-16(a)

2.15.61 **Death Penalty; Life Imprisonment**

Under Georgia law, "life imprisonment" means that the defendant will be sentenced to incarceration for the remainder of his/her natural life; however, he/she will be eligible for parole during the term of that sentence.

If you decide to impose such a sentence of life imprisonment, you would return a verdict that reads: "We, the jury, fix the sentence at life imprisonment."

2.15.62 **Death Penalty; Life Imprisonment without Parole**

Under Georgia law, "life imprisonment without parole" means that the defendant shall be incarcerated for the remainder of his/her natural life and shall not be eligible for parole.

If you decide to impose a sentence of life imprisonment without parole, you would return a verdict that reads, "We, the jury, find beyond a reasonable doubt that statutory aggravating circumstance(s) do exist in this case."

Then, you would set out in writing the aggravating circumstance(s) that you may find from the evidence in this case to exist beyond a reasonable doubt and upon which I have instructed you. Then, you would fix the sentence at life imprisonment without parole.

O.C.G.A. §17-10-31.1 **(*Note: Although this statute has been repealed, it still applies to cases arising prior to April 29, 2009.*)**

2.15.63 **Death Penalty; Death**

If you decide to impose a sentence of death, you would return a verdict that reads, "We, the jury, find beyond a reasonable doubt that statutory aggravating circumstance(s) do exist in this case."

Then, you would set out in writing such aggravating circumstance(s) that you may find from the evidence in this case to exist beyond a reasonable doubt and upon which I have instructed you. Then, you would fix the sentence at death.

If this is your verdict, then the defendant would be sentenced to be put to death in the manner provided by law.

O.C.G.A. §§17-10-16, 17-10-30, 17-10-31

West v. State, 252 Ga. 156 (1984)

Rhode v. State, 274 Ga. 377 (2001)

2.15.70 **Death Penalty; Expression of Opinion by Court**

Members of the jury, I caution and instruct you that anything the court said or did in its rulings or otherwise at any time during this case was not intended and should not be construed or considered by you as any hint, suggestion, or opinion by the court as to what penalty should be imposed in this case.

Whatever penalty is to be imposed within the limits of the law as I have instructed you is a matter solely for you, the jury, to determine, and if the court has made any remark or done or failed to do any act that may have caused you to believe that the court was expressing any opinion, I instruct you not to consider it, and you should disregard it completely.

2.15.80 **Death Penalty; Retire and Make Up Verdict**

Your verdict as to penalty must be unanimous, and it must be in writing, dated, signed by your foreperson, and returned and read in open court.

The court has prepared for you a paper titled "Verdict as to Penalty," stating the name and style of this case, which contains all of the forms of verdict as to penalty that I have instructed you that you may return in this case. You may, if you care to do so, return your verdict as to penalty, whatever it may be, on this paper by completing the particular form of verdict you wish to return in this case and by having your foreperson date and sign

that particular form of verdict, whichever it may be. The verdict forms listed on this paper that are not used by you should be struck out, or crossed out, by you leaving only the particular form of verdict you decide upon, dated and signed by your foreperson.

Members of the jury, you may now retire and make up your verdict as to penalty.

2.15.90 **Death Penalty; Verdict Form, Sentencing**

IN THE SUPERIOR COURT OF _____ COUNTY
STATE OF GEORGIA

State of Georgia

v. Case No. _____

_____
Defendant

COUNT _____
FINDINGS OF JURY AS TO ALLEGED
STATUTORY (b)(7) AGGRAVATING CIRCUMSTANCES

(Place a check mark in appropriate blank(s).)

___ We, the jury (find beyond a reasonable doubt) (do not find) that the offense of _____ was outrageously or wantonly vile, horrible, or inhuman in that it involved torture of the victim before death.

___ We, the jury (find beyond a reasonable doubt) (do not find) that the offense of _____ was outrageously or wantonly vile, horrible, or inhuman in that it involved depravity of mind of the defendant.

___ We, the jury (find beyond a reasonable doubt) (do not find) that the offense of _____ was outrageously or wantonly vile, horrible, or inhuman in that it involved aggravated battery of the victim before death.

This _____ day of _____, 20__

_____
Foreperson (Signature)

_____
Foreperson (Print Name)

BODILY INJURY AND RELATED OFFENSES

(*Charge only the appropriate language; adapt parentheticals to the indictment and evidence.*)

2.20.10 **Assault, Simple; Generally**

A person commits simple assault when that person (attempts to commit a violent injury to the person of another) (commits an act that places another in reasonable apprehension of immediately receiving violent injury).

(*Note: Misdemeanor punishment.*)

O.C.G.A. §16-5-20

Henderson v. State, 136 Ga. App. 490 (1975)

2.20.11 **Assault, Simple; Reasonable Fear**

(*Give in the second type of assault only.*)

Such an assault is an act that places another in reasonable apprehension or fear of immediately receiving a violent injury. If there is a demonstration of violence with an apparent ability to inflict injury so as to cause the person against whom it is directed to reasonably fear the injury, then the assault is complete, even though the assailant may never have been within actual striking distance.

Reeves v. State, 128 Ga. App. 750 (1973)

2.20.12 **Assault, Simple; Detailed Instruction**

To prove (either type of) assault, there need not be an actual, present ability to commit a violent injury. It is not necessary to show an actual injury or even physical contact with the alleged victim.

Tuggle v. State, 145 Ga. App. 603

(*Note: The assault series of charges have been particularly troublesome over the years. The charge MUST be "tailor made" to the indictment AND the evidence. One of the problems involves the two types of assault. If the indictment charges one type, and the judge charges the jury on the other, there likely will be a reversal. Likewise, if the evidence shows*

one type, and the judge charges on the other, a reversal is likely. There are many possibilities in the various combinations.

Some extended charges had become too broad or too vague and needed to be focused only on their respective assault type. The committee has tried to "compartmentalize" the various extended charges with their respective types of assault. We have done likewise with the various factors that aggravate an assault to a felony. While trying to minimize duplication, we have also tried to make it less likely that a judge will cross over to another section and pick up a charge that applies only to another type of assault or aggravating factor. In short, be careful.

For additional special aggravating circumstances—e.g., assault on the elderly, a correctional officer, student or teacher, past or present spouse, or in a public transit vehicle—address with special charge only if so indicted. Apprendi v. New Jersey, *530 U.S. 466 (2000).*)

2.20.20 **Assault, Aggravated (Intent); Statutory; Extended Definition**

A person commits the offense of aggravated assault when that person assaults another person with intent to (murder) (rape) (rob).

O.C.G.A. §16-5-21(a)(1)

To constitute such an assault, actual injury to the alleged victim need not be shown. It is only necessary that the evidence show, beyond a reasonable doubt that the defendant (attempted to cause a violent injury to the alleged victim) (intentionally committed an act that placed the alleged victim in reasonable fear of immediately receiving a violent injury).

The intent to (murder) (rape) (rob) is a material element of aggravated assault as charged in this case. In deciding the question of intent, you may consider all of the facts and circumstances of the case (as well as the character of the weapon used and the manner in which it was used, if you find that a weapon was used).

(*Define (murder) (rape) (rob) as appropriate. See 2.10.10* et seq., *Murder; 2.30.10, Rape; and 2.60.10, Robbery.*)

2.20.21 **Assault, Aggravated (Weapon); Statutory; Extended Definition**

A person commits the offense of aggravated assault when that person assaults another person (with a deadly weapon) (with any object, device, or instrument that, when used offensively against a person, is likely to or actually does result in serious bodily injury).

To constitute such an assault, actual injury to the alleged victim need not be shown. It is only necessary that the evidence show beyond a reasonable doubt that the defendant (attempted to cause a violent injury to the alleged victim) (intentionally committed an act that placed the alleged victim in reasonable fear of immediately receiving a violent injury).

The State must also prove as a material element of aggravated assault, as alleged in this case, that the assault was made with (a deadly weapon) (an object, device, or instrument that, when used offensively against a person, is likely to or actually does result in serious bodily injury).

O.C.G.A. §16-5-21(a)(2)

2.20.22 **Aggravated Assault; Deadly Weapon; Firearm**

A firearm, when used as such, is a deadly weapon as a matter of law.

Willis v. State, 258 Ga. 477(1)

2.20.23 **Aggravated Assault; Deadly Weapon; Other Weapons**

(*Name implement*), if and when used in making an assault upon another person, is not a deadly weapon per se but may or may not be a deadly weapon depending upon the manner in which it is used and the circumstances of the case.

You may or may not infer the (lethal) (serious injury–producing) character of the instrument in question from the nature and extent of the injury, if any, inflicted upon the person allegedly attacked.

Whether or not, under all of the facts and circumstances of this case, the (*name implement*), alleged in this bill of indictment to have been used in making an assault upon the alleged victim did, in fact, constitute a (deadly) weapon (likely to cause serious bodily injury) is a matter to be decided by the jury from the evidence in this case.

O.C.G.A. §16-5-21(a)(2)

Wells v. State, 125 Ga. App. 579(4) (1972)

Hannah v. State, 125 Ga. App. 596 (1972)

Williams v. State, 127 Ga. App. 386 (1972)

Chafin v. State, 154 Ga. App. 122(5) (1980)

(*Note: For use of fists or other "questionable" weapons, see* Quarles v. State, *130 Ga. App. 756 (1974) and* Williams v. State, *127 Ga. App. 386 (1972).*)

2.20.24 **Aggravated Assault; Deadly Weapon; Proof of Capability**

In deciding whether the alleged instrument was a weapon capable of causing (death) (serious bodily injury), you may consider direct proof of the character of the weapon, any exhibition of it to the jury, evidence of the nature of any wound or absence of wound, or other evidence of the capabilities of the instrument.

Jackson v. State, 56 Ga. App. 374 (1937)

Tanner v. State, 86 Ga. App. 767 (1952)

Wells v. State, 125 Ga. App. 579 (1972)

Hannah v. State, 125 Ga. App. 596 (1972)

2.20.25 **Aggravated Assault; Public Safety Officer**

A person commits the offense of aggravated assault upon a public safety officer when that person knowingly commits aggravated assault (as I have previously defined it) upon an officer while that officer is engaged in, or on account of the performance of, official duties.

"Public safety officer" means (peace officer) (correctional officer) (emergency health worker) (firefighter) (highway emergency response operator) (jail officer) (juvenile correctional officer) (probation officer).

An essential element of the offense of aggravated assault on a public safety officer is that the accused knew that the alleged victim was a public safety officer. This may be shown by evidence of circumstances that would cause a reasonable person to know that the alleged victim was a public safety officer.

(*See 2.44.10, Obstruction of Officer; Felony*)

O.C.G.A. §16-5-21 (c); O.C.G.A. §16-5-19 (9)

Bundren v. State, 247 Ga. 180 (1981)

Chandler v. State, 204 Ga. App. 816, 820 (1992)

Tate v. State, 198 Ga. App. 276(4) (*"on duty" defined*)

2.20.26 **Assault, Aggravated (Strangulation); Statutory; Extended Definition**

A person commits the offense of aggravated assault when that person assaults another person with any object, device, or instrument that, when used offensively against a person, is likely to or actually does result in strangulation.

"Strangulation" means impeding the normal breathing or circulation of blood of another person by applying pressure to the throat or neck of such person or by obstructing the nose and mouth of such person.

To constitute such an assault, actual injury to the alleged victim need not be shown. It is only necessary that the evidence show beyond a reasonable doubt that the defendant (attempted to cause a violent injury to the alleged victim) (intentionally committed an act that placed the alleged victim in reasonable fear of immediately receiving a violent injury).

The State must also prove as a material element of aggravated assault, as alleged in this case, that the assault was made with an object, device, or instrument that, when used offensively against a person, is likely to or actually does result in strangulation

O.C.G.A. §16-5-21(a)(3); O.C.G.A. §16-5-19 (11)

2.22.10 **Battery, Simple; Statutory Definition**

A person commits simple battery when that person either

a) intentionally makes physical contact of an insulting or provoking nature with the person of another or
b) intentionally causes physical harm to another.

O.C.G.A. §16-5-23

2.22.11 **Battery**

A person commits the offense of battery when that person intentionally causes substantial physical harm or visible bodily harm to another. The term "visible bodily harm" means bodily harm capable of being perceived by a person other than the alleged victim and may include, but is not limited to, substantially blackened eyes, substantially swollen lips or other facial or body parts, or substantial bruises to facial or body parts.

O.C.G.A. §16-5-23.1

Carroll v. State, 293 Ga. App. 721 (2008)

2.22.20 **Battery, Sexual**

(*See 2.38.70, Battery, Sexual*)

2.22.30 **Battery, Aggravated**

A person commits the offense of aggravated battery when he or she maliciously causes bodily harm to another by depriving him or her of a member of his or her body, by rendering a member of his or her body useless, or by seriously disfiguring his or her body or a member thereof.

O.C.G.A. §16.5.24(a)

2.22.31 **Battery, Aggravated; Malice Defined**

(*Caution: Use of this charge is best limited to circumstances in which the jury has asked for a definition.*)

Malice is not ill will or hatred. For the purpose of this code section, malice means an actual intent to cause the particular harm produced (that is, bodily harm) without justification or excuse. Malice is also the wanton and willful doing of an act with an awareness of a plain and strong likelihood that such particular harm may result. Intention may be shown by the circumstances connected with the offense.

Brewton v. State, 266 Ga. 160(1) (1996)

Hightower v. State, 256 Ga. App. 793 (2002)

2.24.10 **Terroristic Threats**

A person commits the offense of a terroristic threat when that person threatens to (commit any crime of violence) (release any hazardous substance) (burn/damage property) with the purpose of

a) (terrorizing another) (in reckless disregard of the risk of causing terror) or
b) (causing evacuation of a building, place of assembly, facility of public transportation) or
c) (causing serious public inconvenience) (in reckless disregard of the risk of causing serious public inconvenience);

*(And thereby suggested the death of _____);

*(And such act was done with the intent to (retaliate against any person for) (intimidate or threaten any person from):

Attending a judicial or administrative proceeding as a (see list in code);

Providing information relating to commission of a crime to (see list in code).

No person shall be convicted of a terroristic threat on the unsupported testimony of the party to whom the threat is made.

In that connection I charge you . . . (*Here, the court MUST give PJI Criminal 1.31.90 and 1.31.96 EVEN WITHOUT REQUEST.)*

**Enhanced punishment.*

O.C.G.A. §16-11-37 (b)

2.24.15 **Terroristic Acts**

A person commits the offense of a terroristic act when one

(1) Uses a burning or flaming cross or other burning or flaming symbol or flambeau with the intent to terrorize another or another's household;

(2) While not in the commission of a lawful act, shoots at or throws an object at a conveyance which is being operated or which is occupied by passengers; or

(3) Releases any hazardous substance or any simulated hazardous substance under the guise

of a hazardous substance with the purpose of:

a) (terrorizing another) (in reckless disregard of the risk of causing terror) or

b) (causing evacuation of a building, place of assembly, facility of public transportation) or

c) (causing serious public inconvenience) (in reckless disregard of the risk of causing serious public inconvenience)

*(And _____received a physical injury as a direct result of such act);

*(And such act was done with the intent to (retaliate against any person for) (intimidate or threaten any person from):

Attending a judicial or administrative proceeding as a (see list in code);

Providing information relating to commission of a crime to (see list in code).

**Enhanced punishment.*

O.C.G.A. §16-11-37(c)

2.24.50 **Stalking; Statutory Provision**

A person commits the offense of stalking when that person (follows) (places under surveillance) (contacts) another person at any place other than the defendant's residence without such other person's consent and for the purpose of harassing and intimidating such other person.

"Contact" means any communication and shall be deemed to have occurred where any such communication was received.

"Harassing and intimidating" means a knowing and willful course of conduct directed at a specific person that causes emotional distress by placing such person in reasonable fear for such person's safety or for the safety of a member of such person's immediate family by establishing a pattern of harassing and intimidating behavior and that serves no legitimate purpose. There is no requirement that an overt threat of death or bodily injury has been made.

O.C.G.A. §16-5-90

2.24.55 **Stalking, Aggravated; Statutory Provision**

A person commits the offense of aggravated stalking when that person, in violation of a(n) (*specify type of order or restraint*) (follows) (places under surveillance) (contacts) another person at any place other than the defendant's residence without such other person's consent and for the purpose of harassing and intimidating such other person.

O.C.G.A. §16-5-91

2.26.10 **False Imprisonment**

O.C.G.A. §16-5-41

2.26.11 **False Imprisonment under Color of Legal Process**

O.C.G.A. §16-5-42

2.26.20 **Malicious Confinement of Sane Person**

O.C.G.A. §16-5-43

2.26.30 **Kidnapping; Statutory Provision**

A person commits kidnapping when that person abducts or steals away any person without lawful authority or warrant and holds such person against such person's will.

O.C.G.A. §16-5-40

To prove abduction or stealing away, the State must prove that the victim was moved. The movement of the victim must be more than a mere change of position, and such movement must be more than that which is incidental to or necessary to the completion of another crime.

Garza v. State, 284 Ga. 696 (2008)

Rayshad v. State, 295 Ga. App. 29, 33(1)(b) (2008)

(*Note: This charge was modified in response to* Garza*. The above applies to all cases arising before July 1, 2009, when the General Assembly's amendment to the kidnapping*

statute takes effect. ***For cases arising on or after July 1, 2009, judges should review the current version of O.C.G.A. §16-5-40.***)

2.26.31 Kidnapping; Kidnapping with Bodily Injury

When, during a kidnapping, the person abducted receives any bodily injury, however slight, then that constitutes kidnapping with bodily injury. It is not necessary that the State show that the defendant directly committed, caused, nor even intended the injury to the alleged victim nor that the act of kidnapping directly produced the injury. However, the evidence must show beyond a reasonable doubt that any such injury was caused during a period of and in some way connected to the alleged abduction.

Carter v. State, 268 Ga. App. 688 (2004)
Bailey v. State, 269 Ga. App. 262 (2004)
Green v. State, 193 Ga. App. 894 (1989)

2.26.40 Hijacking a Motor Vehicle; Statutory Provision

O.C.G.A. §16-5-44.1

2.28.10 Custody; Interference with Court Order; Children, Insane or Incompetent Persons, and Other Dependent Persons

A person commits the offense of interference with custody when, without lawful authority to do so, that person

a) knowingly or recklessly takes or entices any child or committed person away from the individual who has lawful custody of such child or committed person;
b) knowingly harbors* any child or committed person who has absconded; or
c) intentionally and willfully retains possession within this state of the child or committed person upon the expiration of a lawful period of visitation with the child or committed person.

(A person commits the offense of interstate interference with custody when without lawful authority to do so that person knowingly or recklessly takes or entices any minor or committed person away from the individual who has lawful custody of the

minor or committed person and in so doing brings the minor or committed person into this state or removes the minor or committed person from this state.)

(A person also commits the offense of interstate interference with custody when the person removes a minor or committed person from this state in the lawful exercise of a visitation right and, upon the expiration of the period of lawful visitation, intentionally retains possession of the minor or committed person in another state for the purpose of keeping the minor or committed person away from the individual having lawful custody of the minor or committed person. The offense is deemed to be committed in the county to which the minor or committed person was to have been returned upon expiration of the period of lawful visitation.)

As used herein

1) "Committed person" means any child or other person whose custody is entrusted to another individual by authority of law.
2) "Child" means any individual who is under the age of 17 or any individual who is under the age of 18 who is alleged to be a dependent child or child in need of services.
3) "Child in need of services" (O.C.G.A. §15-11-2) means

(A) A child adjudicated to be in need of care, guidance, counseling, structure, supervision, treatment, or rehabilitation and who is adjudicated to be:

(i) Subject to compulsory school attendance and who is habitually and without good and sufficient cause truant, as such term is defined in Code Section 15-11-381, from school;

(ii) Habitually disobedient of the reasonable and lawful commands of his or her parent, guardian, or legal custodian and is ungovernable or places himself or herself or others in unsafe circumstances;

(iii) A runaway, as such term is defined in Code Section 15-11-381;

(iv) A child who has committed an offense applicable only to a child;

(v) A child who wanders or loiters about the streets of any city or in or about any highway or any public place between the hours of 12:00 Midnight and 5:00 A.M.;

(vi) A child who disobeys the terms of supervision contained in a court order which has been directed to such child who has been adjudicated a child in need of services;

or

(vii) A child who patronizes any bar where alcoholic beverages are being sold, unaccompanied by his or her parent, guardian, or legal custodian, or who possesses alcoholic beverages; or

(B) A child who has committed a delinquent act and is adjudicated to be in need of supervision but not in need of treatment or rehabilitation.

4) "Dependent child" (O.C.G.A. §15-11-2) means a child who

   a) has been abused or neglected and is in need of the protection of the court;
   b) has been placed for care or adoption in violation of the law; or
   c) is without a parent, guardian, or legal custodian.

5) "Lawful custody" means that custody inherent in the natural parents, pursuant to O.C.G.A. §15-11-133, or awarded to a parent, guardian, or other person by a court of competent jurisdiction.

O.C.G.A. §16-5-45

*(The harboring provision does not apply to a service provider that notifies the child's parent, guardian, or legal custodian of the child's location and general state of well being as soon as possible but not later than 72 hours after the child's acceptance of services; provided, further, that such notification shall not be required if:

(i) The service provider has reasonable cause to believe that the minor has been abused or neglected and makes a child abuse report pursuant to Code Section 19-7-5;

(ii) The child will not disclose the name of the child's parent, guardian, or legal custodian, and the Division of Family and Children Services within the Department of Human Services is notified within 72 hours of the child's acceptance of services; or

(iii) The child's parent, guardian, or legal custodian cannot be reached, and the Division of Family and Children Services within the Department of Human Services is notified within 72 hours of the child's acceptance of services.

"Service provider" means an entity that is registered with the Department of Human Services pursuant to Article 7 of Chapter 5 of Title 49 or a child welfare agency as defined in Code Section 49-5-12 or an agent or employee acting on behalf of such entity or child welfare agency. O.C.G.A. §16-5-45 (4).)

2.28.20 **Cruelty to Children in the First Degree; Deprivation**

A parent, guardian, or other person (supervising the welfare of) (having immediate charge or custody of) a child under the age of 18 commits the offense of cruelty to children in the first degree when that person willfully deprives the child of necessary sustenance to the extent that the child's health or well-being is jeopardized. I instruct you that sustenance is food and drink (which is sufficient to support life and maintain health).

O.C.G.A. §16-5-70 (a)

Everhart v. State, 337 Ga. App. 348 (2016)

State v. Lawrence 262 Ga. 714 (1993)

2.28.21 **Cruelty to Children in the First Degree; Malice**

(Caveat: Under some circumstances, it may be error to refuse to give the lesser included offense of reckless conduct. Shah v. State, 300 Ga. 14 (2016). Also consider cruelty to children in the second degree.)

Any person commits the offense of cruelty to children in the first degree when that person maliciously causes a child under the age of 18 cruel or excessive physical or mental pain.

O.C.G.A. §16-5-70 (b)

Malice is not ill will or hatred. For the purpose of this code section, "malice" means an actual intent to cause the particular harm produced (that is, physical pain) (that is, mental pain) without justification or excuse. Malice is also the wanton and willful doing of an act with an awareness of a plain and strong likelihood that such particular harm may result. Intention may be shown by the circumstances connected with the offense.

Brewton v. State, 266 Ga. 160(1) (1996)

Hightower v. State, 256 Ga. App. 793 (2002)

2.28.22 **Cruelty to Children in the Second Degree**

Any person commits the offense of cruelty to children in the second degree when such person with criminal negligence (*define*) causes a child under the age of 18 cruel or excessive physical or mental pain.

O.C.G.A. §16-5-70(c)

(*See definition of criminal negligence, 1.41.40.*)

2.28.23 Cruelty to Children in the Third Degree

Any person commits the offense of cruelty to children in the third degree when

a) such person, who is the primary aggressor, intentionally allows a child under the age of 18 to witness the commission of a forcible felony, battery, or family violence battery or
b) such person, who is the primary aggressor, having knowledge that a child under the age of 18 is present and sees or hears the act, commits a forcible felony, battery, or family violence battery.

O.C.G.A. §16-5-70(d)

2.28.24 Justifiable; Parental Discipline

A parent is justified in using corporal or physical punishment in order to discipline a minor child, so long as the corporal punishment is reasonable. A parent is not justified in using corporal punishment to discipline a minor child if the corporal punishment maliciously causes the child cruel or excessive physical pain, harm, or injury. If you find from the evidence that the defendant did inflict corporal punishment upon the child in this case, and you further find that it was reasonable and did not cause the child to suffer cruel or excessive physical pain, harm, or injury, then the defendant would be justified, and it would be your duty to acquit the defendant.

When the issue of justification (in the exercise of parental discipline) is raised by the evidence, the burden is on the State to disprove that the defendant was justified.

O.C.G.A. §16-3-20(3)

(*See also item "c" in 3.01.10, Justification; Generally.*)

2.28.25 Manufacturing Methamphetamine with Children Present

Any person who intentionally causes or permits a child under the age of 18 to be present where any person is manufacturing methamphetamine or possessing a chemical substance with the intent to manufacture methamphetamine shall be guilty of the offense of manufacturing methamphetamine with children present.

O.C.G.A. §16-5-73(b) (*See subsection (b)(1) for when child receives serious injury.*)

2.28.50 **Abandonment; Statutory Definition**

If any parent willfully and voluntarily abandons minor children, leaving the children in a dependent condition, the parent shall be guilty of abandonment.

If a parent commits the offense of abandonment as I have defined it and leaves this state, the parent shall be guilty of abandonment, a felony.

A minor child is a child under the age of 18.

A child is considered to be in a dependent condition when the parent charged with abandonment does not furnish sufficient food, clothing, or shelter for the needs of the child.

The fact that the custodial parent (grandparent, welfare, etc.) furnished the sufficient food, clothing, and shelter to meet the needs of the child(ren) is no defense to the charge of abandonment against the parent charged.

O.C.G.A. §19-10-1

2.28.55 **Abandonment; Form of Verdict**

If you believe beyond a reasonable doubt that the defendant in this case is the parent of the child or children (named in this bill of indictment) and you further believe beyond a reasonable doubt that the parent did, in _____ County, Georgia, on or about the _____ day of _____, 20_____, unlawfully (*read from accusation*), then you would be authorized to convict the defendant. In that event, the form of your verdict would be, "We, the jury, find the defendant guilty."

After considering the evidence and the law as given you by the court, if you do not believe the defendant is guilty or if you have any reasonable doubt about the defendant's guilt, then you must acquit the defendant.

Whatever your verdict is, it must be agreed upon by all of you; it must be in writing,

entered on the back of the accusation, which the court will send out with you, dated, signed by one of your members as foreperson, and returned and read into open court.

Members of the jury, you may retire to your jury room to make up your verdict.

O.C.G.A. §19-10-1

(*Note: Two paragraphs have been deleted from this charge due to* Whitman v. State, *212 Ga. App. 523 (1994).*)

SEXUAL OFFENSES

(*Charge only the appropriate language; adapt parentheticals to the indictment and evidence.*)

2.30.10 **Rape; Generally**

(*Three alternative charges based on the age of the victim.*)

(*Be aware of adjustments necessitated by changes in the law: (1) age 14 changed to 16 in July 1995; (2) Under 10 classification, July 1, 1999; and (3) tolling of statute of limitations, O.C.G.A. §17-3-2.1.*)

2.30.11 **Rape; Victim under the Age of 10**

(*Effective for offenses occurring on or after July 1, 1999.*)

A person commits the offense of rape when he has carnal knowledge of a female under the age of 10. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ. The State must also prove beyond a reasonable doubt that the alleged victim was under the age of 10.

O.C.G.A. §16-6-1(a)(2)

2.30.12 **Rape; Victim 10 Years of Age or Older but under the Age of 16**

(If the State fails to prove beyond a reasonable doubt that the alleged victim was under the age of 10 but does prove beyond a reasonable doubt that the alleged victim was under the age of 16, then the offense of rape is defined as follows:)

A person commits the offense of rape when he has carnal knowledge of a female forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ. The law of Georgia provides that a person (not married to the defendant) under the age of 16 is legally incapable of giving consent to sexual intercourse.[*] This means such act would be against the will of the victim. The State must also prove the element of force beyond a reasonable doubt. Force may consist of acts of physical force, threats of harm, or intimidation.

O.C.G.A. §16-6-1(a)(1)

Drake v. State, 239 Ga. 232, 236 S.E.2d 748 (1977)

State v. Collins, 270 Ga. 42, 508 S.E.2d 390 (1998)

**See notes for 2.38.70 Battery, Sexual; 2.30.17 Lack of Consent; Sexual Offenses*

2.30.13 Rape; Victim 16 Years of Age or Older

(If the State fails to prove beyond a reasonable doubt any alleged act of rape at a time when the alleged victim was under the age of 16, then the offense of rape is defined as follows:)

A person commits the offense of rape when he has carnal knowledge of a female forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ. The State must prove each of these elements beyond a reasonable doubt. Force may consist of acts of physical force, threats of harm, or intimidation.

O.C.G.A. §16-6-1(a)(1)

2.30.14 Rape; Serious Bodily Injury, Fear of

The lack of consent on the part of the alleged victim is an essential element of the crime of rape, and the burden of proof is on the State to show a lack of consent on the part of the alleged female victim beyond a reasonable doubt. If the State fails to prove such beyond a reasonable doubt, then you must acquit the defendant. However, consent induced by force, fear, or intimidation does not amount to consent in law and does not prevent the intercourse from being rape. Consent to sexual intercourse obtained through a present or immediate fear of serious bodily injury to the female involved is equivalent to no consent at all.

Mathis v. State, 224 Ga. 816 (1968)

Curtis v. State, 236 Ga. 362(12) (1976)

2.30.15 Rape; Incapacity to Consent

If you believe beyond a reasonable doubt that the defendant did have sexual intercourse with the alleged victim, then you must further decide the issue of consent. If you find that the alleged victim was not mentally capable of exercising judgment or of expressing intelligent

consent or objection to the act of intercourse, then you would be authorized to find the defendant guilty of rape.

If the State fails to prove any of these elements beyond a reasonable doubt, you must acquit.

(*See* Drake v. State, *239 Ga. 232, 236 S.E.2d 748 (1977) and* State v. Collins, *270 Ga. 42, 508 S.E.2d 390 (1998)*)

Paul v. State, 144 Ga. App. 106, 240 S.E.2d 600 (1977)

Brown v. State, 174 Ga. App. 913, 331 S.E.2d 891 (1985)

2.30.17 **Lack of Consent**; **Sexual Offenses**

The lack of consent on the part of the alleged victim is an essential element of the crime of (rape) (aggravated sodomy) (sexual battery) (aggravated sexual battery), and the burden of proof is on the State to show a lack of consent on the part of the alleged victim beyond a reasonable doubt. If the State fails to prove such beyond a reasonable doubt, then you must acquit the defendant. However, consent induced by force, fear, or intimidation does not amount to consent in law and does not prevent the (intercourse from being rape) (sexual act involving the sex organs of one and the mouth or anus of another from being aggravated sodomy) (physical contact from being sexual battery/aggravated sexual battery). Consent to (sexual intercourse) (sexual act involving the sex organs of one and the mouth or anus of another from being aggravated sodomy) (physical contact with the (primary genital area/anus/groin/inner thigh(s)/buttocks) of another person (breast(s) of a female)) obtained through a present or immediate fear of serious bodily injury to the person involved is equivalent to no consent at all.

Mathis v. State, 224 Ga. 816 (1968)

Curtis v. State, 236 Ga. 362(12) (1976)

((The law of Georgia provides that a person (not married to the defendant) under the age of 16 is legally incapable of giving consent to (sexual intercourse) (The law of Georgia provides that a person under the age of 16 is legally incapable of giving consent to a sexual act involving the sex organs of one and the mouth or anus of another) (*Note:*

Lack of consent based upon age inapplicable to cases of Sexual Battery and Aggravated Sexual Battery. See 2.38.70.))

2.32.10 **Sodomy, Aggravated; Generally**

(*Three alternative charges based on the age of the victim.*)

2.32.11 **Sodomy, Aggravated; Victim under the Age of 10**

A person commits the offense of aggravated sodomy when that person (performs) (submits to) a sexual act involving the sex organs of one and the (mouth) (anus) of another, when such act is performed with a person under the age of 10. The State must also prove beyond a reasonable doubt that the victim was under the age of 10.

O.C.G.A. §16-6-2(a) (*effective July 1, 2000*)

2.32.12 **Sodomy, Aggravated; Victim 10 Years of Age or Older but under the Age of 16**

(If the State fails to prove beyond a reasonable doubt that the victim was under the age of 10, but does prove beyond a reasonable doubt that the alleged victim was under the age of 16, then the offense of aggravated sodomy is defined as follows:)

The law provides that a person commits the offense of aggravated sodomy when that person (performs) (submits to) a sexual act involving the sex organs of one and the (mouth) (anus) of another (1) with force and (2) against the will of the victim. The law of Georgia provides that a person under the age of 16 is legally incapable of giving consent to such act. This means that such act would be against the will of the victim. The State must prove the element of force beyond a reasonable doubt. Force may consist of acts of physical force, threats of harm, or intimidation.

(*See* Brewer v. State, *271 Ga. 605, 523 S.E.2d 18 (1999)*)

2.32.13 **Sodomy, Aggravated; Victim 16 Years of Age or Older**

(If the State fails to prove beyond a reasonable doubt any alleged acts of sodomy at a time when the alleged victim was under the age of 16, then the offense of aggravated sodomy is defined as follows:)

A person commits the offense of aggravated sodomy when that person (performs) (submits to) a sexual act involving the sexual organs of one and the (mouth) (anus) of another (1) with force and (2) against the will of the victim. The requirement that the State prove beyond a reasonable doubt that the act of sodomy occurred against the will of the victim means that the act occurred without the consent of the victim. The State must also prove the element of force beyond a reasonable doubt. Force may consist of acts of physical force, threats of harm, or intimidation.

2.32.20 **Sodomy (Committed in Public or in Commercial Transaction)**

A person commits the offense of sodomy when that person (performs) (submits to) a sexual act involving the sex organs of one and the (mouth) (anus) of another if the act (is committed in public) (is committed during a commercial transaction).

Powell v. State, 270 Ga. 327, 510 S.E.2d 18 (1998)

2.34.10 **Child Molestation; after 7/1/95**

(*Note: In cases in which the offense occurred on or after July 1, 1995, give the following charge.*)

A person commits the offense of child molestation when that person does an (immoral) (indecent) act (to) (in the presence of) (with) a child less than 16 years of age with the intent to (arouse) (satisfy) the sexual desires of (the person) (the child).

O.C.G.A. §16-6-4(a)

2.34.20 **Child Molestation; before 7/1/95**

(*Note: In cases in which the offense occurred prior to July 1, 1995, give the following charge.*)

A person commits the offense of child molestation when that person does an (immoral) (indecent) act (to) (in the presence of) (with) a child less than 14 years of age with the intent to (arouse) (satisfy) the sexual desires of (the person) (the child).

2.34.30 **Child Molestation, Aggravated**

A person commits the offense of aggravated child molestation when that person does an (immoral) (indecent) act (to) (in the presence of) (with) a child less than 16 years of age with the intent to (arouse) (satisfy) the sexual desires of (the person) (the child) and the act (physically injures the child) (involves the act of sodomy).

(The act of sodomy is defined as performing or submitting to a sexual act involving the sex organs of one and the mouth or anus of another.)

The State must also prove beyond a reasonable doubt that the child was under the age of 16 at the time of any such act.

O.C.G.A. §16-6-4(c)

Powell v. State, 270 Ga. 327 (1998)

2.34.40 **Enticing a Child for Indecent Purposes; Statutory Definition**

(*Note: In cases in which the offense occurred on or after July 1, 1995, give the following charge.*)

A person commits the offense of enticing a child for indecent purposes when that person solicits, entices, or takes any child under the age of 16 to any place for the purpose of child molestation or indecent acts.

O.C.G.A. §16-6-5

(*Note: In cases in which the offense occurred prior to July 1, 1995, give the following charge.*)

A person commits the offense of enticing a child for indecent purposes when that person solicits, entices, or takes any child under the age of 14 to any place for the purpose of child molestation or indecent acts.

2.36.10 **Statutory Rape; Definition**

(*Two alternative charges based on the date the offense occurred.*)

2.36.11 **Statutory Rape; after 7/1/95**

(*Note: In cases in which the offense occurred on or after July 1, 1995, give the following charge.*)

A person commits the offense of statutory rape when that person engages in sexual intercourse with a person less than 16 years of age who is not that person's spouse. The State must prove beyond a reasonable doubt that on the date alleged in the indictment,

1) there was sexual intercourse, which is defined as a penetration of the female sex organ by the male sex organ; even slight penetration is sufficient to constitute the act of intercourse;
2) the victim was under the age of 16; and
3) the victim was not the spouse of the defendant.

There can be no conviction for this offense on the unsupported testimony of the victim.

O.C.G.A. §16-6-3

2.36.12 **Statutory Rape; before 7/1/95**

(*Note: In cases in which the offense occurred prior to July 1, 1995, give the following charge.*)

A person commits statutory rape when he engages in sexual intercourse with any female under the age of 14, not his spouse, provided that there can be no conviction for this offense on the unsupported testimony of the female. In order to authorize a conviction, the State must prove beyond a reasonable doubt that there was a penetration of the female organ of the alleged victim by the male organ of the defendant. Any penetration is sufficient to constitute the act of intercourse whether the penetration be slight or great, but there must be a penetration. The State must also show beyond a reasonable doubt that on the date alleged in the indictment, the victim was not the spouse of the defendant.

O.C.G.A. §16-6-3

2.36.13 **Statutory Rape; Corroboration of Victim**

Ordinarily, the testimony of a single witness, if believed, is sufficient to establish a fact. There are some exceptions to this rule, and one of these exceptions applies in cases of statutory rape. Under Georgia law, a person cannot be convicted for the offense of statutory

rape upon the unsupported testimony of the child alleged to have been statutorily raped. In that connection, I charge you . . . *(Here, the court MUST give Criminal PJI 1.31.90 and 1.31.96 EVEN WITHOUT REQUEST.)*

O.C.G.A. §16-6-3

O.C.G.A. §24-14-8

Worley v. State, 222 Ga. 319 (1966)

Chambers v. State, 141 Ga. App. 438 (1977)

Byars v. State, 198 Ga. App. 793 (1991)

2.38.10 **Bestiality; Statutory Definition**

O.C.G.A. §16-6-6

2.38.20 **Incest; Statutory Definition**

A person commits incest when that person engages in sexual intercourse or sodomy with a known relative, either by blood or by marriage, as follows:

a) father and child or stepchild;
b) mother and child or stepchild;
c) siblings of the whole blood or of the half blood;
d) grandparent and grandchild of the whole blood or of the half blood;
e) aunt and niece or nephew of the whole blood or of the half blood; or
f) uncle and niece or nephew of the whole blood or of the half blood.

O.C.G.A. §16-6-22

(Define Sodomy; O.C.G.A. §16-6-2)

2.38.30 **Bigamy; Statutory Definition**

O.C.G.A. §16-6-20

2.38.31 **Marrying a Bigamist; Statutory Definition**

O.C.G.A. §16-6-21

2.38.40 Indecency, Public; Generally; Statutory Definition

A person commits public indecency when that person performs any of the following acts in a public place:

a) An act of sexual intercourse.
b) A lewd exposure of the sexual organs.
c) A lewd appearance in a state of partial or complete nudity.
d) A lewd caress or indecent fondling of the body of another person.

O.C.G.A. §16-6-8

2.38.50 Pandering by Compulsion; Statutory Definition

A person commits pandering by compulsion when, by duress or coercion, he causes a female to perform an act of prostitution.

O.C.G.A. §16-6-14

2.38.55 Prostitution; Offenses of Pimping and Pandering of a Minor

O.C.G.A. §§16-6-9, 16-6-14, 16-6-15

2.38.60 Obscene Material; Distribution, Possession for Purpose of; Statutory Definition

A person commits the offense of distributing obscene materials when that person sells, lends, rents, leases, gives, advertises, publishes, exhibits, or otherwise disseminates to any person any obscene material of any description, knowing its obscene nature, or offers to do so, or possesses such material with the intent to do so. The word “knowing,” as used here, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter. A person has constructive knowledge of the obscene contents if that person has knowledge of facts that would put a reasonable and careful person on notice about the suspect nature of the material.

Undeveloped photographs, molds, printing plates, and the like may be deemed obscene.

Material is obscene if

1) to the average person applying contemporary community standards, taken as a whole, it predominantly appeals to the prurient (lewd) interest; that is, a shameful or morbid interest in nudity, sex, or excretion;
2) the material taken as a whole lacks serious literary, artistic, political, or scientific value; and
3) the material depicts or describes in a patently offensive way

    a) acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;
    b) acts of masturbation;
    c) acts involving excretory functions or lewd exhibition of the genitals;
    d) acts of bestiality or the fondling of sex organs of animals; or
    e) sexual acts of flagellation, torture, or other violence indicating a sadomasochistic sexual relationship. Additionally, any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this section.

Material not otherwise obscene may be obscene under this section if the distribution of it, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotic literature or art solely for the sake of its prurient (lewd) appeal.

It is an affirmative defense under this section that dissemination of the material was restricted to

a) a person associated with an institution of higher learning, either as a member of the faculty or an enrolled student, teaching or pursuing a course of study related to such material or
b) a person who was authorized in writing by a licensed medical practitioner or psychiatrist to receive such material.

O.C.G.A. §16-12-80

2.38.70 **Battery, Sexual**

(Note: Actual lack of consent must be proved even for minors. Cannot supply lack of consent by age and inappropriate to so charge FOR SEXUAL BATTERY. Watson v. State*, 297 Ga.*

718 (2) (2015); The Court of Appeals has held that actual lack of consent must also be proved in cases of AGGRAVATED SEXUAL BATTERY. Williams v. State *347 Ga. App. 6 (2018);* Croft v. State, *348 Ga. App. 21 (2018), and* Duncan v. State, *342 Ga. App. 530 (2017))*

A person commits sexual battery when that person intentionally makes physical contact with the (primary genital area/anus/groin/inner thigh(s)/buttocks) of another person (breast(s) of a female) without the consent of the other person.

O.C.G.A. §16-6-22.1

(*Give the following if there is any confusion about the requirement of proof of lack of actual consent):*

Lack of actual consent, not lack of consent implied by age, is a specific element of this crime.

2.38.80 Computer or Electronic Pornography and Child Exploitation; Statutory Definition

A person commits the offense of computer or electronic pornography when that person intentionally or fully

a) (compiles) (enters into) (transmits) by (computer) (other electronic device); or
b) (makes) (prints) (publishes) (reproduces) by (other computer) (other electronic device); or
c) (causes) (allows) to be entered into or transmitted by (computer) (other electronic device); or
d) (buys) (sells) (receives) (exchanges) (disseminates)

any (notice) (statement) (advertisement) (any child's (name) (telephone number) (place of residence) (physical characteristics) (other descriptive or identifying information, to wit: [*specify information*])) for the purpose of (offering) (soliciting)

a) sexual conduct of or with an identifiable child, or
b) the visual depiction of sexual conduct of or with an identifiable child.

(*Define "sexual conduct" as the term is defined in O.C.G.A. 16-12-100.1)*

Note: The above conduct, if proved beyond a reasonable doubt, is nevertheless a misdemeanor if all of the following conditions are satisfied:

a) at the time of the offense, any identifiable child visually depicted was at least 14 years of age when the visual depiction was created;
b) the visual depiction was created with the permission of such child;
c) the defendant possessed the visual depiction with the permission of such child; and
d) the defendant was 18 years of age or younger at the time of the offense and
(1) the defendant did not distribute the visual depiction to another person, or
(2) the defendant's distribution, if any, of said visual depiction to another person was not (for the purpose of harassing, intimidating or embarrassing the minor depicted) (for any commercial purpose).
(Note: this provision applies only when the prosecutor and the defendant have agreed and in the exercise of the court's discretion).

In the event the jury finds the defendant guilty, the Court may want to instruct the jury to make a special finding on a separate verdict form if the above conditions are put in issue by the evidence in the case since such findings distinguish whether the defendant is guilty of a felony or misdemeanor.
Caution: Since permission (i.e., consent) of the child, in addition to other factors enumerated above, will reduce the offense herein to a misdemeanor, an instruction given in conjunction with other offenses that may be charged in the indictment (e.g., rape, aggravated sodomy), to the effect that age can constitute lack of consent, must be carefully limited to those other offenses and not applied to the offense herein. See Watson v. State, *297 Ga. 718 (2015).*

O.C.G.A. 16-12-100.2(a) and (c)

2.38.81 Computer or Electronic Pornography and Child Exploitation; Child Defined; Identifiable Child Defined

As used herein, the term “child” means a person under the age of 16 years.

The term “identifiable child,” means a person who:

a) was a child at the time the visual depiction was created, adapted or modified, or whose image as a child was used in creating, adapting or modifying the visual depiction; and

b) is recognizable as an actual person by the person’s face, likeness, or other distinguishing characteristic (such as a unique birthmark or other recognizable feature), or by electronic or scientific means as may be available.

The State is not required to prove the actual identity of the child.

O.C.G.A. 16-12-100.2(b)

2.38.82 Computer or Electronic Pornography and Child Exploitation; Electronic Device Defined; Visual Depiction Defined

The term “electronic device” is defined as follows:

a) any device used for the purpose of communicating with a child for sexual purposes, or

b) any device used to visually depict a child engaged in sexually explicit conduct, store any image or audio of a child engaged in sexually explicit conduct, or transmit any audio or visual image of a child for sexual purposes.

The term “electronic device” may include, but is not limited to, a computer, cellular phone, thumb drive, video game system, or any other electronic device that can be used in furtherance of exploiting a child for sexual purposes.

The term “visual depiction” means any image, and includes undeveloped film and videotape and data stored on computer disk or by electronic means which is capable of conversion into a visual image or which has been created, adapted or modified to show an identifiable child engaged in sexually explicit conduct.

O.C.G.A. 16-12-100.2(b)

2.38.83 Computer or Electronic Pornography and Child Exploitation; Seduce, Solicit, Lure, or Entice; Statutory Definition

A person commits the offense of computer or electronic pornography when that person (intentionally) (willfully) utilizes a computer wireless service or Internet service or other electronic device to (seduce) (solicit) (lure) (entice) (attempt to [seduce] [solicit] [lure] [entice]):

a) a child under the age of 16 years, or
b) another person believed by the accused to be a child under the age of 16 years, or
c) any person having custody or control of a child under the age of 16 years, or
d) another person believed by the accused to have custody or control of a child under the age of 16 years

to commit any illegal act by, with or against a child under the age of 16 years relating to (the offense of [sodomy] [aggravated sodomy] [child molestation] [aggravated child molestation] [enticing a child for indecent purposes] [public indecency] (conduct that by its nature is an unlawful sexual offense against a child, to wit: [*specify unlawful sexual offense*]).

(Define as appropriate sodomy (2.32.20), aggravated sodomy (2.32.10, et seq.), child molestation (2.34.10, et seq.), aggravated child molestation (2.34.30), enticing a child for indecent purposes (2.34.40), and public indecency (2.38.40)).
Caution: If the indictment alleges, as the basis for charging an illegal act involving a child, the phrase "conduct that by its nature is an unlawful sexual offense against a child," the indictment must include the specific underlying criminal statute that constitutes an "unlawful sexual offense against a child." See Wetzel v. State, 298 Ga. 20, 26-27 (2015).
Note: The above conduct, if proved beyond a reasonable doubt, is a misdemeanor if at the time of the offense the victim was at least 14 years of age and the defendant was 18 years of age or younger.
In the event the jury finds the defendant guilty, the Court may want to instruct the jury to

make a special finding on a separate verdict form if the above condition is put in issue by the evidence in the case since such finding distinguishes whether the defendant is guilty of a felony or misdemeanor.

O.C.G.A. 16-12-100.2(d)

2.38.84 Computer or Electronic Pornography and Child Exploitation; Computer Wireless Service or Internet Service Defined

As used herein, the term "computer wireless service or Internet service" includes but is not limited to a local bulletin board service, Internet chat room, e-mail, or instant messaging service.

O.C.G.A. 16-12-100.2(d)

2.38.85 Obscene Internet Contact with a Child; Statutory Definition

A person commits the offense of obscene internet contact with a child under the age of 16 years when that person has contact with someone he/she (knows to be a child under the age of 16 years) (believes to be a child under the age of 16 years) via a computer wireless service or Internet service, and the contact involves any matter containing explicit verbal descriptions or narrative accounts of (sexually explicit nudity) (sexual conduct) (sexual excitement) (sadomasochistic abuse) that is intended to (arouse) (satisfy) the sexual desire of (the child) (the accused).

(Define as appropriate sexually explicit nudity (see O.C.G.A. 16-12-102), sexual conduct (see O.C.G.A. 16-12-100.1), sexual excitement (see O.C.G.A. 16-12-100.1) and sadomasochistic abuse (see O.C.G.A. 16-12-100.1)).

Note: The above conduct, if proved beyond a reasonable doubt, is a misdemeanor if at the time of the offense the victim was at least 14 years of age and the defendant was 18 years of age or younger.

In the event the jury finds the defendant guilty, the Court may want to instruct the jury to make a special finding on a separate verdict form if the above condition is put in issue by the evidence in the case since such finding distinguishes whether the defendant is guilty of a felony or misdemeanor.

O.C.G.A. 16-12-100.2(e)

2.38.86 **Obscene Internet Contact with a Child; Corroboration of Victim**

Ordinarily, the testimony of a single witness, if believed, is sufficient to establish a fact. There are some exceptions to this rule, and one of these exceptions applies in cases of obscene internet contact with a child. Under Georgia law, a person cannot be convicted for this offense upon the unsupported testimony of the child alleged to have been the victim.

Before you would be authorized to convict the defendant of the offense of obscene internet contact with a child, there must be other evidence, independent of the testimony of the alleged victim, that the offense occurred, and all of the evidence taken as a whole must convince your minds beyond a reasonable doubt as to the guilt of the accused.

It is not required that such supporting evidence shall, in itself, be sufficient to warrant a conviction or that the testimony of the alleged victim be supported in every material particular. Slight evidence from another source may be sufficient support of the testimony of the alleged victim. The sufficiency of the supporting evidence of the testimony of the alleged victim is a matter solely for you to determine.

O.C.G.A. 16-12-100.2(e)

See also *Suggested Pattern Jury Instruction 2.36.13*

2.38.88 **Computer or Electronic Pornography and Child Exploitation; Owner / Operator Liability**

An (owner) (operator) of a (computer online service) (Internet service) (local bulletin board service) (other electronic device) that is in the business of providing a service that may be used to sexually exploit a child under the age of 16 years commits the offense of computer or electronic pornography and child exploitation when that (owner) (operator) (intentionally) (willfully) permits a subscriber to utilize the service to violate (*specify which of code sections 16-12-100.2(a) through (e) is being charged and applies)*, knowing that said subscriber intended to utilize such service to violate this code section.

No owner or operator as described above shall be held liable on account of any action taken in good faith in providing the aforementioned services.

O.C.G.A. 16-12-100.2(f)

DANGEROUS INSTRUMENTALITIES AND PRACTICES

(*Charge only the appropriate language; adapt parentheticals to the indictment and evidence.*)

2.40.10 Firearm; Pointing at Another

A person commits the offense of pointing or aiming a gun or pistol at another when that person intentionally and without legal justification points or aims a gun or pistol at another, whether or not the gun or pistol is loaded.

O.C.G.A. §16-11-102

2.40.20 Firearm, Archery Tackle; Misuse while Hunting; Misdemeanor

A person commits the offense of misdemeanor misuse of a firearm or archery tackle while hunting when that person consciously disregards a substantial and unjustifiable risk that the person's act will harm or endanger the safety of another and that such disregard is a gross deviation from the care exercised by a reasonable person in that situation.

2.40.25 Firearm, Archery Tackle; Misuse while Hunting; Felony

A person commits the offense of felony misuse of a firearm or archery tackle while hunting when that person consciously disregards a substantial and unjustifiable risk that

1) the person's act will harm or endanger another,
2) the disregard is a gross deviation from the care exercised by a reasonable person in that situation, and
3) the conduct results in serious bodily harm to another.

O.C.G.A. §16-11-108

2.40.30 Firearm during Commission of Crime; Possession of

(CAUTION: If the court has instructed the jury by defining a lesser included offense of the predicate offense alleged in this count, which lesser offense is not a felony (such as reckless conduct, pointing a gun, misdemeanor drug possession, etc.) the court MUST alert the jury that the LESSSER OFFENSE IS NOT A FELONY AND WOULD NOT SUPPORT A CONVICTION UNDER THIS COUNT. Aguirre-Gomez v. State, *347 Ga. App. 282 (2018))*

A person commits the offense of possession of a firearm during commission of a crime when the person has on or within arm's reach of his/her person a firearm during the commission of or any attempt to commit a felony, which is

a) any crime against or involving the person of another;
b) the unlawful entry into a building or vehicle;
c) a theft from a building;
d) a theft of a vehicle;
e) any crime involving the (possession) (manufacture) (delivery) (distribution) (dispensing) (administering) (selling) (possession with intent to distribute) a controlled substance;* I charge you that (*name of controlled substance charged in the indictment*) is a controlled substance; or
f) any crime involving the trafficking of cocaine, marijuana, methamphetamine, amphetamine, or methaqualone.

The offense of _____ as alleged in this count is a felony under the laws of this state and is defined (as previously stated) (as follows: _____). (You will recall, however, that the court defined for you a lesser included offense, that is _____ under the offense alleged as a predicate in this count. In that connection, such lesser included offense is not a felony and would not support a conviction for this count of possession of a firearm during commission of a felony.)

O.C.G.A. §16-11-106

* (*Note: Or counterfeit substance as defined in O.C.G.A. §16-13-21 or any noncontrolled substance as provided in O.C.G.A. §16-13-30.1.*)

2.40.40 Knife during Commission of Crime; Possession of

A person commits the offense of possession of a knife during the commission of a crime when the person has on or within arm's reach of his/her person a knife, having a blade of three or more inches in length, during the commission of or any attempt to commit a felony, which is

a) any crime against or involving the person of another;
b) the unlawful entry into a building or vehicle;
c) a theft from a building;
d) a theft of a vehicle;
e) any crime involving the (possession) (manufacture) (delivery) (distribution) (dispensing) (administering) (selling) (possession with intent to distribute) a controlled substance;* I charge you that (*name of controlled substance charged in the indictment*) is a controlled substance; or
f) any crime involving the trafficking of cocaine, marijuana, methamphetamine, amphetamine, or methaqualone.

The offense of _____ is a felony under the laws of this state and is defined (as previously stated) (as follows: _____).

O.C.G.A. §16-11-106

* (*Note: Or counterfeit substance as defined in O.C.G.A. §16-13-21 or any noncontrolled substance as provided in O.C.G.A. §16-13-30.1.*)

(*Note: Punishment is five years to be served consecutively.*)

2.42.00 **Possession of a Firearm by a Convicted Felon**

O.C.G.A. § 16-11-131

(*Note: If the charge of possession of a firearm by a convicted felon is unrelated to another count for which the defendant is to be tried, the court, at the request of the defendant, shall undertake to place the defendant on trial for both charges but shall bifurcate the proceedings in such a manner that the jury shall hear and determine first the more serious charge and under circumstances where the jury is unaware of the pendency of the possession charge. (*Head v. State, *253 Ga. 429, 432 (1984).) If the trial is not bifurcated, the court should give a limiting instruction limiting the use of the prior felony to the appropriate charge / count, and caution against use for any other purpose.* Holsey v. State, *281 Ga. 177, (3)(2006) See PJI Criminal 1.34.00 and 1.34.30.)*

(*Note: "when (1) a defendant's prior conviction is of the nature likely to inflame the passions of the jury and raise the risk of a conviction based on improper considerations, and*

(2) the purpose of the evidence is solely to prove the defendant's status as a convicted felon, then it is an abuse of discretion for the trial court to spurn the defendant's offer to stipulate to his prior conviction and admit the evidence to the jury." Ross v. State, *279 Ga. 365, 368 (2005).*)

A person commits the offense of Possession of a Firearm by (Convicted Felon) (First Offender) when that person (possesses) (receives)(transports) a firearm (after having been convicted of) (while serving a sentence of probation as a First Offender for) the offense of _____, which is a felony.*

Or

A person commits the offense of Possession of a Firearm by (Convicted Felon) (First Offender) when that person (attempts to purchase) (obtain transfer of) a firearm (after having been convicted of) (while serving a sentence of probation as a First Offender for) the offense of (specify forcible felony*)_____, which is a felony.

I further instruct you, that the term "firearm" includes any handgun, rifle, or shotgun (or other weapon which will or can be converted to expel a projectile by the action of an explosive or electrical charge.)

**In lieu of instructing the jury in the charge that the designated offense is a felony or forcible felony, further give the definition of felony or forcible felony as applicable (See PJI Criminal 3.10.11 Forcible; Felony; Definition of; O.C.G.A. §16-1-3(b) (5) and (6); O.C.G.A. §16-11-131 (a) (1)*

2.44.10 **Obstruction of Officer; Felony**

A person commits the offense of obstruction of an officer when that person knowingly and willfully resists, obstructs, or opposes any law enforcement officer (prison guard, jailer, correctional officer, community supervision officer, probation officer, or conservation ranger) in the lawful discharge of official duties by offering to do or doing violence to the person of the officer or legally authorized person.

(*See 2.20.25, Aggravated Assault; Public Safety Officer*)

O.C.G.A. §16-10-24

Hudson v. State, 135 Ga. App. 739 (1975)

Ratliff v. State, 133 Ga. App. 256 (1974)

2.44.20 **Obstruction of Officer; Misdemeanor**

A person commits the offense of obstruction of an officer when that person knowingly and willfully obstructs or hinders a law enforcement officer (prison guard, jailer, correctional officer, community supervision officer, probation officer, or conservation ranger) in the lawful discharge of official duties.

2.44.30 **Obstruction of Officer; Additional Charge**

This offense may be committed by actions that, while not otherwise unlawful, have the effect of obstructing or hindering law enforcement officers while carrying out their duties. This definition does not make criminal any actions that incidentally hinder an officer; the accused must have "knowingly and willfully" obstructed or hindered the officer. Whether or not the actions of the defendant did hinder or impede officers in carrying out their assigned duties is for the jury to decide.

2.44.40 **Obstruction of Officer; Intent**

An essential element of the offense of obstruction of a law enforcement officer is that the accused knew that the alleged victim was a law enforcement officer (prison guard, jailer, correctional officer, community supervision officer, probation officer, or conservation ranger). This element may be shown by evidence of circumstances that would cause a reasonable person to know that the alleged victim was a law enforcement officer.

Chandler v. State, 204 Ga. App. 816, 820 (1992)

2.44.60 **Escape**

A person commits the offense of escape when that person

a) having been convicted of a felony or misdemeanor or of the violation of a municipal ordinance, intentionally escapes from lawful custody or from any place of lawful confinement (while armed with a dangerous weapon);

b) being in lawful custody or lawful confinement prior to conviction, intentionally escapes from such custody or confinement (while armed with a dangerous weapon); or
c) after having been released on the condition that the person will return, intentionally fails to return as instructed to lawful custody or confinement or to any residential facility operated by the Georgia Department of Corrections. A (*specify type of facility*) is a residential facility operated by the Georgia Department of Corrections.

O.C.G.A. §16-10-52

2.48.10 **Bribery; Statutory Definition**

A person commits bribery when that person

a) gives or offers to give to another person acting for or on behalf of the State or any political subdivision or of any agency of either any benefit, reward, or consideration to which the other person is not entitled with the purpose of influencing the other person in the performance of any act related to the functions of the other person's office or employment; or
b) acting for or on behalf of the State or any political subdivision or of any agency of either, solicits or receives any such benefit, reward, or consideration.

O.C.G.A. §16-10-2

2.48.20 **Perjury; Statutory Definition**

A person to whom a lawful oath or affirmation has been administered commits perjury when, in a judicial proceeding, that person knowingly and willfully makes a false statement material to the issue or point in question. In that connection, I charge you . . . *(Here, the court MUST give PJI Criminal 1.31.90 and 1.31.96 EVEN WITHOUT REQUEST.)*

O.C.G.A. §16-10-70

O.C.G.A. §24-14-8.

2.48.25 **False Swearing**

O.C.G.A. §16-10-71

2.48.50 **Disorderly Conduct; False Public Alarm; Statutory Definition**

A person who transmits in any manner a false alarm to the effect that a bomb or other explosive of any nature is concealed in a place that an explosion would endanger human life, knowing at the time that there is no reasonable ground for believing that such a bomb or explosive is concealed in such place, is guilty of transmitting a false public alarm.

O.C.G.A. §16-10-28

ROBBERY

(*Charge only the appropriate language; adapt parentheticals to the indictment and evidence.*)

2.60.10 **Robbery; Statutory Definition**

A person commits robbery when, with intent to commit theft, that person takes property of another from the person or the immediate presence of another (by use of force) (by intimidation) (by use of threat or coercion) (by placing such person in fear of immediate serious bodily injury to that person or to another) (by suddenly snatching).

The essential elements of the offense that the State must prove beyond a reasonable doubt are that the taking was done

1) with the purpose to commit theft,
2) against the will of the person robbed, and
3) by force, by intimidation, by the use of threat or coercion, by placing such person or another in fear of immediate serious bodily injury to himself/herself or another, or by sudden snatching.

O.C.G.A. §16-8-40

(*Note: A person may be deemed to protect all things belonging to that person within an area over which the influence of the person's personal presence extends.*)

Welch v. State, 235 Ga. 243, 246 (1975)

2.60.20 **Force; Defined**

"Force" means personal violence or that degree of force necessary to remove articles from the person or from the clothing of the person so as to create resistance, however slight.

Walker v. State, 225 Ga. 734(2) (1979)

2.60.30 **Robbery, Armed**

A person commits armed robbery when, with intent to commit theft, that person takes property of another from the person or the immediate presence of another by use of an offensive weapon or by any replica, article, or device having the appearance of such a weapon.

O.C.G.A. §16-8-41

2.60.31 **Offensive Weapon; Defined**

An offensive weapon is any object, device, or instrument that, when used offensively against a person, is likely to (or gives the appearance of being likely to) or actually does result in death or serious bodily injury.

The character of a weapon may be established by direct or circumstantial evidence.

Long v. State, 12 Ga. 293, 294 (1852)

Henderson v. State, 209 Ga. 72, 74(1) (1952)

2.60.32 **Robbery by Intimidation; Lesser Included Offense**

If you find present in the case before you all of the elements of armed robbery, but you do not find that an offensive weapon or thing having the appearance of such a weapon was used but that the taking was accomplished by the accused putting the alleged victim (or another) under such fear as would create in the mind of the victim (or another) an apprehension of danger to life or limb, and if you so find beyond a reasonable doubt, then you would be authorized to find the defendant guilty of robbery by intimidation.

O.C.G.A. §§16-8-40, 16-8-41

Johnson v. State, 1 Ga. App. 729, 730 (1907)

(*Note: Robbery by intimidation is a lesser included crime of armed robbery, but it is not necessary to charge on robbery by intimidation when all credible evidence shows the completion of the greater offense of armed robbery, unless so requested.*)

Brock v. State, 232 Ga. 47(2) (1974)

Lawrence v. State, 235 Ga. 216, 219 (1975)

2.60.40 **Robbery by Intimidation**

A person commits robbery by intimidation when, with intent to commit theft, that person takes property of another from the person or the immediate presence of another by putting the alleged victim (or another) under such fear as would create in the mind of the victim (or another) an apprehension of danger to life or limb.

The essential elements of the offense that the State must prove beyond a reasonable doubt are that the taking was done

1) with the purpose to commit theft,
2) against the will of the person robbed, and
3) by creating in the mind of the victim (or another) an apprehension of danger to life or limb.

If you so find these elements to be present beyond a reasonable doubt, you would be authorized to find the defendant guilty of robbery by intimidation.

O.C.G.A. §16-8-40

2.60.50 **Robbery; Recent Possession of Stolen Property**

(*See 2.62.30, Recent Possession of Stolen Goods*)

2.60.60 **Ownership**

(*See 2.64.14, Theft; Owner*)

BURGLARY AND RELATED OFFENSES

(*Charge only the appropriate language; adapt parentheticals to the indictment and evidence.* Bolden v. State*, 335 Ga. App. 653 (2016).*)

2.62.10 Burglary with Intent to Commit Theft

(Give charge in cases where the offense is alleged to have occurred before July 1, 2012.)

A person commits the offense of burglary when, without authority, that person enters (or remains in) any building or dwelling place of another (or into any room or any part of it) with the intent to commit a theft.

To constitute the offense of burglary, it is not necessary that it be shown that a break-in occurred or that an actual theft was accomplished. Intent to commit a theft is an essential element and must be proved by the State beyond a reasonable doubt.

An intent to steal may be shown in many (different) ways, provided you, the jury, believe (beyond a reasonable doubt) that it existed from the proven facts and circumstances before you.

You may infer an intent to steal where the evidence shows an unlawful entry into the building or dwelling place of another where (goods) (valuables) (items of some value) are present/stored or kept inside, and where there is no other apparent (alleged) motive for the entry.

Whether or not you make any such inference is a matter solely within your discretion.

O.C.G.A. §16-7-1

Smith v. State, 130 Ga. App. 390 (1973)

Sandstrom v. Montana, 61 L. Ed.2d 39 (1978)

Craft v. State, 152 Ga. App. 486 (1979)

Jackson v. State, 151 Ga. App. 596 (1979)

Bradshaw v. State, 172 Ga. App. 330 (1984)

Pound v. State, 230 Ga. App. 467 (1990)

Legg v. State, 204 Ga. App. 356 (1992)

2.62.11 **Burglary in the First Degree (Intent to Commit a Theft)**

(Give charge in cases where the offense is alleged to have occurred on or after July 1, 2012.)

A person commits the offense of burglary in the first degree when without authority and with the intent to commit a theft therein that person enters (or remains within) the dwelling of another. For purpose of this law, a dwelling includes any house, building, or structure (vehicle, railroad car, watercraft, aircraft, or other such structure) (or any portion thereof) which is designed or intended for occupancy for residential use. It makes no difference whether the building or structure was occupied, unoccupied, or vacant; however, you may consider occupation status in determining whether or not the structure in question was designed or intended for residential use. *See Intent to Steal—Amplified 2.62.13.*

2.62.12 **Burglary in the Second Degree (Intent to Commit a Theft)**

(Give charge in cases where the offense is alleged to have occurred on or after July 1, 2012.)

(For this crime, there is no need for the State to prove that the place or structure entered is the dwelling place of another.)

A person commits the offense of burglary in the second degree when without authority and with intent to commit a theft therein he or she enters (or remains within) the building (structure, vehicle, railroad car, watercraft, or aircraft) of another. It makes no difference whether the building was occupied, unoccupied, or vacant. *See Intent to Steal—Amplified 2.62.13.*

2.62.13 **Burglary (Intent to Steal—Amplified)**

(Give subsections below as facts may dictate.)

The evidence need not show that an actual theft was accomplished; however, an intent to commit a theft, that is, an intent to steal, is an essential element of burglary as alleged in this indictment.

An intent to steal may be shown in many ways, provided you, the jury, believe (beyond a reasonable doubt) that it existed from the proven facts and circumstances before you.

You may infer an intent to steal where the evidence shows an unlawful entry without authority into the place described in the indictment of another where (goods) (valuables) (items of some value) are present/stored or kept inside and where there is no other apparent (alleged) motive for the entry. Whether or not you make such inference is a matter solely for you, the jury, to determine.

O.C.G.A. §16-7-1(b)

Smith v. State, 130 Ga. App. 390 (1973)

Sandstrom v. Montana, 61 L.Ed.2d 39 (1978)

Craft v. State, 152 Ga. App. 486 (1979)

Jackson v. State, 151 Ga. App. 596 (1979)

Bradshaw v. State, 172 Ga. App. 330 (1984)

Pound v. State, 230 Ga. App. 467 (1990)

Legg v. State, 204 Ga. App. 356 (1992)

2.62.20 **Burglary with Intent to Commit a Felony**

(Give charge in cases where the offense is alleged to have occurred before July 1, 2012.)

A person commits the offense of burglary when, without authority, that person enters (or remains in) any building or dwelling place of another (or into any room or part of it) with the intent to commit a felony.

The offense of _____ constitutes a felony.

_____ is defined under Georgia law as follows:

(*Define the alleged felony.*)

To constitute the offense of burglary, it is not necessary that the alleged felony actually occur (or be accomplished). It is only necessary that the evidence show beyond a reasonable doubt that the accused did, without authority, enter (or remain in) the building or dwelling place of another with the intent to commit the alleged felony.

2.62.21 **Burglary in the First Degree (Intent to Commit a Felony)**

(Give charge in cases where the offense is alleged to have occurred on or after July 1, 2012.)

A person commits the offense of burglary in the first degree when without authority and with the intent to commit a felony therein that person enters (or remains within) the dwelling of another. For purpose of this law, a dwelling includes any house, building, or structure (vehicle, railroad car, watercraft, aircraft, or other such structure) (or any portion thereof) which is designed or intended for occupancy for residential use. It makes no difference whether the building or structure was occupied, unoccupied, or vacant; however, you may consider occupation status in determining whether or not the structure in question was designed or intended for residential use. *See Intent to Commit a Felony—Amplified 2.62.23.*

2.62.22 **Burglary in the Second Degree (Intent to Commit a Felony)**

(Give charge in cases where the offense is alleged to have occurred on or after July 1, 2012.)

(For this crime, there is no need for the State to prove that the place or structure entered is the dwelling place of another.)

A person commits the offense of burglary in the second degree when without authority and with intent to commit a felony therein he or she enters (or remains within) the building (structure, vehicle, railroad car, watercraft, or aircraft) of another. It makes no difference whether the building was occupied, unoccupied, or vacant. *See Intent to Commit a Felony—Amplified 2.62.23.*

2.62.23 **Burglary (Intent to Commit a Felony—Amplified)**

The offense of _____ is a felony and is defined under Georgia law as follows: (*define the alleged felony).*

To constitute the offense of burglary, it is not necessary that the alleged felony actually occur (or be accomplished). It is only necessary that the evidence show beyond a reasonable doubt that the accused did, without authority, enter (or remain in) the place described in the indictment with the intent to commit the alleged felony.

2.62.30 **Recent Possession of Stolen Goods (Burglary, Theft, Robbery)**

If you should find beyond a reasonable doubt that the crime(s) of _____ has (have) been committed as charged in this indictment and that certain personal property (as set forth in this indictment) was stolen as a result of such crime, and if recently thereafter, the defendant should be found in possession of (any of) the stolen property, that would be a circumstance, along with all of the other evidence, from which you may infer guilt as to the charge of _____ as set forth in this indictment. If you find the evidence merits such an inference, you may not draw an inference of guilt if, from the evidence, there is a reasonable explanation of the possession of such property consistent with a plea of innocence, which is a question solely for you, the jury, to determine.

Aiken v. State, 226 Ga. 840, 843 (1970)
Horton v. State, 228 Ga. 690, 691(1) (1972)
Shearer v. State, 128 Ga. App. 809, 812 (1973)
Evans v. State, 138 Ga. App. 460 (1976)
Cosby v. Jones, 682 F.2d 1373 (1982)
Thomas v. State, 274 Ga. 156 (2001)

As to theft by receiving stolen property, however, unexplained possession of recently stolen goods in itself will neither support an inference of guilt nor authorize a conviction of theft by receiving stolen property.

Hilton v. State, 134 Ga. App. 590 (1975)
Shorts v. State, 137 Ga. App. 314 (1976)

2.62.31 **Burglary (Entry—Amplified)**

To constitute the offense of burglary, it is not necessary that it be shown that a break-in occurred. To constitute "entry," the evidence need only show a "breaking of the plane" of the structure alleged by the defendant or by any part of his/her body or by any instrument controlled by him/her.

Mullinnix v. State, 177 Ga. App. 168 (1985)

2.62.40 **Tools Used in Commission of Crime; Possession**

O.C.G.A. §16-7-20

THEFT

(*Charge only the appropriate language; adapt parentheticals to the indictment and evidence.*)

2.64.10 **Theft; Definitions of Terms**

(*See 2.64.11–2.64.15*)

2.64.11 **Theft; Deprive**

"Deprive" means to, without justification, (a) withhold the property of another permanently or temporarily or (b) dispose of the property so as to make it unlikely that the owner will recover it.

2.64.12 **Theft; Financial Institution**

"Financial institution" means a bank, insurance company, credit union, building and loan association, investment trust, or other organization held out to the public as a place of deposit of funds or medium of savings or collective investment.

2.64.13 **Theft; Property of Another**

"Property of another" includes property in which any person other than the accused has an interest (but does not include property belonging to the spouse of an accused or to them jointly).

O.C.G.A. §16-8-1

2.64.14 **Theft; Owner**

"Owner" in this context means a person who has a right to possession of property, which is a right superior to that of a person who takes, uses, obtains, or withholds the property from him/her and upon which the person taking, using, obtaining, or withholding is not privileged to infringe.

O.C.G.A. §16-1-3(10)

(In that connection, ownership may be described in an indictment in the name of the real owner or in the name of the person in lawful possession of the property.

If the property alleged to have been stolen was taken from the lawful possession of the person named in the indictment as the owner, then this would constitute sufficient proof of ownership.)

Morris v. State, 228 Ga. 39, 45 (1971)

2.64.15 **Theft; Asportation or Removal of Property**

In theft cases, the slightest change of location, whereby complete control of the property is transferred from the owner to another, is sufficient evidence of carrying away or removal.

Johnson v. State, 9 Ga. App. 409 (1911)
Parrish v. State, 123 Ga. App. 625 (1971)

Any unlawful carrying away or removal, however slight, is sufficient to show the "taking" element. It is not necessary that property be removed from the premises of the owner.

Stanley v. State, 97 Ga. App. 828 (1958)
Johnson v. State, 9 Ga. App. 409 (1911)
Lundy v. State, 60 Ga. 143 (1878)
Craighead v. State, 126 Ga. App. 300 (1972)

2.64.20 **Theft by Taking; Statutory Definition**

(*Note: For punishment, see 2.64.50, Theft; Generally; Punishment.*)

(*Adapt charge to indictment and evidence, as it is erroneous to charge both methods of taking unless each is separately involved.*)

A person commits theft by taking when

a) that person unlawfully takes any property of another with the intention of depriving the other person of the property, regardless of the manner in which the property is taken or appropriated; or
b) being in lawful possession of any property of another, that person unlawfully appropriates such property with the intention of depriving the other person of the property, regardless of the manner in which the property is taken or appropriated.

O.C.G.A. §16-8-2

Walker v. State, 146 Ga. App. 237, 239 (1978)

Robinson v. State, 152 Ga. App. 296 (1979)

2.64.30 **Theft by Shoplifting**

(*Only the parts of the following charge applicable to the case on trial should be given.*)

A person commits the crime of theft by shoplifting when that person, with the intent of appropriating merchandise for the person's own use without paying for it or to deprive the owner of its possession or of its value, in whole or in part,

a) conceals or takes possession of the goods or merchandise of any store or retail establishment,
b) alters the price tag or other price marking on goods or merchandise of any store or retail establishment,
c) transfers the goods or merchandise of any store or retail establishment from one container to another, or
d) interchanges the label or price tag from one item of merchandise with a label or price tag for another item of merchandise.

In all cases involving theft by shoplifting, the term "value" means the actual retail price of the property at the time and place of the offense. The unaltered price tag or other marking on property or duly identified photographs of it shall be *prima facie* evidence of value and ownership of such property.

O.C.G.A. §16-8-14

2.64.31 **Theft; Recent Possession of Stolen Property**

(*See 2.62.30, Recent Possession of Stolen Goods; 2.70.11, Possession, Legal*)

2.64.40 **Theft by Taking**

(*See 2.64.41–2.64.43*)

2.64.41 **Theft; Value over $500**

(Give charge in cases where the offense is alleged to have occurred before July 1, 2012. The charge applies to alleged violations of O.C.G.A. §§16-8-2 through 16-8-9.)

If you believe beyond a reasonable doubt that the defendant committed the offense of theft by (taking) (receiving) (conversion) (deception) the property of a proven value in excess of $500 that is described in this indictment, the property of _____, then you would be authorized to find the defendant guilty. In that event, the form of your verdict would be, "We, the jury, find the defendant guilty."

Walker v. State, 146 Ga. App. 237, 239 (1978)

Robinson v. State, 152 Ga. App. 296 (1979)

O.C.G.A. §16-8-12(a)(1) *(pre–July 1, 2012 version)*

2.64.42 **Theft; Value of $500 or Less**

(Give charge in cases where the offense is alleged to have occurred before July 1, 2012. The charge applies to alleged violations of O.C.G.A. §§16-8-2 through 16-8-9.)

Should you find the defendant guilty beyond a reasonable doubt in the way and manner I have instructed you, except that you find and believe that the value of the property alleged to have been (taken) (received) (converted) (obtained) did not exceed $500, the form of your verdict would be, "We, the jury, find the defendant guilty of theft by taking property not exceeding $500 in value."

O.C.G.A. §16-8-12(a) *(pre–July 1, 2012 version)*

2.64.43 **Theft by Taking; Value Defined**

When value is an element of an offense, the value that must be proved by the State is "fair market value" of the property at the time of the taking (or receiving).

Fair market value is defined as the price agreed upon by the seller who is willing, but not compelled, to sell and a buyer who is willing, but not compelled, to buy.

(In a theft of retail items from a retail establishment, value is the same as retail price, if shown.)

Brown v. State, 143 Ga. App. 678 (1977)

2.64.44 **Theft; Value of Element Increments for Theft by Taking, Receiving, Deception, and Conversion; Verdict Form**

(Give charge in cases where the offense is alleged to have occurred on or after July 1, 2012. The charge applies to alleged violations of O.C.G.A. §§16-8-2 through 16-8-9.)

(Charge only increments supported by indictment and evidence.)

I have defined for you the offense of theft by _____ (taking) (deception) (conversion) (receiving) as defined in our code (and as alleged in this indictment). Value of the property alleged is an additional element that must be proved by the State. In that connection, I charge that the State must show that the value of the property (which was the subject of the alleged theft) (taken, received, retained, or disposed of by defendant) was ($25,000 or more) ($5,000 or more) ($1,500.01 or more) ($.01 or more, or some value).

O.C.G.A. §16-8-12(a)

Hammett v. State, 246 Ga. App. 287 (4)

The form of your verdict should also include your finding as to value increment supported by the evidence beyond a reasonable doubt:

"We, the jury, find the defendant guilty of theft by_____ (taking) (deception) (conversion) (receiving) valued at ($25,000 or more) ($5,000 or more) ($1,500.01 or more) ($.01 or more, or some value)."

(FOR LESSER INCLUDED THEFT OFFENSES OCCURING ON OR AFTER JULY 1, 2012, the Committee recommends that the judge create a lesser included charge using 1.60.11 as a base charge, with applicable value ranges based upon the agreement of the code and the evidence. O.C.G.A. §16-8-12(a).)

2.64.50 **Theft; Generally; Punishment**

(*See applicable code section*)

(*Note: For punishment in shoplifting cases, see O.C.G.A. §16-8-14.*)

2.64.60 **Theft by Deception; Statutory Definition**

A person commits theft by deception when that person obtains property by any deceitful means or artful practice with the intention of depriving the owner of the property. A person deceives if that person intentionally

a) creates or confirms another's impression of an existing fact or past event that is false and that the accused knows or believes to be false;
b) fails to correct a false impression of an existing fact or past event previously created or confirmed;
c) prevents another from acquiring information pertinent to the disposition of the property involved;
d) sells or otherwise transfers or encumbers property by intentionally failing to disclose a substantial and valid known lien, adverse claim, or other legal impediment to the enjoyment of the property, whether or not such impediment is a matter of official record; or
e) promises performance of services with no intention of performing them or knowing they will not be performed. Evidence of failure to perform in itself shall not be sufficient to authorize a conviction under this subsection.

"Deceitful means" and "artful practice" do not include either falsity as to matters having no monetary significance or puffery in the form of statements that are unlikely to deceive ordinary persons in the group addressed.

O.C.G.A. §16-8-3

2.64.70 **Theft by Extortion; Defined**

A person commits theft by extortion when that person unlawfully obtains property of or from another person by threatening to

a) inflict bodily injury on anyone or commit any other criminal offense;
b) accuse anyone of a criminal offense;
c) disseminate any information tending to subject any person to hatred, contempt, or ridicule or to impair the other person's credit or business repute;
d) take or withhold action as a public official or cause an official to take or withhold action;
e) bring about or continue a strike, boycott, or other collective unofficial action if the property is not demanded or received for the benefit of the group in whose interest the actor purports to act; or

f) testify or provide information or withhold testimony or information with respect to another's legal claim or defense.

2.64.71 **Theft by Extortion; Venue**

In a prosecution under this section, this crime venue is proper and may be proved in the county in which the threat was made or received or in the county in which the property was unlawfully obtained.

2.64.72 **Theft by Extortion; Affirmative Defense**

O.C.G.A. §16-8-16(c)

(*Note: See 3.00.00* et seq. *for Affirmative Defenses.*)

2.64.80 **Theft by Receiving Stolen Property; Knowledge**

A person commits theft by receiving stolen property when that person receives, disposes of, or retains stolen property that the person knows, or should know, was stolen, unless the property is received, disposed of, or retained with the intent to restore it to the owner. "Receiving" means acquiring possession or control or lending on the security of the property.

O.C.G.A. §16-8-7

Knowledge on the part of the defendant that the goods were stolen or evidence sufficient to show beyond a reasonable doubt that the defendant had reason to know that the goods were stolen is an essential element of the offense of theft by receiving stolen property.

Knowledge that the goods were stolen may be shown by circumstances that would excite suspicion in the mind of an ordinary person.

The burden is upon the State to prove beyond a reasonable doubt that the defendant had knowledge or, under all of the circumstances, should have known that the goods in question were stolen and were in the defendant's possession. If there is any reasonable doubt in your mind as to any of the essential elements, then it would be your duty to acquit the defendant.

Nichols v. State, 111 Ga. App. 699 (1965)

Hudgins v. State, 125 Ga. App. 576 (1972)

LaRoche v. State, 140 Ga. App. 509 (1976)

Shorts v. State, 137 Ga. App. 314 (1976)

2.64.90 **Theft by Conversion; Statutory Definition**

A person commits theft by conversion when, having lawfully obtained funds or other property of another under an agreement or other known legal obligation to make a specified application of such funds or a specified disposition of such property, that person knowingly converts the funds or property to the person's own use in violation of the agreement or legal obligation. This definition applies whether the application or disposition is to be made from the funds or property of another or from the person's own funds or property in equivalent amount when the agreement contemplates that the person may deal with the funds or property of another as the person's own.

O.C.G.A. §16-8-4(a)

2.64.91 **Theft by Conversion; Inference; Government or Financial Agent**

(*Note: Give the following charge when applicable.*)

In this context, when an officer or employee of a government or of a financial institution fails to pay on an account, upon lawful demand, from the funds or property of another, you may infer that the officer or employee intended to convert such funds or property to the officer's or employee's own use.

O.C.G.A. §16-8-4(b)

2.64.92 **Theft by Conversion; Inference; Leased or Rental Property**

I charge you that there are circumstances under which you may infer that a person intended to convert personal property to his/her own use in violation of a lease or rental agreement. You may make this inference if you find that the person had personal property in his/her possession or his/her control under a lease or rental agreement and failed to return such personal property within five days after having been sent a letter to his/her last known address by the owner of the personal property demanding a return of the property. The letter must have been sent by certified mail, return receipt requested. In calculating the five days,

Saturdays, Sundays, and holidays are not to be counted. Whether or not you make such inference is a matter for you to decide in light of all of the evidence.

O.C.G.A. §16-8-4(c)

(*Note: O.C.G.A. §16-8-15 provides for special treatment of theft by conversion of payments for property improvements. This section also provides for punishment in such cases.*)

2.64.93 Theft by Conversion (Formerly Embezzlement or Larceny after Trust); Distinguished from Other Theft

Theft by conversion differs from other theft in the following way. In theft by conversion, a thief comes into possession lawfully. In other theft, the property comes into the hands of the thief secretly and unlawfully. In the first example, there is an entrustment; in the second example, there is not. Theft by conversion is what used to be called embezzlement or larceny after trust, while other theft used to be called larceny.

Simmons v. State, 79 Ga. App. 390 (1949)

Partain v. State, 129 Ga. App. 213, 214 (1973)

(*Note: O.C.G.A. §16-8-4, Theft by Conversion, is compared with other statutes in the latter case. Former Ga. Code Ann. §26-2801,* et seq. *(§16-5-70) treated larceny after trust and embezzlement as being practically synonymous.*)

2.65.10 Theft; Defense; Claim of Right

It is a defense to a charge of (theft by taking) (receiving stolen property) that the accused

a) was unaware that the property was that of another or
b) acted under an honest claim of right to the property involved or under a right to acquire or dispose of it.

Should you find from the evidence in this case that the accused acted under such claim of right, as I have just instructed you, then it would be your duty to acquit the defendant. The burden of proof rests upon the State to prove beyond a reasonable doubt that the accused did not act under an honest claim of right to the property and that the accused

was aware that the property was that of another person. If the State fails to prove such beyond a reasonable doubt, then you must acquit the defendant.

O.C.G.A. §16-8-10

DECEPTIVE BUSINESS PRACTICES; FORGERY; CHECK AND CREDIT CARD OFFENSES

(*Charge only the appropriate language; adapt parentheticals to the indictment and evidence.*)

2.66.10 First Degree Forgery; Statutory Definition *(pre–July 1, 2012)*

(Give charge in cases where the offense is alleged to have occurred before July 1, 2012.)

A person commits forgery in the first degree when that person

1) (makes any writing in another person's name or in a fictitious name) (alters or possesses any writing made in the name of another or made in a fictitious name)
    a) with knowledge that the writing is forged and
    b) with intent to defraud another person, and
2) (delivers) (passes) (cashes) (tender) the forged writing to another person.

The burden of proof is upon the State to prove each of these elements beyond a reasonable doubt. If the State fails to prove any element beyond a reasonable doubt, then it would be your duty to acquit the defendant.

O.C.G.A. §16-9-1 *(pre–July 1, 2012)*

Kurtz, *Criminal Offenses in Georgia*, 3d ed. (1991), 214–17

2.66.11 Second Degree Forgery; Statutory Definition *(pre–July 1, 2012)*

(Give charge in cases where the offense is alleged to have occurred before July 1, 2012.)

A person commits forgery in the second degree when that person (makes any writing in another person's name or in a fictitious name) (alters or possesses any writing made in the name of another or made in a fictitious name)

1) with knowledge that the writing is forged and
2) with intent to defraud another person.

The burden of proof is upon the State to prove each of these elements beyond a reasonable doubt. If the State fails to prove any element beyond a reasonable doubt, then it would be your duty to acquit the defendant.

O.C.G.A. §16-9-2 *(pre–July 1, 2012)*

Kurtz, *Criminal Offenses in Georgia*, 3d ed. (1991), 214–17

2.66.12 **Forgery; Authority**

Under the law of Georgia, if one person signs another person's name, with the authority and permission of the person whose name is being signed, this is not forgery. The gist of forgery (in the first degree) is the signing (and delivering) of a document, purporting to be that of another person, with the intent to defraud.

Estes v. State, 169 Ga. App. 685(1) (1984)

Pope v. State, 179 Ga. App. 740, 741(1) (1986)

2.66.13 **Forgery; "Writing"; Definition of**

For the purpose of defining forgery, the word "writing" includes, but is not limited to, printing or any other method of recording information, money, coins, tokens, stamps, seals, credit cards, badges, trademarks, and other symbols of value, right, privilege, or identification.

O.C.G.A. §16-9-3

2.66.14 **Forgery; Knowledge**

Knowledge on the part of the defendant that a particular instrument alleged in the indictment was forged is an essential element of the crime of forgery. Such knowledge may be shown by direct evidence or by circumstances that would excite suspicion in the mind of an ordinarily careful person that such instrument was forged.

The State has the burden to prove such knowledge beyond a reasonable doubt.

Foster v. State, 193 Ga. App. 368, 369–70 (1989)

2.66.15 **Forgery; Intent to Defraud; Necessity of; Proof of**

The intent of the accused to defraud is an essential element of the crime of forgery. As one of the essential elements of the crime, it is the duty of the State to prove that in (*insert indicted action, e.g., writing the name of another person, altering the writing, etc.*) (and in presenting the writing as a genuine document), it was the intent of the accused to defraud

(some particular person). The State must prove beyond a reasonable doubt that the accused intended to defraud.

Chambers v. State, 22 Ga. App. 748, 750 (1918)
Lewis v. State, 180 Ga. App. 890(2) (1986)

2.66.16 **Forgery; Delivery (First Degree Forgery)**

(For offenses on or after July 1, 2012, the crime of First Degree Forgery does not apply to delivery of a check.)

In order for you to convict the defendant of forgery in the first degree, the State must prove to you beyond a reasonable doubt that the defendant delivered a forged writing. This is an essential element of the offense.

To sustain this element of the offense of forgery in the first degree, the State must prove beyond a reasonable doubt that the defendant delivered a forged writing to another person, representing directly or indirectly, by words or conduct, that it was a genuine document.

Blount v. State, 11 Ga. App. 239(2) (1912)
Ward v. State, 123 Ga. App. 216 (1971)
Reeves v. State, 139 Ga. App. 214(1) (1976)
Stone v. State, 166 Ga. App. 245(3) (1983)

2.66.17 **Forgery; Intent to Defraud; Passing Forged Instrument**

If you believe beyond a reasonable doubt that the accused did knowingly and intentionally pass a forged instrument, you may infer, at your discretion, that the accused intended to defraud. Whether or not you so infer is entirely up to you.

Lewis v. State, 180 Ga. App. 890(2) (1986)
Sandstrom v. Montana, 442 U.S. 510 (1979) (*A conclusive mandatory inference is unconstitutional.*)

2.66.18 **First Degree Forgery; Statutory Definition** (*on or after July 1, 2012)*

(Give charge in cases where the offense is alleged to have occurred on or after July 1, 2012.)

A person commits the offense of forgery in the first degree when with the intent to defraud he or she knowingly (makes) (alters) (possesses) any writing, other than a check, (in a fictitious name) (in such manner) that the writing as (made) (altered) purports to have been made (by another person) (at another time) (with different provisions) (by authority of one who did not give such authority) and (utters) (delivers) such writing.

The burden of proof is upon the State to prove each of these elements beyond a reasonable doubt. If the State fails to prove any element beyond a reasonable doubt, then it would be your duty to acquit the defendant.

O.C.G.A. §16-9-1(b)

2.66.19 **Second Degree Forgery; Statutory Definition** (*on or after July 1, 2012)*
(Give charge in cases where the offense is alleged to have occurred on or after July 1, 2012.)

(*Charge only those provisions that are supported by the indictment and evidence.)*

A person commits forgery in the second degree when with the intent to defraud he or she knowingly (makes) (alters) (possesses) any writing, other than a check, (in a fictitious name) (in such manner) that the writing as (made) (altered) purports to have been made (by another person) (at another time) (with different provisions) (by authority of one who did not give such authority). The burden of proof is upon the State to prove each of these elements beyond a reasonable doubt. If the State fails to prove any element beyond a reasonable doubt, then it would be your duty to acquit the defendant.

O.C.G.A. §16-9-1(c)

2.66.20 **Third Degree Forgery; Statutory Definition**
(Give charge in cases where the offense is alleged to have occurred on or after July 1, 2012.)

(*Charge only those provisions that are supported by the indictment and evidence.)*

A person commits forgery in the third degree when with the intent to defraud he or she knowingly:

1) (makes) (alters) (possesses) (utters) (delivers) any check written in the amount of $1,500 or more (in a fictitious name) (in such manner) that the check as (made)

(altered) purports to have been made (by another person) (at another time) (with different provisions) (by authority of one who did not give such authority); or

2) possesses 10 or more checks written without a specified amount (in a fictitious name) (in such manner) that the checks as (made) (altered) purport to have been made (by another person) (at another time) (with different provisions) (by authority of one who did not give such authority).

The burden of proof is upon the State to prove each of these elements beyond a reasonable doubt. If the State fails to prove any element beyond a reasonable doubt, then it would be your duty to acquit the defendant.

O.C.G.A. §16-9-1(d)

2.66.21 Fourth Degree Forgery; Statutory Definition

(Give charge in cases where the offense is alleged to have occurred on or after July 1, 2012.)

(*Charge only those provisions that are supported by the indictment and evidence.)*

A person commits forgery in the fourth degree when with the intent to defraud he or she knowingly:

1) (makes) (alters) (possesses) (utters) (delivers) any check written in the amount of less than $1,500 (in a fictitious name) (in such manner) that the check as (made) (altered) purports to have been made(by another person) (at another time) (with different provisions) (by authority of one who did not give such authority); or

2) possesses fewer than 10 checks written without a specified amount (in a fictitious name) (in such manner) that the checks as (made) (altered) purport to have been made(by another person) (at another time) (with different provisions) (by authority of one who did not give such authority).

The burden of proof is upon the State to prove each of these elements beyond a reasonable doubt. If the State fails to prove any element beyond a reasonable doubt, then it would be your duty to acquit the defendant.

O.C.G.A. §16-9-1(e)

2.66.25 Deposit Account Fraud (Bad Checks; Writing, Delivering, etc.)

O.C.G.A. §16-9-20 (*Note: Charging the* prima facie *evidence provisions of the statute in a criminal case may shift the burden of proof to the defendant and result in reversal. See* Mohamed v. State*, 276 Ga. 706 (2003).*)

Note that the amounts for minimum amounts for treatment of this offense as a high and aggravated misdemeanor and as a felony changed on July 1, 2012. For offenses that are alleged to have occurred prior to this date, see the previous version of O.C.G.A. §16-9-20.

2.66.30 Financial Transaction Card; Statutory Definition

"Financial transaction card," or FTC, means an instrument or device—whether known as a credit card, credit plate, bank services card, banking card, check guarantee card, or debit card or by any other name—issued with or without fee by an issuer for the use of the cardholder in obtaining money, goods, services, or anything else of value. (This definition shall not be construed to include negotiable instruments.)

O.C.G.A. §16-9-30

2.66.32 Financial Transaction Card Fraud; Statutory Definition

A person commits the offense of financial transaction card fraud when—with intent to defraud the issuer; a person or organization providing money, goods, services, or other things of value; or any other person—he/she

a) uses for the purpose of obtaining money, goods, services, or other things of value a financial transaction card or financial transaction card account number that was obtained or retained unlawfully, or that was received with knowledge that it was obtained or retained unlawfully, or a financial transaction card that he/she knows is forged, expired, altered, revoked, or was obtained as a result of a fraudulent application or
b) obtains money, goods, services, or other things of value by representing, without the consent of the cardholder, that he/she is the holder of a specified card; presenting the financial transaction card without the authorization or permission of the cardholder; falsely representing that he/she is the holder of a card and such card has not in fact been issued; or giving, orally or in writing, a financial transaction card account

number to a provider of the money, goods, services, or other things of value for billing purposes without the authorization or permission of the cardholder.

O.C.G.A. §16-9-33

(*Note: The fraud section appears to be the most commonly used provision in the area of illegal use of credit card and, therefore, this is the only section included. Care should be taken to note the definitions contained in O.C.G.A. §16-9-30. Also, it should be remembered that O.C.G.A. §§16-9-31–16-9-39 cover other credit card offenses such as credit card theft, forgery, and illegal possession of forgery devices among others. For punishment, see O.C.G.A. §16-9-38.*)

2.66.50 **Deceptive Business Practice, Engaging in; Statutory Definition**

A person commits a deceptive business practice when, in the regular course of business, that person knowingly

a) uses or possesses for use a false weight or measure or any other device for falsely determining or recording any quality or quantity;
b) sells, offers, exposes for sale, or delivers less than the represented quality or quantity of any commodity; or
c) takes or attempts to take more than the represented quantity of any commodity when, as buyer, furnishing the weight or measure.

(*Note: Misdemeanor punishment.*)

O.C.G.A. §16-9-50

2.66.70 **Fraud in Obtaining Public Assistance**

Any person who, by means of a false statement, failure to disclose information, or impersonation or by other fraudulent device obtains or attempts to obtain, or any person who knowingly or intentionally helps such person in obtaining or attempting to obtain

a) any grant or payment of public assistance, food stamps, or medical assistance (Medicaid) to which that person is not entitled;

b) a larger amount of public assistance, food stamp allotment, or medical assistance (Medicaid) than that entitled; or

c) payment of any forfeited grant of public assistance or any person who, with intent to defraud the Department of Human Resources in buying or in any way disposing of the real property of a recipient of public assistance, shall be guilty of fraud in obtaining public assistance.

O.C.G.A. §49-4-15

NATURAL PRODUCTS, FAILURE TO PAY FOR

2.66.80 Natural Products, Failure to Pay for; Statutory Definition

Any person, either on the person's own account or for others, who buys (*name particular livestock, produce, crops, etc.*) or other products or chattels and who fails or refuses to pay for them or makes way with or disposes of them before paying (unless credit shall have been expressly extended for them) shall be guilty of the offense of failure to pay for natural products or chattels.

O.C.G.A. §16-9-58

2.66.81 Natural Products, Failure to Pay for; Cash Sale

The law I have just quoted covers cash sales only and not credit transactions. You may consider any lapse in time between delivery and payment contemplated by the parties, but that is not necessarily determinative of that issue. Whether a job is for cash or credit is determined by the intention of the parties as may be shown by any agreement, understanding, or other circumstances connected with the transaction. The burden is on the State to show that the transaction was for cash and not for credit.

Wilson v. State, 215 Ga. 775 (1960)
Marshall v. State, 127 Ga. App. 805 (1972)

2.66.82 Natural Products, Failure to Pay for; Check Not Payment until Honored

A check given in payment for the purchase price of goods is not payment until the check is actually paid by the depository upon which it is drawn.

(*Note: Punishment is one to five years.*)

CRIMES AGAINST PROPERTY

(*Charge only the appropriate language; adapt parentheticals to the indictment and evidence.*)

2.68.10 **Arson, First Degree**

O.C.G.A. §16-7-60

2.68.12 **Arson, Second Degree**

O.C.G.A. §16-7-61

2.68.14 **Arson, Third Degree**

O.C.G.A. §16-7-62

2.68.16 **Arson; Presumption of Accidental Cause**

The burden rests upon the State to prove beyond a reasonable doubt that

1) the building described in the indictment (burned) (was damaged by fire),
2) the burning was caused by a criminal act, and
3) the accused was the person doing the burning or was a party to it.

The law presumes every fire to be accidental or naturally caused until the State shall prove beyond a reasonable doubt that such fire was the result of a criminal act. A criminal act will not be presumed, and the burden is upon the State to overcome the presumption that the fire was accidentally or naturally caused by proof of the criminal act beyond a reasonable doubt.

Pulliam v. State, 196 Ga. 782 (1943)
Randall v. State, 3 Ga. App. 653 (1908)
Grimes v. State, 79 Ga. App. 489 (1949)
Riddings v. State, 125 Ga. App. 334 (1972)

2.68.20 **Criminal Damage to Property in the First Degree**

O.C.G.A. §16-7-22

2.68.22 **Criminal Damage to Property in the Second Degree**

O.C.G.A. §16-7-23

2.68.24 **Criminal Damage to Property; Value**

The burden of proof is on the State to prove that the damage, if any, exceeded $500. In that connection, the damage to be determined is the difference between the fair market value of the alleged property immediately before the damage and the fair market value of the alleged property after the damage, if any.

2.68.26 **Interference with Government Property**

O.C.G.A. §16-7-24

2.68.30 **Criminal Trespass; Damage; Interference**

A person commits the offense of criminal trespass when that person

a) intentionally damages any property of another person without that person's consent, and the damage to it is $500 or less or
b) knowingly and maliciously interferes with the possession or use of the property of another person without that person's consent.

O.C.G.A. §16-7-21(a)

2.68.32 **Criminal Trespass; Entering or Remaining**

A person commits the offense of criminal trespass when that person knowingly and without authority

a) enters upon the land or premises of another person or into any part of any vehicle, railroad car, aircraft, or watercraft of another person for an unlawful purpose;
b) enters upon the land or premises of another person or into any part of any vehicle, railroad car, aircraft, or watercraft of another person after receiving, prior to entry, notice from the owner, rightful occupant, or, upon proper identification, an authorized representative of the owner or rightful occupant that entry is forbidden; or

c) remains upon the land or premises of another person or within the vehicle, railroad car, aircraft, or watercraft of another person after receiving notice from the owner, rightful occupant, or, upon proper identification, an authorized representative of the owner or rightful occupant to depart.

O.C.G.A. §16-7-21(b)

2.68.34 **Criminal Trespass; Failure or Refusal to Leave**

A person commits the offense of criminal trespass when, while lawfully upon the property or within the vehicle, railroad car, aircraft, or watercraft of another, that person refuses to leave after being requested to do so by the owner or lawful occupant.

O.C.G.A. §16-7-21(b)(3)

The State must prove beyond a reasonable doubt that

1) a request was made by the property owner or lawful occupant that the defendant leave and
2) the defendant refused or failed to leave after the request was made.

A person, when rightfully ordered to leave a building by one in charge of the premises, is entitled to be allowed such time as is necessary to enable the person to exit from the room or building that he/she is ordered to vacate.

Hollis v. State, 13 Ga. App. 307 (1913)

2.68.40 **Ownership**

(*See 2.64.14, Theft; Owner*)

DRUGS

(*Charge only the appropriate language; adapt parentheticals to the indictment and evidence.*)

2.70.10 **Drug Possession; Sale, Manufacture, with Intent to Distribute, etc**.

The offense charged in this indictment is violation of the Georgia Controlled Substances Act, which provides that it is unlawful for any person to

a) (purchase) (possess, or have under one's control) or
b) (manufacture) (sell) (deliver) (possess with intent to distribute) (distribute) (administer) (dispense)

any quantity of _____, which is a controlled substance (except as authorized in this law).

O.C.G.A. §§16-13-30(a), 16-13-30(b)

Definitions: (*Note: Define any of the terms used in the indictment.*)

1) "Manufacture" means, among other things, preparation, propagation, processing and production that includes planting, cultivation, growing, or harvesting.

   O.C.G.A. §§16-13-21(15), 16-13-21(24).

2) "Deliver" means the actual, constructive, or attempted transfer of a controlled substance from one person to another, whether or not there is an agency relationship.

   O.C.G.A. §16-13-21(7).

3) "Distribute" means to deliver a controlled substance (other than by administering* or dispensing* it).

   O.C.G.A. §16-13-21(11).

   *(Note: *If applicable, define terms from code as well as "practitioner," etc. O.C.G.A. §16-13-21(1), (9), and (23).)*

4) "Intent to distribute" means intent to unlawfully deliver or sell.
5) "Sell" means to transfer property, actually or constructively, for consideration either in money or its equivalent.

Black's Law Dictionary

Wade-Corry v. Mosley, 233 Ga. 474

6) "Marijuana" means all parts of the marijuana plant of the genus cannabis, whether growing or not, the seeds thereof, the resin extracted from any part of such plant and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin. Marijuana does not include the completely defoliated mature stalks of such plant; fiber, oil, or cake produced from such stalks; or the completely sterilized samples of seeds of the plant that are incapable of germination.

O.C.G.A. §16-13-21(16)

(Marijuana does not include samples of tetrahydrocannabinols, a Schedule I violation.)

O.C.G.A. §16-13-25(3)(P)

2.70.11 **Possession, Legal**

Only the "ultimate user" to whom or for whose use a controlled substance has been lawfully prescribed, sold, or dispensed by a registered practitioner (i.e., physician, dentist, veterinarian, or pharmacist) (or who is in lawful possession of a Schedule V substance) may possess it (and only in dosages not exceeding quantities prescribed or dispensed). The term "ultimate user" means a person who lawfully possesses a (controlled substance) (regulated Schedule V substance) for (his/her own use) (use by a member of his/her household) (administering to an animal owned by him/her or by a member of his/her household). (It also includes an agent or representative of such person.) When the issue of lawful possession is raised by the evidence, the State must prove beyond a reasonable doubt that the accused was not in lawful possession of the substance.

(*Note: There are very rare cases in which someone other than the ultimate user is in legal possession of a prescribed controlled substance; see code section; the charge fits almost every prescription drug case.*)

O.C.G.A. §§16-13-21(23), 16-13-21(28), 16-13-35(c)(3)

2.72.10 Selling or Dispensing

Only physicians, dentists, veterinarians, and pharmacists are authorized to prescribe and dispense controlled substances. No other individuals are authorized to sell or dispense any controlled substance.

Green v. State, 129 Ga. App. 27, 28 (1973)

Bloodworth v. State, 129 Ga. App. 40 (1973)

2.74.00 Trafficking

The offense charged in this indictment is a violation of the Georgia Controlled Substances Act. This act provides in part as follows:

2.74.10 Trafficking Marijuana

2.74.20 Trafficking Cocaine (mixture not alleged or not proved)

2.74.23 Weight/Mixture Caveat

2.74.25 Trafficking Cocaine Mixture

2.74.27 Cocaine; Purity

2.74.30 Trafficking Heroin (Morphine or Opium)

2.74.40 Trafficking Methaqualone

2.74.50 Trafficking Methamphetamine

2.74.53 Trafficking Methamphetamine (Manufacturing)

2.74.60 Trafficking 3,4-Methylenedyoxyamphetamine or 3,4-Methylenedyoxymethamphetamine

2.74.70 Weight

2.74.10 Trafficking Marijuana

Note: For offenses allegedly occurring on or after July 1, 2013, knowledge is not an essential element of this offense.

Any person who (*knowingly*) sells, manufactures, grows, delivers, brings into this state, or has possession of a quantity of marijuana exceeding (10)* (2,000) (10,000) pounds commits the offense of trafficking in marijuana.

* (*Note: Amended to 10 lbs from 50 lbs in 2003.*)

2.74.20 **Trafficking Cocaine (mixture not alleged or not proved)**

Note: For offenses allegedly occurring on or after July 1, 2013, knowledge is not an essential element of this offense.

Any person who (*knowingly*) sells, delivers, or brings into this state or who is knowingly in possession of (28) (200) (400) grams or more of cocaine commits the offense of trafficking in cocaine. Weight is calculated by multiplying the percentage of cocaine, if proved, by the total weight of the substance. As with all other elements of the prosecution, the State has the burden of proving weight.

O.C.G.A. §16-13-31(a)(1)

(*Note: Confirm current statutory weight; see 2.74.23, Weight/Mixture Caveat.*)

2.74.23 **Weight/Mixture Caveat** (*for judge only*)

(*Note the following:*

1) *For any drug OTHER THAN COCAINE, the State may prove the weight of the substance in question by showing the gross weight of any mixture that contains the alleged drug, regardless of the percentage purity of the drug, BUT ONLY IF THE INDICTMENT CHARGES POSSESSION OF "A MIXTURE CONTAINING. . . ."*
2) *If not indicted for possession of a mixture as stated above, weight is shown by proving the NET weight of the drug (i.e., the percentage of drug in the sample multiplied by the weight of the sample). Do not charge on "mixture" for ANY drug unless indicted for mixture.*
3) *Cocaine is unique in that purity of the mixture is an issue. Where percentage purity of cocaine is not alleged or not proven to be 10 percent or greater, calculate weight as in "2" above.*
4) *Where percentage purity of cocaine in the substance is alleged AND proven to be 10 percent or greater, the State may prove gross weight of the mixture.*

Hill v. State, 253 Ga. App. 658 (2002) (*charge problem*)
Barnett v. State, 204 Ga. App. 491 (1992) (*indictment problem*)

5) *Where the weight or quantity of the drug is an essential element of the crime, the State is not required to prove that the Defendant had knowledge of the weight or quantity of the drug for offenses alleged to have occurred on or after July 1, 2013. OCGA 16-13-54.1.*

2.74.25 **Trafficking Cocaine Mixture**

Note: For offenses allegedly occurring on or after July 1, 2013, knowledge is not an essential element of this offense.

Any person who (*knowingly*) sells, delivers, or brings into this state or who is knowingly in possession of (28) (200) (400) grams or more of cocaine or of any mixture with a purity of 10 percent or more of cocaine commits the offense of trafficking in cocaine.

O.C.G.A. §16-13-31(a)(1)

2.74.27 **Cocaine; Purity**

(*Charge only when indicted for mixture.*)

One of the elements of this offense is that the cocaine alleged was of a purity of 10 percent or more. As to this element of the offense, the State likewise has the burden of proof. If you should find that the defendant is otherwise guilty but are not convinced beyond a reasonable doubt that the mixture involved was 10 percent or more of pure cocaine, then the form of your verdict would be, "We find the defendant guilty, less than 10 percent purity."

2.74.30 **Trafficking Heroin (Morphine or Opium)**

Note: For offenses allegedly occurring on or after July 1, 2013, knowledge is not an essential element of this offense.

Any person who (*knowingly*) sells, manufacturers, delivers, or brings into this state or has possession of (4) (14) (28) grams or more of any heroin, morphine, or opium; or any salt, isomer, or salt of an isomer thereof; or (4) (14) (28) grams or more of any mixture containing any such substance commits the offense of trafficking in illegal drugs.

O.C.G.A. §16-13-31(b)

(*Note: Confirm current statutory weight; see 2.74.23, Weight/Mixture Caveat.*)

2.74.40 **Trafficking Methaqualone**

Note: For offenses allegedly occurring on or after July 1, 2013, knowledge is not an essential element of this offense.

Any person who (*knowingly*) sells, manufactures, delivers, or brings into this state (200) (400) grams or more of methaqualone or (200) (400) grams or more of any mixture containing any methaqualone commits the offense of trafficking in methaqualone.

O.C.G.A. §16-13-31(d)

(*Note: Confirm current statutory weight; see 2.74.23, Weight/Mixture Caveat.*)

2.74.50 **Trafficking Methamphetamine**

Note: For offenses allegedly occurring on or after July 1, 2013, knowledge is not an essential element of this offense.

Any person who (*knowingly*) sells, delivers, brings into this state, or has possession of (28) (200) (400) grams or more of methamphetamine, amphetamine, or any mixture containing either methamphetamine or amphetamine commits the offense of trafficking in methamphetamine.

O.C.G.A. §16-13-31(e)

(*Note: Confirm current statutory weight; see 2.74.23, Weight/Mixture Caveat.*)

2.74.53 **Trafficking Methamphetamine; Manufacturing**

Note: For offenses allegedly occurring on or after July 1, 2013, knowledge is not an essential element of this offense.

Any person who (*knowingly*) manufactures (any quantity) (200) (400) grams or more of methamphetamine, amphetamine, or of any mixture containing either methamphetamine or amphetamine commits the offense of trafficking in methamphetamine.

O.C.G.A. §16-13-31(f)

(*Note: Confirm current statutory weight; see 2.74.23, Weight/Mixture Caveat.*)

2.74.60 Trafficking 3,4-Methylenedyoxyamphetamine or 3,4-Methylenedyoxymethamphetamine

Note: For offenses allegedly occurring on or after July 1, 2013, knowledge is not an essential element of this offense.

Any person who (*knowingly*) sells, manufactures, delivers, brings into this state or has possession of (28) (200) (400) grams or more of 3,4-Methylenedyoxyamphetamine or 3,4-Methylenedyoxymethamphetamine or (28) (200) (400) grams or more of any mixture containing any 3,4-Methylenedyoxyamphetamine or 3,4-Methylenedyoxymethamphetamine commits the offense of trafficking in 3,4-Methylenedyoxyamphetamine or 3,4-Methylenedyoxymethamphetamine.

O.C.G.A. §16-13-31.1

(*Note: Confirm current statutory weight; see 2.74.23, Weight/Mixture Caveat.*)

2.74.70 Weight

One of the elements of this offense is that the amount of (marijuana) (cocaine/mixture of 10 percent or more purity cocaine) (methamphetamine) (methaqualone) (illegal drugs) (opium/morphine/heroin) possessed was (over one ounce) (_____ grams/ounces/pounds) or more. As to that element, the State likewise has the burden of proof.

If you should believe that the defendant is otherwise guilty but are not convinced beyond a reasonable doubt that the amount of _____ was as alleged in the indictment, then the form of your verdict would be, "We find the defendant guilty, less than _____."

(*Note: See* Stoneaker v. State*, 236 Ga. 1 (1976) for lesser included charges.*)

2.76.10 Possession of Drugs, Narcotics, etc.; Joint, Several, Actual, and Constructive

The law recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing at a given time is in actual possession of it. A person who, though not in actual possession, knowingly has both the power and the intention at a given time to exercise authority or control over a thing is in constructive possession of it.

The law also recognizes that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint. You would be authorized to convict only if you should find, beyond a reasonable doubt, that the defendant had actual or constructive possession, either alone or jointly with others.

Lee v. State, 126 Ga. App. 38 (1972)

2.76.20 **Equal Access**

If you determine from the evidence that persons other than the defendant had equal opportunity to possess or to place the articles of contraband upon the described premises, then you must acquit the defendant, unless it is shown beyond a reasonable doubt that the defendant knowingly possessed the contraband or shared possession or control with another person and helped or procured the other person in possessing and having control of the contraband.

Gee v. State, 130 Ga. App. 634, 636 (1974)

2.76.30 **Premises; Inference of Possession**

If you find that a person owns or is the lessee of a house or premises, you will be permitted, but not required, to infer that such person is in possession of the entire premises and all of the property located on or in the premises. However, this is a rebuttable inference and may be overcome by evidence in the case that others had access to the premises. Whether or not this inference is drawn from proof that a person is the owner or the lessee of a house or premises and whether or not the inference has been overcome by proof that others had access to the premises are questions for the jury alone. I further charge you in that connection that if you find that the house or premises were used by others, with the defendant, such evidence would not alone authorize a conviction. However, such a fact, if it is a fact, should be considered by you, the jury, together with all of the evidence in the case in passing upon the guilt or innocence of the defendant.

Knighton v. State, 248 Ga. 199, 200 (1981)

TRAFFIC AND VEHICULAR OFFENSES

(*Charge only the appropriate language; adapt parentheticals to the indictment and evidence.*)

2.80.10 Habitual Violator

It is unlawful for any person to operate any motor vehicle in this state after the person has received notice from the Department of Public Safety that the person's driver's license has been revoked because the department has determined that the person is a habitual violator of the Uniform Rules of the Road and other laws governing the operation of motor vehicles and the person, after receipt of notice from the department, has not obtained a valid driver's license.

(*Note: Punishment is one to five years or a fine of not less than $750, or both (O.C.G.A. §40-5-58(c)).* Nolo *plea shall be considered a conviction, with same penalty.*)

2.82.10 Homicide by Vehicle in the First Degree

A person commits the offense of homicide by vehicle in the first degree when, without malice aforethought, that person

a) causes the death of another person by driving any vehicle in such a manner as to be in reckless disregard for the safety of persons or property (O.C.G.A. §40-6-390);
b) causes the death of another person by driving or being in actual physical control of any moving vehicle while under the influence of alcohol (or any drug) to a degree that renders the person incapable of safely driving (O.C.G.A. §40-6-391);
c) causes the death of another person while driving a vehicle, and at such time willfully fails or refuses to bring the vehicle to a stop or otherwise flees or attempts to elude a pursuing police vehicle when a visual or an audible signal is given by a police officer to bring the vehicle to a stop and this signal is given by a police officer in uniform prominently displaying the badge of office and the vehicle is appropriately marked to show it to be an official police vehicle; the signal may be given by hand, voice, emergency light, or siren (O.C.G.A.§40-6-395(a));
d) is the driver of a vehicle who causes an accident which causes the death of any person, and leaves the scene of the accident, and

1) fails to give his/her name and address and the registration number of the vehicle driven;
2) upon request, and if it is available, fails to exhibit his/her operator's license to the person struck or the driver or occupant of or the person attending any vehicle collided with;
3) fails to render to any person injured in such accident reasonable assistance, including the carrying or the making of arrangements for the carrying of such person to a physician, surgeon, or hospital for medical or surgical treatment, if it is apparent that such treatment is necessary or if such carrying is requested by the injured person; or
4) where a person injured in such accident is unconscious, appears deceased, or is otherwise unable to communicate, fails to make every reasonable effort to ensure that emergency medical services and local law enforcement are contacted for the purpose of reporting the accident and making a request for assistance. (O.C.G.A. §40-6-270);

e) causes the death of another person by operating a motor vehicle after having been declared a habitual violator under the provisions of O.C.G.A. §40-5-58 and while such person's license is in revocation;* or
f) causes the death of another person by failing to stop a vehicle before reaching a school bus when meeting or overtaking from either direction a school bus stopped on the highway and displaying proper visual signals (O.C.G.A. §40-6-163).

* (*Note: Penalty is 5 to 20 years; see 2.80.10, Habitual Violator*.)

O.C.G.A. §40-6-393

2.82.20 **Homicide by Vehicle in the Second Degree; Misdemeanor**

Whoever shall cause the death of another person, without any intention to do so, by violating O.C.G.A. Title 40, Chapter 6 (*other than §§40-6-163(a), 40-6-270(b), 40-6-390, 40-6-391, or 40-6-395*), shall be guilty of homicide by vehicle in the second degree when such violation is the cause of said death.

O.C.G.A. §40-6-_____ provides as follows:

(*Read code section.*)

(*See 2.86.70, Speeding (O.C.G.A. §§40-6-180, 40-6-181).*)

(*See 2.88.19, Stop Sign (O.C.G.A. §40-6-72).*)

O.C.G.A. §40-6-393(b)

2.82.30 **Homicide; Contributing to Death**

(*See 2.10.60, Homicide; Contributing to Death*)

2.84.10 **Driving under the Influence; Alcohol; Less Safe; General Charge**

It shall be unlawful for any person while under the influence of alcohol to drive or be in actual physical control of any moving vehicle anywhere within this state. A driver or operator of a motor vehicle is under the influence of alcohol when the person is affected by alcohol to the extent that it is less safe for the person to drive than it would be if the person were not affected by alcohol. A driver who is less safe is less efficient, less skillful, less coherent, less able, less qualified, and less proficient.

In deciding this issue, you may consider anything in the evidence that you find relevant in deciding whether defendant was a less safe driver. Specifically as to consumption of alcohol, you may consider, among other factors, the smell or lack of smell of alcoholic beverages on the defendant's breath and/or his/her person and whether any test indicated the presence of alcohol in the defendant's system. As to whether the defendant was less safe to drive, you may consider the factors you deem relevant, including, but not limited to, the actual manner of driving the motor vehicle; the defendant's control of his/her mental and/or physical abilities; the defendant's demeanor; the physical condition of defendant; and any expert testimony. Merely showing that the defendant had been drinking or that there was the smell of alcohol on the defendant's breath or person without proof of the manner of driving or the ability to drive is insufficient to prove that the defendant was guilty of driving under the influence of alcohol.

O.C.G.A. §40-6-391(a)(1)

Turner v. State, 95 Ga. App. 157 (1957)

Smith v. State, 202 Ga. App. 701, 702 (1992)

Anderson v. State, 226 Ga. 35, 36–37(3) 1970)

Cadden v. State, 176 Ga. App. 377, 378(2) (1985)

2.84.11 **Driving under the Influence; Chemical Analysis; Inferences**

If you should find from the evidence in this case that, at the time of the alleged offense, the defendant's alcohol concentration, as shown by a chemical analysis of his/her blood, breath, or urine or other bodily substances, was 0.05 grams or less, you may infer that the defendant was not under the influence of alcohol. Whether or not you make such inference is a question for you to decide.

If you should find from the evidence in this case that, at the time of the alleged offense, the defendant's alcohol concentration, as shown by a chemical analysis of his/her blood, breath, or urine or other bodily substances, was in excess of 0.05 grams but less than 0.08 grams at the time of the alleged offense, (such fact shall not give rise to any inference that the defendant was or was not under the influence of alcohol, but) such fact may be considered along with any other evidence in determining whether or not the defendant was under the influence of alcohol to the extent that it was less safe for the defendant to drive than it would have been if the defendant were not affected by alcohol.

O.C.G.A. §40-6-392(b)(2)

2.84.12 **Driving under the Influence; Per Se Violation; 0.08 Grams Alcohol**

It shall be unlawful for any person to drive or be in actual physical control of any moving vehicle while there is an alcohol concentration of 0.08 grams or more in the person's blood at any time within three hours after driving or being in actual physical control of a moving vehicle from alcohol consumed before such driving or physical control ended.

O.C.G.A. §§40-6-391(a)(5), 40-6-392(c)(1)

(*Note: Substitution of 0.08 for 0.10 effective July 1, 2001*.)

2.84.13 Driving under the Influence; Per Se Violation; Persons under 21 Years of Age

It is unlawful for any person under the age of 21 to drive or be in actual physical control of any moving vehicle while there is an alcohol concentration of 0.02 grams or more in the person's blood at any time within three hours after driving or being in actual physical control of a moving vehicle from alcohol consumed before such driving or physical control ended.

O.C.G.A. §§40-6-391(k), 40-6-392(c)(3)

2.84.14 Driving under the Influence; Per Se Violation; Commercial Vehicles

It is unlawful for a person to be in actual physical control of any moving commercial motor vehicle while there is 0.04 percent or more by weight of alcohol in that person's blood, breath, or urine.

(*Note: There is no time reference in this portion of the statute.*)

O.C.G.A. §§40-6-391(i), 40-6-392(c)(2)

2.84.20 Driving under the Influence; Refusal; Implied Consent

Any person who operates a motor vehicle upon the highways or elsewhere throughout this state shall be deemed to have given consent, subject to the police officer's compliance with the laws of this state, to a chemical test or tests of his or her blood, breath, urine, or other bodily substances for the purpose of determining the presence of alcohol or any other drug if arrested for any offense arising out of acts alleged to have been committed in violation of this state's laws concerning driving under the influence of alcohol (or if such person is involved in any traffic collision resulting in serious injuries or fatalities.) The test or tests shall be administered at the request of a law enforcement officer who has reasonable grounds to believe that the person has been driving or was in actual physical control of a moving motor vehicle upon the highways or elsewhere throughout this state in violation of Georgia's driving under the influence of alcohol laws. (The test or tests shall be administered as soon as possible to any person who operates a motor vehicle upon the highways or elsewhere throughout this state who is involved in any traffic collision resulting in serious injuries or fatalities.) The requesting law enforcement officer shall designate which test or tests shall be administered, (provided that a blood test with drug screen is

administered to any person operating a motor vehicle involved in a traffic collision resulting in serious injuries or fatalities.)

2.84.21 **Driving under the Influence; Refusal; Inference**

A person accused of driving under the influence of alcohol to the extent that he/she was less safe has the right to refuse to submit to (field sobriety exercises) (an Alco-Sensor) (chemical tests of his/her blood, breath, or urine) requested by the law enforcement officer.

Should you find that the defendant refused to take the requested test, you may infer that the test would have shown the presence of (alcohol)(drugs), though not that the (alcohol)(drugs) impaired his/her driving. Whether or not you draw such an inference is for you to determine.

This inference may be rebutted.

The inference alone is not sufficient to convict the defendant.

Alewine v. State, 273 Ga. App. 629 (2005); *Nelson v. State*, 237 Ga. App. 620 (1999); *Crusselle v. State*, 303 Ga. App. 879 (2010).

Refusal to take the requested test admissible: see *Vanorsdall v. State*, 241 Ga. App. 871 (2000).

Refusal alone insufficient evidence: see *Brinson v. State*, 232 Ga. App. 706 (1998).

Inference from refusal of Alco-Sensor and field sobriety tests: see *Massa v. State*, 287 Ga. App. 494 (2007).

2.84.30 **Driving under the Influence; Drugs; General Charge**

It shall be unlawful for any person to drive or be in actual physical control of any moving vehicle while under the influence of any drug to the extent that it is less safe for the person to drive than it would have been without having consumed such drug.

In deciding this issue, you may consider anything in the evidence you find relevant in deciding whether the defendant was a less safe driver. Specifically as to consumption of any drug, you may consider, among other factors, the smell or lack of smell of any drug on or about the defendant's person and whether any test indicated the presence of any drug in the defendant's system. As to whether the defendant was less safe to drive, you may consider factors you deem relevant, including, but not limited to, the actual manner of driving the motor vehicle, the defendant's control of his/her mental and/or physical abilities,

the physical condition of the defendant, and any expert testimony. Merely showing that the defendant may have consumed any drug or that there was the smell of any drug on or about the defendant's person without proof that the defendant was rendered incapable of driving safely as a result of using drugs is insufficient to prove the defendant was guilty of driving under the influence of any drug.

O.C.G.A. §40-6-391(a)(2)

Turner v. State, 95 Ga. App. 157 (1957)

Smith v. State, 202 Ga. App. 701, 702 (1992)

2.84.31 **Driving under the Influence; Legal Use of Drugs**

The fact that any person charged with driving under the influence (of any drug) is or has been legally entitled to use that drug shall not constitute a defense to this charge of driving under the influence of drugs—provided, however, that such person shall not be in violation of the law unless such person is rendered incapable of driving safely as a result of using drugs that he/she is legally entitled to use.

O.C.G.A. §40-6-391(b)

State v. Kachwalla, 274 Ga. 886 (*"incapable of driving safely = less safe"*)

2.84.32 **Driving under the Influence; Per Se Violations; Drugs**

It shall be unlawful for any person to drive or be in actual physical control of any moving vehicle if there is any amount of (*insert the name of the controlled substance as defined in O.C.G.A. §16-13-21*) present in his/her blood or urine, or both, including the metabolites and derivatives of each or both without regard to whether or not any alcohol is present in the person's breath or blood.

(*Note: "Other bodily substances" appears to be excluded by the specific language of the code section.*)

O.C.G.A. §40-6-391(a)(6)

(*Note: Even though the statute references marijuana, the Georgia Supreme Court has declared O.C.G.A. §40-6-391(a)(6)* vis-à-vis *marijuana unconstitutional due to lack of relation between the legislative distinction between legal and illegal marijuana use*

(O.C.G.A. §40-6391(b)) and the public safety purpose. Love v. State, *271 Ga. 398 (1999). The Georgia Court of Appeals has held that O.C.G.A. §40-6-391(a)(6) is constitutional as "applied to those convicted of driving with a detectable level of cocaine in their system."* Keenan v. State, *248 Ga. App. 474 (2001). Marijuana violations should be charged under O.C.G.A. §40-6-391(a)(2) at present.*)

2.84.40 **Driving under the Influence; Other Substances**

It shall be unlawful for any person to drive or be in actual physical control of any moving vehicle while under the influence of any glue, aerosol, or other toxic vapor to the extent that it is less safe for the person to drive than it would have been without having consumed such substance.

In deciding this issue, you may consider anything in the evidence that you find relevant in deciding whether the defendant was a less safe driver. Specifically as to consumption of any glue, aerosol, or other toxic vapor, you may consider, among other factors, the smell or lack of smell of any glue, aerosol, or other toxic vapor on the defendant's breath and/or about the defendant's person and whether any test indicated the presence of any glue, aerosol, or other toxic vapor in the defendant's system. As to whether the defendant was less safe to drive, you may consider factors you deem relevant, including, but not limited to, the actual manner of driving the motor vehicle, the defendant's control of his/her mental and/or physical abilities, the physical condition of the defendant, and any expert testimony. Merely showing that the defendant may have consumed any glue, aerosol, or other toxic vapor or that there was the smell of any such on the defendant's breath or person without proof of the manner of driving or the ability to drive is insufficient to prove that the defendant was guilty of driving under the influence of any glue, aerosol, or other toxic vapor.

O.C.G.A. §40-6-391(a)(3)

2.84.50 **Driving under the Influence; Combination**

It shall be unlawful for any person to drive or be in actual physical control of any moving vehicle while under the combined influence of any two or more of the substances alcohol, any drug, and any glue, aerosol, or other toxic vapor to the extent that it is less safe for the

person to drive than it would have been if the person were not under the combined influence of such substances.

O.C.G.A. §40-6-391(a)(4)

2.84.51 **Driving under the Influence; Chemical Analysis; Alcohol; Inference**

If you should find from the evidence in this case that at the time of the alleged offense, the defendant was in actual physical control of any moving vehicle while under the influence of a combination of any drug and/or any glue, aerosol, or other toxic vapor and alcohol and that the defendant's alcohol concentration, as shown by a chemical analysis of his/her blood, breath, or urine or other bodily substances, was 0.05 grams or less, you may infer that the defendant was not under the influence of alcohol. Whether or not you make such inference is a question for you to decide.

If you should find from the evidence in this case that at the time of the alleged offense, the defendant was in actual physical control of any moving vehicle while under the influence of a combination of any drug and/or any glue, aerosol, or other toxic vapor and alcohol and that the defendant's alcohol concentration, as shown by a chemical analysis of his/her blood, breath, or urine or other bodily substances, was in excess of 0.05 grams but less than 0.08 grams at the time of the alleged offense, (such fact shall not give rise to any inference that the defendant was or was not under the influence of alcohol, but) such fact may be considered along with any other competent evidence in determining whether or not the defendant was under the influence of alcohol to the extent that it was less safe for the defendant to drive than it would have been if the defendant were not affected by alcohol.

O.C.G.A. §40-6-392(b)(2)

2.84.52 **Driving under the Influence; Less Safe; Drugs (Marijuana and Prescription Drugs)**

If you should find from the evidence in this case that at the time of the alleged offense, the defendant was in actual physical control of any moving vehicle while under the influence of a combination of alcohol and/or any glue, aerosol, or other toxic vapor and any drug, the fact that any person charged with driving under the influence of such combination is or has been legally entitled to use that drug shall not constitute a defense to this charge of driving under

the influence of the combination of alcohol and/or any glue, aerosol, or other toxic vapor and that legally entitled drug, provided, however, that such person shall not be in violation of the law unless such person is rendered incapable of driving safely as a result of using that legally entitled drug in combination with alcohol and/or any glue, aerosol, or other toxic vapor.

In deciding this issue, you may consider anything in the evidence that you find relevant in deciding whether the defendant was a less safe driver. Specifically as to consumption of any drug, you may consider, among other factors, the smell or lack of smell of that drug on or about the defendant's person and whether any test indicated the presence of that drug in the defendant's system. As to whether the defendant was less safe to drive, you may consider the factors you deem relevant, including, but not limited to, the actual manner of driving the motor vehicle, the defendant's control of his/her mental and/or physical abilities, the physical condition of the defendant, and any expert testimony. Merely showing that the defendant may have consumed any drug or that there was the smell of any drug on or about the defendant's person without proof that the defendant was rendered incapable of driving safely as a result of using any drugs in combination with alcohol and/or any glue, aerosol, or toxic vapor is insufficient to prove the defendant was guilty of driving under the influence of any drug in combination with alcohol and/or any glue, aerosol, or other toxic vapor.

(*Observation: Great difficulty arises when there is a combination of alcohol less than 0.08 grams and "any drug."*)

2.84.60 **Driving under the Influence; Intent**

To prove DUI, the State need not prove that the defendant intended to commit the offense of driving under the influence, but the State must prove the defendant's condition of being under the influence of alcohol to the extent of impairment and, while in this condition, the intent to drive. This general intent may or may not be inferred from the conduct of the accused and other circumstances.

Tam v. State, 232 Ga. App. 15 (1998)

Prine v. State, 237 Ga. App. 679 (1999)

2.86.10 **Reckless Driving**

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

O.C.G.A. §40-6-390

2.86.20 **Leaving the Scene; Hit and Run**

It is unlawful for the driver of any vehicle involved in a collision resulting in (damage to a vehicle driven or attended by any person) (injury to or death of any person) to fail to do the following:

1) immediately (stop the vehicle at, or as close as possible) (return forthwith) to the scene of the collision (the stop shall be made without obstructing traffic more than is necessary);
2) give his/her name, address, and registration number of the vehicle driven;
3) upon request, and if it is available, show his/her operator's license to the person struck or to the driver or person occupying or attending the other vehicle;
4) render reasonable assistance to any person injured in the collision;
5) if (it is apparent that medical or surgical treatment is necessary) (the injured person so requests), the driver shall (transport) (make arrangements for the transport of) the injured person to a physician, surgeon, or hospital;
6) where a person injured in such accident is unconscious, appears deceased, or is otherwise unable to communicate, make every reasonable effort to ensure that emergency medical services and local law enforcement are contacted for the purpose of reporting the accident and making a request for assistance; and
7) remain at the scene of the collision until fulfilling the requirements I have just set out.

O.C.G.A. §40-6-270(a)

2.86.22 **Leaving the Scene; Hit and Run; Felony**

It is unlawful for any person to knowingly fail to stop and comply with the requirements previously stated where the collision is the proximate cause of (death) (a serious bodily injury).

O.C.G.A. §40-6-270(b)

Proximate cause is that which, in the natural and continuous sequence, unbroken by other causes, produces an event and without which the event would not have occurred. Proximate cause is that which is nearest in the order of responsible causes, as distinguished from remote, and that which stands last in causation, not necessarily in time or place but in causal relation.

O.C.G.A §§51-12-3, 51-12-8, 51-12-9

2.86.24 **Leaving the Scene; Unattended Vehicle**

It is unlawful for the driver of any vehicle that collides with an unattended vehicle to fail to immediately stop and

a) locate and notify the vehicle's operator or owner of the name and address of the driver and owner of the vehicle striking the unattended vehicle or
b) leave in a conspicuous place on the struck vehicle a written notice name and address of the driver and the owner of the vehicle doing the striking.

O.C.G.A. §40-6-271

2.86.70 **Speeding**

No person shall drive a vehicle at a speed greater than is reasonable and careful under the conditions and having regard for actual and potential hazards.

Every person shall drive at a reasonable and careful speed

1) when approaching and crossing an intersection (or railroad grade crossing),
2) when approaching and going around a curve,
3) when approaching and traversing a hillcrest,
4) when traveling upon any narrow or winding roadway, and
5) when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions.

Where no special hazards exist that require lower speed, no vehicle shall be driven in excess of

1) 30 m.p.h. in any urban or residential district;

2) 35 m.p.h. on an unpaved county road unless otherwise designated by appropriate signs;
3) 70 m.p.h. on a highway on the federal interstate system and on physically divided highways with full control of access that are outside an urbanized area of 50,000 population or more, provided that such speed limit is designated by appropriate signs;
4) 65 m.p.h. on a highway on the federal interstate system that is inside an urbanized area of 50,000 population or more, provided that such speed limit is designated by appropriate signs;
5) 65 m.p.h. on those sections of physically divided highways without full access control on the state highway system, provided that such speed limit is designated by appropriate signs; and
6) 55 m.p.h. in other locations.

See also the maximum speed limits authorized under conditions set forth in O.C.G.A. §§40-6182, 40-6-183, 40-6-188.

O.C.G.A. §§40-6-180, 40-6-181

2.88.15 **Driving without License**

O.C.G.A. §§40-5-20, 40-5-29

2.88.17 **Operating Vehicle without Tag**

O.C.G.A. §§40-2-8, 40-2-20, 40-2-21, 40-2-8.1

O.C.G.A. §§40-2-21(a)(.2)(1)(ii), 40-2-21(b)(i)

2.88.19 **Stop Sign**

Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line. However, even if there is no stop line, drivers shall stop before entering the crosswalk on the near side of the intersection and before entering an intersecting roadway at the point nearest the intersection/roadway where the driver has a view of approaching traffic on the intersection roadway. After having stopped, the driver shall yield the right-of-way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the

time when the driver is moving across, or within, the intersection or junction of roadways.

O.C.G.A. §40-6-72(b)

2.88.20 Failure to Report a Collision

It is unlawful for the driver of a vehicle involved in a collision resulting in (a) (injury to) (death of) any person or (b) property damage to an apparent extent of $500 or more to fail to immediately give notice of the collision by the quickest means of communication to the local police department if the collision occurs within a municipality or to the local sheriff or nearest office of the state patrol if the collision occurs outside a municipality.

O.C.G.A. §40-6-273

2.88.30 Insurance; Operating Vehicle without Proof of; Proof Required

A person must at all times during the operation of a motor vehicle keep in the vehicle proof or evidence of the minimum insurance coverage on the vehicle as required by the laws of this state.

It is unlawful for the owner of a motor vehicle to fail to provide to the operator of the vehicle proof or evidence of the minimum insurance coverage on the vehicle as required by the laws of this state.

O.C.G.A. §40-6-10

2.88.31 Insurance on Vehicle Registered in State

No owner or any other person shall (operate) (authorize any other person to operate) a motor vehicle required to be registered in this state unless the owner has motor vehicle liability insurance as required under Georgia law.

O.C.G.A. §33-34-4

An owner or operator of a motor vehicle is required to register the vehicle within 30 days of becoming a resident of this state.

O.C.G.A. §40-2-8(a)

A person is a resident if the person has a permanent home in Georgia to which, when absent, the person has the intention of returning.

You may infer that a person is a resident if

a) it has been more than 10 days since the person accepted and began employment or engaged in a trade or profession or occupation in Georgia,
b) it has been more that 10 days since the person's children were entered to be educated in Georgia public schools, or
c) the person has been present in the state for 30 or more days except for infrequent, brief absences.

Whether you draw such an inference is within your discretion.

O.C.G.A. §40-2-1

(*Charge the following if necessary.*)

The minimum insurance coverage required by law is:

(*Read O.C.G.A. §33-34-4(a).*)

2.88.40 **Littering**

O.C.G.A. §16-7-40

AFFIRMATIVE DEFENSES

(*Charge only the appropriate language; adapt parentheticals to the indictment and evidence.*)

3.00.00 Affirmative Defense; Definition; Burden of Proof

An affirmative defense is a defense that admits the doing of the act charged but seeks to justify, excuse, or mitigate it. Once an affirmative defense (other than that of insanity*) is raised, the burden is on the State to disprove it beyond a reasonable doubt.

O.C.G.A. §§16-1-3, 16-3-28

State v. Moore, 237 Ga. 269 (1976)

* (*Note: For the burden of proof on insanity, see 3.80.20, Insanity at Time of Act (Right and Wrong) and* Harris v. State, *256 Ga. 350, 355 (1986).*)

3.01.10 Justification; Generally

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

a) when the person's conduct is justified under O.C.G.A. §§16-3-21, 16-3-23, 16-3-24, 16-3-25, 16-3-26;
b) when the person's conduct is in reasonable fulfillment of his or her duties as a government officer or employee;
c) when the person's conduct is the reasonable discipline of a minor by his or her parent or a person *in loco parentis*;
d) when the person's conduct is reasonable and is performed in the course of making a lawful arrest;
e) when the person's conduct is justified for any other reason specified under the laws of this state; or
f) in all other instances based on similar reason and justice as those enumerated in this charge.

O.C.G.A. §16-3-20

(*See* Preston v. State, *282 Ga. 210 (3) (2007)*)

3.10.10 **Justification; Use of Force in Defense of Self or Others**

A person is justified in threatening or using force against another person when, and to the extent that, he/she reasonably believes that such threat or force is necessary to defend himself/herself or a third person against the other's imminent use of unlawful force. A person is justified in using force that is intended or likely to cause death or great bodily harm only if that person reasonably believes that such force is necessary to prevent death or great bodily injury to himself/herself or a third person or to prevent the commission of a forcible felony.

O.C.G.A. §16-3-21

(*Consider 3.10.13, No Duty to Retreat to Be Justified*)

The State has the burden of proving beyond a reasonable doubt that the defendant was not justified.

State v. Shepperd, 253 Ga. 321 (1984)

Bishop v. State, 271 Ga. 291 (1999)

(Give the following only as appropriate. BE CAREFUL. See Mullins v. State, *299 Ga. 681 (2016).)*

A person is not justified in using force if that person

a) initially provokes the use of force against himself/herself with the intent to use such force as an excuse to inflict bodily harm upon the assailant;
b) is attempting to commit, is committing, or is fleeing after the commission or attempted commission of a felony (*define arguable felony*); or
c) was the aggressor or was engaged in a combat by agreement, unless the person withdraws from the encounter and effectively communicates his/her intent to withdraw to the other person and the other person still continues or threatens to continue the use of unlawful force.

O.C.G.A. §§16-3-20, 16-3-21

Maddox v. State, 241 Ga. 398 (1978)

Dasher v. State, 146 Ga. App. 118 (1978)

Riner v. State, 147 Ga. App. 707 (1978)

Scott v. State, 141 Ga. App. 848 (1977)

Heard v. State, 261 Ga. 262 (1991)

Williams v. State, 274 Ga. 371 (2001)

3.10.11 **Forcible Felony; Definition of**

A forcible felony is any felony that involves the use or threat of physical force or violence against any person.

(*Name offense*) is a felony, defined as follows:

(*Give definition of the felony.*)

O.C.G.A. §16-1-3(b)(6)

3.10.12 **Reasonable Beliefs; Doctrine of**

In applying the law of self-defense, a defendant is justified to (kill) (use force against) another person in defense of self or others. The standard is whether the circumstances were such that they would excite (not merely the fears of the defendant but) the fears of a reasonable person. For the (killing) (use of force) to be justified under the law, the accused must truly have acted under the influence of these fears and not in a spirit of revenge.

Moore v. State, 228 Ga. 662 (1972)

Wilson v. State, 232 Ga. 506 (1974)

Jackson v. State, 239 Ga. 40 (1977)

Anderson v. State, 245 Ga. 619 (1980)

Smith v. State, 268 Ga. 196 (1997)

What the facts are in this case is a matter solely for you, the jury, to determine given all of the circumstances of this case.

3.10.13 **Retreat (No Duty to Retreat to Be Justified)**

(*Note: Give this charge, even absent a request, when argument or the evidence raises the issue of retreat in the defense of self, habitation, or other property.* Johnson v. State, *253*

Ga. 37 (1984).)

One who is not the aggressor is not required to retreat before being justified in using such force as is necessary for personal defense or in using force that is likely to cause death or great bodily harm if one reasonably believes such force is necessary to prevent death or great bodily injury to oneself or a third person or to prevent the commission of a forcible felony.

O.C.G.A. §§16-3-21, 16-3-23, 16-3-24
Glover v. State, 105 Ga. 597 (1898)
Johnson v. State, 253 Ga. 37 (1984)
Bracewell v. State, 243 Ga. App. 792 (2000)

3.10.14 **Battered Person Syndrome**

I charge you that if you find from the evidence that the defendant suffers from battered person syndrome, you may consider that evidence in connection with the defendant's claim of self-defense. Such evidence relates to the issue of the reasonableness of the defendant's belief that the use of force was immediately necessary, even though no use of force against the defendant may have been, in fact, imminent. The standard is whether the circumstances were such that they would excite the fears of a reasonable person possessing the same or similar psychological and physical characteristics as the defendant and faced with the same circumstances surrounding the defendant at the time the defendant used force.

Smith v. State, 268 Ga. 196 (1997)
Bishop v. State, 271 Ga. 291 (1999)

3.12.10 **Justification; Use of Force in Defense of Habitation (Motor Vehicle)**

A person is justified in threatening or using force against another person when, and to the extent that, the person reasonably believes that such threat or force is necessary to prevent or terminate the other's unlawful entry into or attack upon a (residence) (motor vehicle) (place of business). A person is justified in the use of force that is intended or likely to cause death or great bodily harm only if

a) the entry is made or attempted in a violent and disorderly manner and the person reasonably believes that the entry is attempted or made for the purpose of assaulting or offering personal violence to any person living or present in the (residence) (motor vehicle) (place of business) and that such force is necessary to prevent the assault or offer of personal violence; or
b) that force is used against another person who is not a member of the family or household and who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence, and the person using such force knew or had reason to believe that an unlawful and forcible entry occurred; or
c) the person reasonably believes that the entry is made or attempted for the purpose of committing a felony in the (residence) (motor vehicle) (place of business) and that such force is necessary to prevent the commission of the felony.

O.C.G.A §§16-3-23, 16-3-24.1

(*Consider 3.10.13, No Duty to Retreat to Be Justified*)

Chambers v. State, 134 Ga. App. 53 (1975)
Lavender v. State, 234 Ga. 608 (1975)
Futch v. State, 151 Ga. App. 519 (1979)

3.14.10 **Justification; Use of Force in Defense of Property**

A person is justified in threatening or using force against another person when, and to the extent that, the person reasonably believes that such threat or force is necessary to prevent or terminate the other's trespass on or other tortious or criminal interference with real property (other than a residence or place of business) or personal property (other than a motor vehicle) that

a) is lawfully in the person's possession,
b) is lawfully in the possession of a member of the person's immediate family, or
c) belongs to another person whom the person had a legal duty to protect.

The use of force that is intended or likely to cause death or great bodily harm in order to prevent a trespass on or other tortious or criminal interference with real property (other than a residence or place of business) or personal property (other than a motor

vehicle) is not justified unless the person using such force reasonably believes that such force is necessary to prevent the commission of a forcible felony.

(*Note: See definition of personal property at O.C.G.A. §16-3-24.1.*)

O.C.G.A. §16-3-24

(*Consider 3.10.13, No Duty to Retreat to Be Justified*)

Williams v. State, 144 Ga. App. 72 (1977)

3.16.10 **Justification; Threats, Menaces Causing Reasonable Belief of Danger**

To justify a homicide, it is not essential that there be an actual assault made upon the defendant.

Threats accompanied by menaces, though the menaces do not amount to an actual assault, may in some instances be sufficient to arouse a reasonable belief that one's life is in imminent danger or that one is in imminent danger of great bodily injury or that a forcible felony is about to be committed upon one's person.

Provocation by threats or words alone will in no case justify the homicide (or be sufficient to free the accused from the crime of murder) (or to reduce it to manslaughter) when the killing is done solely in resentment of the provoking words.

Whether or not the killing, if there was a killing, was done under circumstances that would be justifiable (or was done solely as a result of, and in resentment of, threats or provoking words alone) is a matter for you, the jury, to determine.

If you believe that the defendant was justified (under the instructions that the court has given you), then it would be your duty to acquit the defendant.

Facison v. State, 152 Ga. App. 645(1) (1979)
Moore v. State, 228 Ga. 662, 663(1) (1972)
Green v. State, 195 Ga. 759(2) (1943)
Smith v. State, 268 Ga. 196 (1997)

3.16.20 **Excessive Force**

The use of excessive or unlawful force while acting in self-defense is not justifiable, and the defendant's conduct in this case would not be justified if you find that the force used

exceeded that which the defendant reasonably believed was necessary to defend against the victim's use of unlawful force, if any.

3.16.30 **Revenge for Prior Wrong**

A person has the right to defend himself/herself, but a person is not justified in deliberately assaulting another person (not to prevent any impending wrong, but) solely in revenge for a past or previous wrong, regardless of how serious the past or previous wrong might have been, when the episode involving the previous wrong has ended. Such person is not justified in acting out of revenge by deliberately seeking out and assaulting the alleged wrongdoer.

If you find from the evidence in this case that the defendant used force against the alleged victim named in this indictment in order to prevent an impending wrong that the defendant reasonably believed was about to be committed by such other person and that the defendant reasonably believed that such force was necessary in order to prevent such impending wrong (death or great bodily injury to the defendant, or to prevent the commission of a forcible felony), then that use of force would be justified, and it would be your duty to acquit the defendant.

On the other hand, if you believe beyond a reasonable doubt from the evidence in this case that the defendant used force against the alleged victim named in the indictment (in the way and manner alleged in the indictment) for the sole purpose of avenging a past or previous wrong, regardless of how serious such previous wrong may have been, and not for the purpose of preventing an impending wrong (death or great bodily injury to the defendant, or to prevent the commission of a forcible felony), then you would be authorized to convict the defendant.

Channell v. State, 109 Ga. 150 (1899)
Brown v. State, 228 Ga. 215 (1971)
Scroggs v. State, 94 Ga. App. 28 (1956)
Ellison v. State, 137 Ga. 193 (1911)
Brown v. State, 270 Ga. 601 (1999)

3.16.40 **Arrest; Right to Resist Unlawful Force in Making Legal Arrest**

(*Note: The following charge should relate to charges arising out of the arrest itself, for example, assault, escape, etc.*)

A police officer is authorized to use in making a lawful arrest only that degree of force that is reasonably necessary to accomplish the arrest. The mere fact that a lawful arrest is being made does not give the officer the right to use excessive force or an unlawful degree of force upon the person being arrested.

A person being arrested, even though the arrest itself is lawful, has the right to resist the use of excessive and unlawful force by those making the arrest to the extent that the person reasonably believes that the degree of resistance used is necessary to defend against the officer's use of unlawful or excessive force. In resisting, the person being arrested would not be authorized to use force that is unlawful or disproportionate to the amount of force necessary to prevent the unlawful force being used against the person.

Webb v. State, 159 Ga. App. 403 (1981)

3.16.41 **Illegal Arrest; Right to Use Force to Prevent**

One upon whom an illegal or unlawful arrest is being made has the right to resist the arrest with such force as is reasonably necessary to prevent the arrest.

Smith v. State, 84 Ga. App. 79 (1951)

Ronemous v. State, 87 Ga. App. 588 (1953)

Brooks v. State, 206 Ga. App. 485 (1992)

3.16.50 **Justification; Parental Discipline**

(*See 2.28.22 Justifiable; Parental Discipline.*)

3.20.10 **Entrapment**

A person is not guilty of a crime if that person's conduct is induced or solicited through entrapment by a government officer or employee or an agent of either for the purpose of obtaining evidence to be used in prosecuting the person for commission of the crime. Entrapment exists when the idea and intention of the commission of the crime originated

with a government officer or employee or with an agent of either and that officer or employee, by undue persuasion, incitement, or deceitful means, induced the accused to commit the act, which the accused would not have committed except for the conduct of such officer or employee.

O.C.G.A. §16-3-25

To constitute entrapment, the accused must have been induced to commit a criminal act that he/she would not have otherwise committed except by undue persuasion, incitement, or deceitful means implemented by a government officer or employee or an agent of either.

Garrett v. State, 133 Ga. App. 564 (1974)
Hinton v. State, 236 Ga. App. 140 (1999)

No entrapment exists when a police officer or an agent of the police merely furnishes an opportunity to commit a criminal offense to a person who is already ready and willing to commit the criminal offense.

Scudiere v. State, 130 Ga. App. 477(9), 480 (1973)
Paras v. State, 247 Ga. 75 (1981)

(*Note: Use the following charge with caution.*)

If an officer of the law has reason to believe that the law is being violated, the officer may proceed to ascertain whether those who are thought to be doing so are actually committing a criminal offense. If the conduct of the officer is such as not to induce an innocent person to commit a crime but to secure evidence upon which a guilty person can be brought to justice, then there is no entrapment.

Hill v. State, 261 Ga. 377 (*"Willingness" cannot be shown by acts that are products of the inducement when a* prima facie *case of "lack of predisposition" is made.*)
Orkin v. State, 236 Ga. 176, 196(9) (1976)
Sutton v. State, 59 Ga. App. 198, 199 (1938)
Gibson v. State, 133 Ga. App. 68, 69 (1974)
Keaton v. State, 253 Ga. 70 (1984) (*overruled charge language allowed in Sutton*)

3.20.20 **Entrapment; Burden of Proof**

The State has the burden of proving beyond a reasonable doubt that the defendant was not entrapped.

Any evidence as to entrapment should be considered by you in connection with all of the other evidence in the case. If you should entertain a reasonable doubt as to the guilt of the accused, it would be your duty to acquit.

On the other hand, should you believe from the evidence as a whole that the defendant is guilty beyond a reasonable doubt, you may convict.

State v. McNeill, 234 Ga. 696 (1975)
Allen v. State, 137 Ga. App. 302, 304 (1976)
Mitchell v. State, 249 Ga. App. 520 (2001)

3.22.10 **Coercion**

A person is not guilty of a crime (except murder) if the act upon which the supposed criminal liability is based is performed under such coercion that the person reasonably believes that performing the act is the only way to prevent his/her imminent death or great bodily injury.

O.C.G.A. §16-3-26

Coercion involves the involuntary performance of a criminal act under fear induced by threats or menaces involving a direct danger to life or great bodily injury when the danger can be avoided only by the performance of the criminal act. In order for duress or fear produced by threats or menaces to be a valid legal excuse for doing something that would otherwise be criminal, the act must have been committed under threats or menaces that show that the defendant's life or a part of the defendant's body was in danger or that there was reasonable cause to believe that there was such danger and that the accused, in order to protect himself/herself from the threat of harm, had no alternative course of conduct but to commit the alleged criminal act. The danger must not have been one of future violence but rather must have been one of present, imminent, and immediate violence at the time the alleged act was committed.

Chambers v. State, 154 Ga. App. 620, 624 (1980)

Syck v. State, 130 Ga. App. 50 (1973)

Hill v. State, 135 Ga. App. 766 (1975)

Aleman v. State, 227 Ga. App, 607 (1997)

The burden rests upon the State to disprove coercion beyond a reasonable doubt.

O.C.G.A. §16-3-28

Aleman v. State, 227 Ga. App. 607 (1997)

3.26.10 **Theft; Defense; Claim of Right**

(*See 2.65.10, Theft; Defense; Claim of Right*)

O.C.G.A. §16-8-10

EVIDENTIARY DEFENSES

3.30.10 Alibi

The defendant contends that he/she was not present at the scene of the alleged offense at the time of its commission. Alibi, as a defense, involves the impossibility of the defendant's presence at the scene of the alleged offense at the time of its commission. Presence of the defendant at the scene of the crime alleged (or the defendant's involvement as a coconspirator or as a party to the crime) is an essential element of the crime set forth in this indictment, and the burden of proof rests upon the State to prove such beyond a reasonable doubt.

Any evidence in the nature of alibi should be considered by you in connection with all of the other evidence in the case. If, in doing so, you should entertain a reasonable doubt as to the guilt of the accused, it would be your duty to acquit the defendant.

On the other hand, if you believe from the entire evidence that the defendant is guilty beyond a reasonable doubt, you may convict.

O.C.G.A. §16-3-40

Allen v. State, 137 Ga. App. 302, 304 (1976)

Patterson v. State, 233 Ga. 724 (1975)

(*See* Parham v. State, *120 Ga. App. 723 (1969);* Young v. State, *225 Ga. 255 (1969).*)

3.35.10 Character Trait of Defendant

See 1.37.10 Good Character of Defendant

3.38.10 Equal Access

If you determine from the evidence that persons other than the defendant had equal opportunity to possess or to place the articles of contraband upon the described premises, then you must acquit the defendant. However, if you are convinced beyond a reasonable doubt that the defendant knowingly possessed the contraband or shared possession or control with another person and helped or procured the other person in possessing and having control of the contraband, you would be authorized to convict.

Gee v. State, 130 Ga. App. 634, 636 (1974)

(*Note: Refer to "equal access" as it pertains to drugs; see 2.76.20, Equal Access.*)

INTENT-RELATED DEFENSES

(*Charge only the appropriate language; adapt parentheticals to the indictment and evidence.*)

3.40.10 Mistake of Fact

A person shall not be found guilty of a crime if the act, or omission to act, constituting the crime was induced by a misapprehension of fact that, if true, would have justified the act or omission.

3.50.10 Accident

No person shall be found guilty of any crime committed by misfortune or accident in which there was no criminal scheme, undertaking, or intention (or criminal negligence). An accident is an event that takes place without one's foresight or expectation, which takes place, or begins to exist, without design.

If you find from the evidence that the incident that is the subject matter of this case occurred as a result of misfortune or accident and not as a result of a criminal undertaking or criminal negligence, then it would be your duty to acquit the defendant.

When the issue of accident is raised, the burden is on the State to negate or disprove it beyond a reasonable doubt. Any evidence as to misfortune or accident should be considered by you in connection with all of the other evidence in this case. If in doing so you should entertain a reasonable doubt as to the guilt of the accused, it would be your duty to acquit. On the other hand, should you believe from the evidence as a whole that the defendant is guilty beyond a reasonable doubt, you may convict.

(*Note: See 1.41.40, Criminal Negligence.*)

O.C.G.A. §1-3-3(2)

O.C.G.A. §16-2-2

Allen v. State, 137 Ga. App. 302, 304 (1976)

Bruce v. Smith, 274 Ga. 432 (2001)

3.60.10 Intoxication, Voluntary; No Excuse for Crime

Georgia law provides that voluntary intoxication shall not be an excuse for any criminal act. It further provides that if a person's mind, when not affected by intoxicants, is capable of

distinguishing between right and wrong as well as of reasoning and acting rationally, and the person voluntarily deprives himself/herself of reason by consuming intoxicants and commits a criminal act while under the influence of such intoxicants, the person is criminally responsible for such acts to the same extent as if the person were sober. Whether or not the defendant in this case was voluntarily intoxicated at or during the time alleged in this indictment is a matter solely for you, the jury, to determine.

O.C.G.A. §16-3-4
Thomas v. State, 105 Ga. App. 754, 757 (1962)
Davis v. State, 161 Ga. App. 344 (1982)
Pope v. State, 256 Ga. 195 (1986) (*overruled on other grounds*)
Foster v. State, 258 Ga. 236 (1988)
Payne v. State, 273 Ga. 317 (2001)

3.60.20 **Intoxication, Involuntary; Defense of**

A person shall not be found guilty of a crime when, at the time of the conduct constituting the crime, the person did not have sufficient mental capacity to distinguish between right and wrong in relation to the criminal act because of involuntary intoxication. Involuntary intoxication means intoxication caused by (a) consumption of a substance through excusable ignorance or (b) the coercion, fraud, trick, or contrivance of another person.

O.C.G.A. §16-3-4

3.60.30 **Intoxication; Alcoholism; No Defense for Crime**

Alcoholism is not involuntary and is no defense to any criminal act. A person who knows that he/she suffers a chronic alcohol-drinking problem or knows that he/she suffers from alcoholism may not intentionally and voluntarily induce or bring on a state of intoxication and then be excused from the commission of a criminal act during the voluntarily induced intoxicated state.

McLaughlin v. State, 236 Ga. 577 (1976)

3.60.40 Intoxication, Voluntary; Insanity Resulting from Excessive, Continued Use of Alcohol

If the influence of (alcohol) (drugs) (narcotics) impairs a person's mind to the extent that the person is not able to form the intent to commit the act with which he/she is charged, that person would not be criminally responsible for the act. Whether that is true is a question for you, the jury, to decide.

O.C.G.A. §16-3-4

Choice v. State, 31 Ga. 424 (1860)

Whether the defendant in this case was voluntarily intoxicated at or during the time alleged in this indictment is a matter solely for you, the jury, to decide.

Hayes v. State, 262 Ga. 881(3a) (1993) (*charge not authorized for temporary condition*)

Brown v. State, 264 Ga. 48(3d) (1994) (*charge not authorized for temporary condition*)

Scott v. State, 275 Ga. 305(4) (2002) (*charge not authorized for temporary condition*)

Foster v. State, 258 Ga. 736(10) (1988)

McEver v. State, 258 Ga. 768(2) (1988)

Gilreath v. State, 247 Ga. 814 (1981)

McLaughlin v. State, 236 Ga. 577 (1976)

Goldsmith v. State, 148 Ga. App. 786 (1979)

Horton v. State, 258 Ga. 489 (1988)

3.80.10 Insanity at Time of Commission of Offense

(*Warning: Do not charge "at time of the offense" in intellectual disability cases; see* Perkinson v. State*, 279 Ga. 232 (2005).*)

Every person is presumed to be of sound mind and discretion. However, this presumption may be rebutted.

O.C.G.A. §16-2-3

Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L. Ed.2d 281 (1977)

(*See* Butler v. State, *252 Ga. 135 (1984).*)

If you find that, at the time of the alleged criminal act, the defendant was suffering from insanity, mental illness, or intellectual disability, then you shall determine whether the defendant is

a) not guilty,
b) not guilty by reason of insanity,
c) guilty beyond a reasonable doubt,
d) guilty beyond a reasonable doubt but mentally ill (*applies only to felonies*), or
e) guilty beyond a reasonable doubt but with intellectual disability (*applies only to felonies*).

The law makes a distinction between being insane at the time of the commission of the alleged criminal act and being mentally ill or with intellectual disability at the time of the alleged act. Therefore, it is necessary that you understand this distinction.

O.C.G.A. §17-7-131

(*Note: The statute requires that the jury be instructed to consider all five options set out in O.C.G.A. § 17-7-131(c). A failure to charge on all five options is harmless error if there is no evidence to support the omitted option(s). In addition, if the jury is not advised of the consequences of an applicable potential verdict, (not guilty by reason of insanity, guilty but mentally ill, or guilty but with intellectual disability), this error is presumptively harmful.* Foster v. State, *283 Ga. 47 (2008).*)

3.80.20 **Insanity at Time of Act (Right and Wrong)**

A person shall not be found guilty of a crime if, at the time of the act, omission, or negligence constituting the crime, that person did not have the mental capacity to distinguish between right and wrong in relation to the act, omission, or negligence.

In regard to the question of sanity or insanity at the time of the alleged criminal act, there is a test to determine whether the person is suffering such a degree of insanity that the person is not capable of committing a crime. The test is whether the insanity was such that it deprived that person of the mental capacity to distinguish between right and wrong in relation to the act, omission, or negligence that the person allegedly committed.

The perpetrator may be what is commonly referred to as insane—in a loose and general sense—yet in the eyes of the law, he/she may be sane and responsible so far as the act in question is concerned if, at the time of the commission of the alleged act, the accused had sufficient capacity to distinguish between the right and wrong of the particular act. This is a question of fact to be determined by you.

Mere weak-mindedness, mental abnormality, intellectual disability, or mental state shown only by repeated unlawful or antisocial conduct, which does not amount to insanity, is not a defense to a crime if the person had the mental capacity to distinguish between right and wrong in relation to the alleged offense when the alleged offense was committed.

Insanity may be only a temporary malady, and if the accused did not have sufficient mental capacity to distinguish between right and wrong with reference to the act alleged in this indictment at the time that act was committed, then the accused would not be criminally responsible. The test of criminal responsibility is the condition of the mind of the accused at the time of the commission of the alleged act.

If a person of unsound mind has intervals of understanding, during which that person can distinguish between the right and wrong of a particular act, then that person shall answer for that act if it was committed during those periods of understanding.

If, due to an affliction of the mind, a person's mind is so impaired that the person is incapable of forming the intent to commit the act with which he/she is charged or to understand that a certain consequence would likely result from that act, then that person would not be criminally responsible for the act.

The defendant has the burden of proving insanity by a preponderance of evidence.*

If you believe beyond a reasonable doubt that the defendant committed the act charged in this bill of indictment but also believe by a preponderance of evidence that at the time of the commission of this act, the defendant was mentally incapable of distinguishing between right and wrong regarding this particular act, then it would be your duty to acquit the defendant because of insanity.

I have already defined what "beyond a reasonable doubt" means. Now let me tell you what "preponderance of evidence" means. It means evidence on the issues involved that, while not enough to free the mind from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other.

If you find the defendant not guilty by reason of insanity, then you must specify this in your verdict and your deliberations cease. In that event, the form of your verdict would be, "We, the jury, find the defendant not guilty by reason of insanity."

* (*Note: See 3.00.00, Affirmative Defense; Definition; Burden of Proof, for affirmative defenses generally.*)

Should you find the defendant not guilty by reason of insanity at the time of the crime, the defendant will be committed to a state mental health facility until such time, if ever, the court is satisfied that he/she should be released pursuant to law.

O.C.G.A. §16-3-2
O.C.G.A. §17-7-131(b)(3)(A)
Thomas v. State, 105 Ga. App. 754 (1962)
Berryhill v. State, 235 Ga. 549(8) (1975)
Brown v. State, 228 Ga. 215, 242 (1971)
Revill v. State, 235 Ga. 71 (1975)
Clark v. State, 245 Ga. 629 (1980)
Brown v. State, 250 Ga. 66, 70 (1982)
Keener v. State, 254 Ga. 699 (1985)
Harris v. State, 256 Ga. 350, 355 (1986) (*burden of proof*)
Price v. State, 179 Ga. App, 598 (1986)
Moore v. State, 217 Ga. App. 207 (1995)
McDuffie v. State, 210 Ga. App. 112 (1993)
Levin v. State, 222 Ga. App. 123 (1996)

3.80.30 **Insanity, Delusional**

(*Charge justification or other appropriate affirmative defense with this charge.*)

There is an exception to the rule that I have just given you. If a person has reason sufficient to distinguish between right and wrong as to a particular act about to be committed but, because of some mental delusion, the person's will was overpowered so that there was no criminal intent to commit the act in question, that person cannot be held criminally responsible for that act.

In that regard, a person shall not be found guilty of a crime when, at the time of the act, omission, or negligence constituting the crime, that person, because of mental disease, injury, or congenital deficiency, acted because of a delusional compulsion that overpowered the person's will to resist committing the crime.

(However, a person who suffers from periodic mental delusions may not intentionally and voluntarily induce delusion or mental disorder and then be excused from the commission of a criminal act committed during the delusional episode. If such a person intentionally and voluntarily induces the delusion with the intent and expectation that the conduct during the delusional episode will be excused because of the delusion—and while under the influence of the induced delusion that person commits a criminal act—then the person is criminally responsible for the criminal act.)

In order for mental delusion or delusional compulsion to constitute a defense, it must appear not only that the accused was actually laboring under a delusion at the time of the commission of the alleged criminal act but that the alleged criminal act itself was connected with the particular delusion under which the accused was then laboring and that the delusion was as to a fact that, if true, would have justified the alleged act by the accused. This is a question of fact to be determined by you. (*Here define justification claims: defense of self or others (§16-3-21), defense of habitation (§§16-3-23; 16-3-24.1), or defense of property (§16-3-24).* Woods v. State *291 Ga. 804 (2012).*)

If you believe this defendant committed the act charged in this bill of indictment but, at that time, the defendant was actually laboring under a mental delusion, and that the act was connected with that delusion, and that the delusion was as to a fact that, if true, would have justified the alleged act by the accused, then you should find the defendant not guilty because of insanity. In this event, your deliberations will cease and the form of your verdict would be, "We, the jury, find the defendant not guilty by reason of insanity."

I charge you that should you find the defendant not guilty by reason of insanity at the time of the crime, the defendant will be committed to a state mental health facility until such time, if ever, that the court is satisfied that he/she should be released pursuant to law.

O.C.G.A. §§16-3-3, 17-7-131(b)(3)(A)

Gibson v. State, 236 Ga. 175 (1976)

Bailey v. State, 249 Ga. 535, 537 (1982)

Brown v. State, 228 Ga. 215, 218 (1971)

Teasley v. State, 228 Ga. 107 (1971)

Brannen v. State, 235 Ga. 505 (1975)

Moore v. State, 217 Ga. App. 207 (1995)

3.80.40 **Insanity; Mentally Ill at Time of Alleged Act**

(*Note: The law regarding "guilty but mentally ill" went into effect July 1, 1982, and the following charge should be given only in cases in which the offense occurred after that date.*)

If, and only if, you do not find the defendant not guilty by reason of insanity, then you may consider whether or not the defendant was mentally ill.

As to being mentally ill at the time of the act alleged in the indictment, the term "mentally ill" means having a disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life. The term "mentally ill" does not include a mental state shown only by repeated unlawful or antisocial conduct.

O.C.G.A. §17-7-131

Under the evidence and the court's instructions, if you believe beyond a reasonable doubt that the defendant is guilty and was mentally ill at the time of the commission of the offense, then you would be authorized to find the defendant "guilty but mentally ill at the time of the crime." If this is your finding, then you must specify it in your verdict, and the form of your verdict in that event would be, "We, the jury, find the defendant guilty but mentally ill at the time of the crime."

*(I charge you that should you find the defendant guilty but mentally ill at the time of the crime, the defendant will be placed in the custody of the Department of Corrections, which will have responsibility for the evaluation and treatment of the mental health needs of the defendant, which may include, at the discretion of the Department of Corrections, referral for temporary hospitalization at a facility operated by the Department of Behavioral Health and Developmental Disabilities).

O.C.G.A. §17-7-131(b)(3)(B)

Spivey v. State, 253 Ga. 187(2) (1984) (*burden of proof*)

Mitchell v. State, 187 Ga. App. 40(7) (1988)

Hood v. State, 187 Ga. App. 88 (1988)

Moore v. State, 217 Ga. App. 207 (1995)

(Note: *The preceding parenthetical section may be misleading in a death penalty case. Consider giving the following charge in a death penalty case:

I charge you that should you find the defendant guilty but mentally ill at the time of the crime, this case would still go forward to the Penalty Phase where the jury would address the three possible punishment options of life, life without parole, or the death penalty. In the event of a life sentence or a life without parole sentence, the defendant will be placed in the custody of the Department of Corrections, which will have responsibility for the evaluation and treatment of the mental health needs of the defendant, which may include, at the discretion of the Department of Corrections, referral for temporary hospitalization at a facility operated by the Department of Behavioral Health and Developmental Disabilities.)

3.80.50 **Insanity; Intellectual Disability**

(*Note: The law regarding "guilty but mentally retarded" went into effect July 1, 1988, and the following charge should be given only in cases in which the offense occurred after that date. The term was statutorily changed from "guilty but mentally retarded" to "guilty but with intellectual disability" effective July 1, 2017.*)

The term "intellectual disability" means having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period.

O.C.G.A. §17-7-131

Under the evidence and the court's instructions, if you believe beyond a reasonable doubt that the defendant is guilty but with intellectual disability, then you would be authorized to find the defendant "guilty but intellectual disability." If you find the defendant guilty but with intellectual disability, then you must specify it in your verdict, and the form

of your verdict in that event would be, “We, the jury, find the defendant guilty but with intellectual disability.”

I charge you that should you find the defendant guilty but with intellectual disability, the defendant will be placed in the custody of the Department of Corrections, which will has responsibility for the evaluation and treatment of the mental health needs of the defendant, which may include, at the discretion of the Department of Corrections, referral for temporary hospitalization at a facility operated by the Department of Behavioral Health and Developmental Disabilities.

O.C.G.A. §17-7-131(b)(3)(C)
Spivey v. State, 253 Ga. 187(2) (1984)
Mitchell v. State, 187 Ga. App. 40(7) (1988)
Hood v. State, 187 Ga. App. 88 (1988)
Moore v. State, 217 Ga. App. 207 (1995)
Perkinson v. State, 279 Ga. 232 (2005)

3.80.60 **Insanity; Consider Evidence as a Whole**

Any evidence as to the (sanity) (insanity) (mental illness) (intellectual disability) of the defendant is to be considered by you along with all of the other evidence in this case. If the evidence as a whole raises a reasonable doubt as to the defendant’s guilt, the doubt must be resolved in favor of the accused.

MENTAL INCOMPETENCE AT TIME OF TRIAL

3.90.10 Special Plea Trial Contentions of Movant (Give Movant's Contentions)

(*These charges formerly contained the word "insanity." The current charge uses the phrase "mental incompetence."*)

(*Give general charges as required in a civil case.*)

Georgia law provides that one charged with a criminal offense shall not be placed on trial while in a condition of mental incompetence.

Whether a person's mental condition is such that the person is not mentally capable of being placed on trial is a question solely for you, the jury, to decide.

Every person is presumed to be of sound mind and discretion, but this presumption may be rebutted. The burden of proof is upon the accused to establish that he is mentally incompetent. The burden of proof in this case is what is termed "preponderance of evidence," which means that superior weight of evidence upon the issues involved, although not enough to wholly free the mind from a reasonable doubt, is sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other.

(*Here give charge on credibility of witnesses.*)

3.90.20 Mental Condition of Defendant

The question for your determination is whether the accused, (*name defendant*), is at this time without the ability to

1. understand the nature and object of the proceedings going on against [him or her],
2. comprehend [his or her] own condition in reference to such proceedings, and
3. render [his or her] attorneys such assistance as a proper defense to the indictment preferred against [him or her] demands.

It is necessary that the defendant be competent under all three prongs of the test. If you should find by a preponderance of the evidence that the defendant is not competent under any one of these prongs, then it would be your duty to find [him or her] "not competent to stand trial." If you find that [he or she] does meet all three prongs of the test, then you should find [him or her] "competent to stand trial."

O.C.G.A. §17-7-130

Brown v. State, 215 Ga. 784 (1960)

Crawford v. State, 240 Ga. 321, 326 (1977)

Waldrip v. State, 267 Ga. 739 (1997)

Stowe v. State, 272 Ga. 866 (2000)

Humphrey v. Walker, 294 Ga. 855 (2014)

Sims v. State, 279 Ga. 389 (2005)

Partridge v. State, 256 Ga. 602 (1987)

Lindsey v. State, 252 Ga. 493(III) (1984)

Norris v. State, 250 Ga. 38(3), 295 S.E.2d 321 (1982)

Dusky v. United States, 362 U.S. 402 (1960)

3.90.30 Findings and Form of Verdict

Upon your consideration of this case, under all of the evidence and all of the instructions that the court has given you, if you find that the defendant is not competent to stand trial, the form of your verdict would be, "We, the jury, find that the defendant is not competent to stand trial."

In the event that, under all of the evidence and all of the instructions given to you by the court, you find that the defendant is competent to stand trial, the form of your verdict would be, "We, the jury, find that the defendant is competent to stand trial."

If you find that (*name defendant*) is mentally competent to stand trial, then the case in which [he or she] is charged with a criminal offense will be tried before another jury. You would not try that case.

In the event that you find that the defendant is not mentally competent to stand trial, then that trial would be postponed until the defendant is later found to be mentally competent to stand trial.

O.C.G.A. §17-7-130

Partridge v. State, 256 Ga. 602(2) (1987)

Whatever your verdict is, it must be unanimous (that is, agreed upon by all of your members); it must be in writing; it must be dated and signed by one of your members as foreperson; and it must be returned in open court. You may now retire and decide your verdict.

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