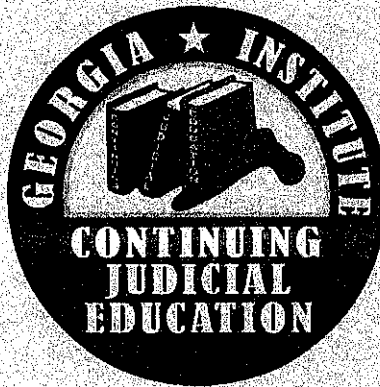


Criminal Case Law Update



Hon. Ben Studdard

Studdard on Criminal Law

Georgia Criminal Case Law Update

2021 State Court Judges Seminar

Ben W. Studdard, Senior Judge

State of Georgia

(c) 2021 Ben W. Studdard

No copyright claimed to original court opinions or statutes

Includes opinions issued through September 8, 2021

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

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

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

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

I.	ATTORNEYS.....	2
II.	CONSTITUTIONAL ISSUES	7
III.	CONTEMPT	14
IV.	DEFENSES	16
V.	DUI.....	19
VI.	EVIDENCE	26
VII.	JURIES AND JURORS	33
VIII.	PLEAS.....	36
IX.	POST-CONVICTION RELIEF/APPEALS	37
X.	PROCEDURE.....	40
XI.	SEARCH AND SEIZURE	42
XII.	SENTENCING	50
XIII.	WITNESSES	51

I. ATTORNEYS

A. APPOINTMENT OF COUNSEL

1. PROBATION REVOCATION

Newbern v. State, 356 Ga.App. 696, 849 S.E.2d 39 (September 17, 2020). **Probation revocation vacated and remanded to consider whether defendant was entitled to appointment of counsel in revocation proceeding.** Following guilty plea to exploitation of an elderly person, State moved to revoke probation based on failure to pay victim restitution as ordered. Trial court denied defendant's request for appointment of counsel and, following hearing, revoked probation.

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

790(III), 93 S.Ct. 1756; *accord Vaughn*, 265 Ga. at 775(3), 462 S.E.2d 132; *Kitchens*, 234 Ga. App. at 785(1), 508 S.E.2d 176.] counsel should be provided if ‘there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.’ [FN27: *Gagnon*, 411 U.S. at 790(III), 93 S.Ct. 1756; *accord Vaughn*, 265 Ga. at 775(3), 462 S.E.2d 132; *Kitchens*, 234 Ga. App. at 785(1), 508 S.E.2d 176.]]” *Accord, Torregano v. State*, A21A0809, ___ Ga.App. ___, ___ S.E.2d ___, 2021 WL 3854115 (August 30, 2021) (probation revocation vacated and remanded to make record of reasons for refusal of counsel).

B. RIGHT TO COUNSEL

1. ON APPEAL

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

repeatedly rejected his requests to have counsel appointed to represent him.” **4. Functional waiver – engaging in dilatory tactics.** “A second type of functional waiver occurs when a trial court concludes that a defendant (whether indigent or not) is attempting to use the discharge and employment of counsel as a dilatory tactic and declines to continue a proceeding until the defendant obtains new counsel. See *Bryant*, 268 Ga. at 617, 491 S.E.2d 320; *Hobson v. State*, 266 Ga. 638, 638, 469 S.E.2d 188 (1996). See also *Jefferson v. State*, 209 Ga.App. 859, 861, 434 S.E.2d 814 (1993) (explaining that if a defendant does not have good reason for discharging his counsel, a trial court does not err by requiring him to choose between continued representation by that attorney and proceeding pro se). Before a trial court requires a defendant to proceed pro se under this waiver theory, the court should advise the defendant of the dangers of self-representation. See *Hobson*, 266 Ga. at 638, 469 S.E.2d 188.” Although the trial court noted defendant’s pretrial dilatory tactics, “[a]t no time during the post-conviction proceedings did the trial court advise Daker of the dangers of representing himself at that distinct stage, ask him to choose between representing himself or retaining counsel, or give him a deadline by which to obtain counsel.” **5. Determination of indigency. Contrary to defendant’s argument, the determination of indigency lies with the public defender under Georgia law.** “The Indigent Defense Act of 2003 (IDA), OCGA § 17-12-1 et seq., expressly assigns to the circuit public defenders (and other indigent defense providers), rather than to the trial courts, the authority and responsibility to determine if criminal defendants are indigent and therefore entitled to appointed counsel at the government’s expense.” “If Daker believed that his indigency status had changed with respect to his right to appointed counsel, his remedy was to seek a re-determination from the CDO, by mandamus if necessary. See *Calmes*, 312 Ga.App. at 774, 719 S.E.2d 516 (explaining that when a defendant asserts that a circuit public defender has failed to fulfill the duties prescribed by the IDA, the defendant may seek relief by application for a writ of mandamus); *Bynum v. State*, 289 Ga.App. 636, 637-638, 658 S.E.2d 196 (2008) (same).” **6. The habeas court erred by attempting to remand the case to the trial court to determine defendant’s indigency.** “[A] habeas court is not authorized to remand a case to the trial court to make findings of fact or conclusions of law. See OCGA § 9-14-49 (‘After reviewing the pleadings and evidence offered at the trial of the [habeas] case, the judge of the superior court hearing the case shall make written findings of fact and conclusions of law upon which the judgment is based.’); *Newsome v. Black*, 258 Ga. 787, 788, 374 S.E.2d 733 (1989) (‘[OCGA § 9-14-49] does not authorize the superior court in a habeas corpus proceeding to remand the proceeding to another superior court.’).” **7. Remedy for denial of appellate counsel is second direct appeal.** “[T]he unconstitutional complete denial of counsel for direct appeal of a criminal conviction means that the original appellate proceeding was of no validity, and the issues raised or not raised in the prior pro se appeal do not procedurally bar the issues that may be raised in a proper new appeal. See *Trauth v. State*, 295 Ga. 874, 876-877, 763 S.E.2d 854 (2014). See also *Merriweather*, 285 Ga. at 766-767, 684 S.E.2d 237 (directing that habeas relief be granted because the defendant did not validly waive his right to appellate counsel).”

2. WAIVER OF AT TRIAL

Wright v. State, 358 Ga.App. 798, 856 S.E.2d 391 (March 8, 2021). Aggravated assault and related convictions reversed. Trial court erred by denying defendant’s request for appointment of counsel, made during voir dire. “Wright made a post-waiver request for counsel during voir dire when he stated, ‘I got a right to an attorney. Still got a right to an attorney.’” A lengthy argument between defendant and court ensued, in which the court refused to consider appointment of counsel. Later that day, after the first of State’s thirteen witness had testified, defendant filed a handwritten notice of insanity defense, request for evaluation, and request for appointment of a specific attorney. The trial court never ruled on defendant’s oral or written requests for counsel. “Wright contends that this constituted an abuse of discretion and structural error, requiring

reversal.[fn] We agree. We are mindful of the record, which shows that Wright was antagonistic toward his appointed attorneys prior to trial and during post-trial proceeding, and he filed multiple pro se motions prior to trial. Nevertheless, failure to appoint counsel post-waiver may constitute structural error, which can never be harmless,[fn] and a trial court's failure to exercise its discretion is in itself an abuse of discretion.[fn] Although Wright did not request a ruling on his written motion for reappointment for counsel,[fn] it was the second request for reappointment made by Wright at that point. Most of the trial remained to be conducted, and **the trial court's failure to consider and rule on the motion was error.** Accordingly, the judgment of conviction is reversed."

Porter v. State, 358 Ga.App. 442, 855 S.E.2d 657 (February 19, 2021). Identity fraud convictions reversed; "the record fails to demonstrate that the trial court properly advised Porter of the dangers of proceeding pro se. Moreover, we conclude that, even if there was no unequivocal request to proceed pro se, the trial court failed to properly evaluate whether Porter acted with reasonable diligence in obtaining counsel and whether the absence of counsel was attributable to reasons beyond Porter's control." **1. Dangers of proceeding pro se.** "In this case, no transcripts of any pre-trial proceedings are included in the record or, apparently, even exist." At hearing on motion for new trial, and subsequently, the court recited that it had discussed with defendant his right to counsel, and that defendant originally stated an intent to hire counsel after failing to qualify for the public defender, but "[d]uring the course of this time, Mr. Porter became embolden[ed] in the fact that he wanted to represent himself." "At no time did the trial court indicate it had discussed the dangers of proceeding pro se with Porter, and Porter did not testify during the hearing on his motion for new trial." "[N]ot only is there no evidence of a *Faretta* hearing, and even though we accept the trial court's statements about the substance of his discussions concerning self-representation as true, there is no indication from the trial court's post-trial statements that it ever advised Porter, in any form, of the dangers of self-representation.[fn] In view of the presumption against a waiver of the right to counsel, [cits.] it follows that Porter's convictions must be reversed." **2. Evaluation of defendant's diligence in securing counsel.** "[W]here a non-indigent defendant has not invoked his right to represent himself at trial, but has also failed to hire an attorney to represent him, ... the determination of whether he validly waived his right to counsel does not turn upon whether he knowingly and intelligently chose to proceed pro se. Instead, a finding of waiver depends on whether the non-indigent defendant exercised reasonable diligence in securing representation." (Citations and emphasis omitted.) *Longo v. City of Dunwoody*, 351 Ga.App. 735, 742(2), 832 S.E.2d 884 (2019). Therefore, "[s]ince a non-indigent defendant's right to counsel is predicated upon his own diligence, a failure on his part to retain counsel may constitute a waiver of the right to counsel. Thus, when presented with a non-indigent defendant who has appeared for trial without retained counsel, the trial judge has a duty to delay the proceedings long enough to ascertain whether the defendant has acted with reasonable diligence in obtaining an attorney's services and whether the absence of an attorney is attributable to reasons beyond the defendant's control." (Citations and punctuation omitted; emphasis supplied.) *Eason v. State*, 234 Ga.App. 595, 597-598(2), 507 S.E.2d 175 (1998); see also *Longo*, 351 Ga.App. at 741-742(2), 832 S.E.2d 884; [other cits.]" **This requires the court to "determine three issues on the record: (1) whether [a defendant is] eligible to have appointed counsel represent him, and, if not, (2) whether [the defendant] exercised reasonable diligence in attempting to retain trial counsel and (3) whether the absence of trial counsel was attributable to reasons beyond [the defendant's] control.'** *Martin v. State*, 240 Ga.App. 246, 248(2), 523 S.E.2d 84 (1999)." **A. Trial court's finding that defendant failed to exercise reasonable diligence "was based largely upon a singular fact — Porter's appearance for trial without counsel — which it automatically equated to a lack of reasonable diligence. But '[t]he fact that [Porter] did not retain counsel as instructed by the trial court, standing alone, is not sufficient to establish a waiver of right to counsel by the defendant.'**

Ford [v. *State*, 254 Ga.App. 413, 416, 563 S.E.2d 170 (2002)]. **B. Factors beyond defendant's control.** "[T]he record does not demonstrate that the trial court inquired of Porter whether the reason he appeared without counsel was based upon reasons beyond his control. See *Martin*, 240 Ga.App. at 250-251(3), 523 S.E.2d 84." **C. "Even if a defendant is determined to be nonindigent, a trial court has a duty to affirmatively exercise its discretion to appoint counsel for nonindigent defendants based on individual circumstances" if authorized by Uniform Superior Court Rules 29.4 and 29.5,"** citing *Martin*.

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

C. WHEN REPRESENTATION ENDS

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

without the entry of a written order for the purposes of allowing Appellant to proceed pro se.”

Dos Santos v. State, 307 Ga. 151, 834 S.E.2d 733 (October 21, 2019). **Following defendant’s guilty pleas to malice murder and related offenses, trial court erred by denying her motion to withdraw her pleas. 1. The motion was a nullity because she filed it pro se while still represented by plea counsel; thus, the trial court should have dismissed the motion rather than denying it. Based on *White v. State*, 302 Ga. 315, 806 S.E.2d 489 (October 16, 2017). *Accord*, *Branner v. State*, 355 Ga.App. 137, 843 S.E.2d 26 (May 7, 2020); *Pounds v. State*, 309 Ga. 376, 846 S.E.2d 48 (July 1, 2020); *Ringold v. State*, 309 Ga. 443, 847 S.E.2d 181 (August 10, 2020); *Meheux v. State*, 309 Ga. 857, 848 S.E.2d 844 (September 28, 2020). 2.** “If it was not clear enough before, these recent decisions – along with our reiteration of *White*’s holding today – should leave no doubt that Georgia lawyers cannot simply abandon their criminal defendant clients immediately after the defendants enter guilty pleas and are sentenced. **Defense counsel are obligated to continue to represent their clients at least until the time for these post-conviction remedies expires (and if such a remedy is timely pursued, until it is resolved)** – unless the lawyer is properly authorized by the trial court to withdraw from the representation or is properly replaced by substitute counsel, events that should be reflected in writing in the record for the case. ... We recognize that these holdings may place difficult burdens on conscientious defense counsel.” Recommends that counsel discuss with their clients before guilty plea “the basic processes for (and limitations on) post-conviction challenges to guilty pleas, leaving only the decision to be made about whether to invoke such a process. And when time is tight, plea counsel may protect their client’s interests by filing a timely, bare-bones ‘placeholder’ motion to withdraw guilty plea, which – unlike an untimely motion or an inoperative motion filed pro se by the still-represented client – meets the filing deadline and might be amended later (by conflict-free new counsel if necessary).” *Accord*, *Meheux v. State*, 309 Ga. 857, 848 S.E.2d 844 (September 28, 2020) (“when time is tight...”).

II. CONSTITUTIONAL ISSUES

A. CONFRONTATION

1. UNAVAILABLE WITNESS/*CRAWFORD*

Gilmore v. State, S20G1430, ___ Ga. ___, ___ S.E.2d ___, 2021 WL 3727795 (August 24, 2021). *Reversing* 355 Ga.App. 536, 844 S.E.2d 877 (2020); in prosecution for sale of methamphetamine and related offenses, trial court erred by excluding video of confidential informant’s drug buy under Confrontation Clause. Informant is now deceased, so unavailable to testify. Informant made the drug buy and video at request of officers investigating Gilmore. The video had no intelligible audio, but showed informant handing money to Gilmore and receiving drugs in return. **1.** Trial court, and Court of Appeals, found the informant’s actions shown on the video to be nonverbal statements, but Supreme Court disagrees. **“We have noted that ‘the key to the definition of ‘statement’ is that nothing is an assertion unless intended to be one.’** *State v. Orr*, 305 Ga. 729, 741, 827 S.E.2d 892 (2019) (quoting Fed. R. Evid. 801(a) advisory committee’s note on 1972 Proposed Rules). ... On the other hand, this Court and others have concluded that **nonverbal conduct does not constitute a statement when it is not intended to be an assertion.** See *Orr*, 305 Ga. at 741, 827 S.E.2d 892 (stating that a defendant’s failure to call the police after he was allegedly attacked by the victim was not a nonverbal statement). See also, e.g., *United States v. Farrad*, 895 F.3d 859, 877 (6th Cir. 2018) (rejecting defendant’s argument that photographs of guns—including one featuring a person who looked like the defendant and others showing a close-up of a hand holding a gun—‘were all out-of-court “statements” that [the defendant] illegally possessed a firearm,’ and concluding that the photographs did not constitute nonverbal statements) (citation and punctuation omitted); *United States v. Kool*, 552 Fed. Appx. 832, 834 (10th Cir. 2014) (holding that a defendant did not intend

to make an assertion when he, upon being told that law enforcement officials had an incriminating photograph showing a hand with tattoos on it, moved his hands from the interview table and placed them under his armpits). Here, Gilmore contends that the CI's nonverbal conduct in the video recording constituted a statement because the CI intended to 'prove [that] Gilmore sold drugs.' But we are not convinced. Unlike a witness pointing to a specific person in a police lineup (nonverbal conduct intended to assert something along the lines of 'that is the person') or a person nodding her head in response to a specific question (nonverbal conduct that is intended to assert 'yes') **we cannot say that a person handing money to another person and taking possession of a physical object in return is 'intended [to be] an assertion.'** See Rule 801(a)(2). We simply cannot conclude on this record—as Gilmore implicitly asks us to—that the CI intended to assert through his conduct something along the lines of 'You are a drug dealer' or 'We are entering into a sale of illegal drugs' when he handed a \$20 bill to Gilmore and received drugs in exchange.” 2. Significantly, officers here asked informant to purchase drugs specifically from Gilmore, *distinguishing* “*United States v. Gomez*, 617 F.3d 88, 91-97 (2d Cir. 2010) (holding that an agent’s testimony that he told a CI to ‘call his [drug] supplier,’ took the CI’s phone, and dialed the defendant’s number before handing the phone back to the CI was ‘prejudicial hearsay’ because it created the ‘inescapable’ inference that the CI ‘had told [the agent] that [the defendant] was his supplier,’ and recognizing that such testimony ‘directly implicates the Confrontation Clause and [the defendant’s] right to confront his accusers in court’).” 3. *Also distinguishing* “*United States v. Martinez*, 588 F.3d 301, 310-311 (6th Cir. 2009) (holding that a doctor’s conduct on a video recording, which depicted him performing a medical procedure, constituted a nonverbal statement about the proper way to perform the procedure).” “Dr. Boswell made the video in response to an FBI request, with the purpose of demonstrating the proper performance of nerve-block injections. Accordingly, because of Dr. Boswell’s intent, we conclude that his conduct during the course of the video is an assertion of proper medical performance and is, therefore, a statement under Rule 801(a) of the Federal Rules of Evidence.”

B. EQUAL PROTECTION

Mitchell v. State, 301 Ga. 563, 802 S.E.2d 217 (June 26, 2017). Interlocutory appeal in DUI prosecution. **No equal protection or separation of powers violations in different standards for admission of scientific evidence in civil and criminal cases. Equal protection.** “[T]his Court rejected the equal protection argument with regard to the distinct provisions governing expert testimony in civil and criminal proceedings in *Mason v. Home Depot USA Inc.*, 283 Ga. 271, 276-277(2) and (3) (658 S.E.2d 603) (2008) (construing former OCGA § 24-9-67 [now OCGA § 24-7-707] and OCGA § 24-9-67.1 [now OCGA § 24-7-702]); see also *Zarate-Martinez v. Echemendia*, 299 Ga. 301, 304(2) n.2 (788 S.E.2d 405) (2016).” *Same issue transferred to Court of Appeals*, *Woods v. State*, 310 Ga. 358, 850 S.E.2d 735 (November 2, 2020), but note special concurrence by Nahmias (joined by Blackwell and Peterson): “if that court affirms Woods’s convictions, I would be inclined to grant a petition for certiorari asking this Court to reconsider its equal protection holding in *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 273-275 (658 S.E.2d 603) (2008), as summarily extended to claims by criminal defendants in *Mitchell v. State*, 301 Ga. 563, 571-572 (802 S.E.2d 217) (2017).”

C. JURY TRIAL, WAIVER OF

Agee v. State, 311 Ga. 340, 857 S.E.2d 642 (April 19, 2021). Malice murder and related convictions affirmed; record showed “that Appellant made a knowing, voluntary, and intelligent waiver of his right to a jury trial.” Defendant answered “yes” when trial court asked, before trial, **“Do you understand you’ve got a right to a jury trial if you chose to have one?” and “with a bench trial, the court will make the—will be the finder of fact as well as the person that presides over the law, as opposed to in a jury trial, the jury would be the fact-finder and the**

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

D. PRESENCE

1. DEFENDANT ABSENT

Gobert v. State, 311 Ga. 305, 857 S.E.2d 647 (April 19, 2021). Felony murder and related convictions affirmed; no violation of defendant's right to be present at bench conferences. "Before the first bench conference in the jury selection process after Gobert's case had been called for trial, the trial court stated the following: 'Let's take that up, up here. Mr. Dunn, your client's always welcome up here just so you know.' Dunn, Gobert's trial counsel, responded, in Gobert's presence, 'Mr. Gobert, the defendant is staying here, Your Honor.' ... Gobert was present in court both when the trial court invited him to 'always' join his counsel at bench conferences and when his attorney waived his presence at such conferences, and he did not voice any objection to his counsel's statement. Nor did he or his counsel ever seek his inclusion in any of the subsequent bench conferences of which Gobert now complains on appeal. Thus, his right to be present was waived.

Champ v. State, 310 Ga. 832, 854 S.E.2d 706 (February 15, 2021). Following convictions for malice murder and firearms offense, judgment vacated and remanded for hearing on whether defendant "acquiesced to his absences from the bench conferences" discussing excusal of jurors. During jury selection, the court conducted numerous bench conferences with counsel and/or prospective jurors, and excused for cause several prospective jurors. Defendant was generally present in the courtroom but not at the bench, and apparently unable to hear or participate in the conferences. "There is no indication in the record the Appellant personally waived his right to be present for these bench conferences or that his counsel waived that right in Appellant's presence or with his express authority." As the issue was raised for the first time on appeal, not at trial or in motion for new trial, Supreme Court remands for hearing by trial court on acquiescence, "at which the parties have an opportunity to supplement the record with relevant evidence and after which the trial court may make factual findings and issue an order ruling on the claim." Reasoning: "[f]irst, ... **acquiescence is a fact-specific issue that turns on how to interpret a defendant's silence after his absence from a proceeding. Trial judges are generally better situated than appellate courts to make such inferences in the first instance,** particularly in a context where the trial judge's own practices, procedures, and observations of what occurred during the trial may be pertinent. Second, **we should not lightly assume that defense counsel allowed his client's constitutional right to be present to be violated without the client's consent; rather, we would normally expect that if bench conferences or other proceedings to which the right applies happened without the defendant's presence, counsel advised the**

defendant of his right to be present and of what occurred to ensure that the defendant acquiesced to his absence. [Cit.] Third, and relatedly, it would promote gamesmanship and create ethical concerns if defense counsel – having realized that the defendant did not participate in a bench conference or other proceeding at which he had a right to be present and that the trial transcript would not show acquiescence, even though a fuller record could or would show acquiescence – **could secure reversal of a conviction by not raising the issue until appeal, depriving the State of the opportunity to create that fuller and more truthful record.**” Notes that “we are *not* holding today that there is in this context a presumption that defense counsel ensured their clients’ acquiescence to violations of the right to be present, which (if unrebutted) could be relied on without more to prove such acquiescence. But we also should not presume that defense counsel performed their professional duties deficiently by allowing their clients’ constitutional rights to be violated, even if they did not make as clear a record of their clients’ waiver or acquiescence as they perhaps should.” Also, suggests that the Court may reconsider case law prohibiting harmless error analysis on this issue if asked to do so, *citing Rushen v. Spain*, 464 U.S. 114, 117-120, 104 S.Ct. 453, 454-57, 78 L.Ed.2d 267 (1983) (per curiam) and cases from other states.

2. DEFENDANT DISRUPTIVE

Haynes v. State, 356 Ga.App. 631, 848 S.E.2d 644 (September 10, 2020). Armed robbery convictions affirmed; trial court properly excluded disruptive defendant from courtroom and provided representation by standby counsel over defendant’s objection. Instead of participating in voir dire of jurors, defendant repeatedly attempted to question the court on frivolous sovereign-citizen matters, despite trial court’s warning that doing so would result in his exclusion from the courtroom. Defendant also attempted to talk over the judge and argue with her. **Presence.** “Haynes argues that his behavior was not sufficiently disruptive to warrant his exclusion, particularly since he did not affirmatively inform the court that he would continue his disruptive behavior. **We hold that the trial court did not err by removing Haynes given his behavior, including his repetitive arguing, his refusal to answer the judge’s questions, and his repeatedly interrupting the judge while she was speaking.** Further, when the trial court asked Haynes if he would like to stay in the courtroom without disrupting the proceedings or to leave the courtroom, he only responded that he did not ‘consent’ to the proceedings. And ultimately, Haynes instructed the trial court that ‘you can continue without me,’ and that he was ‘leaving the courtroom.’” **Standby counsel.** “As described above, once Haynes was removed from the courtroom, the trial court ruled that the attorney who had been assisting as standby counsel would conduct the trial on Haynes’s behalf. **The United States Supreme Court paved the way for the trial court’s ruling in *Faretta*, 422 U.S. at 806, 95 S.Ct. 2525, stating that ‘the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. Of course, a [s]tate may — even over objection by the accused — appoint a “standby counsel” to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant’s self-representation is necessary.’** *Id.* at 834 n. 46(IV), 95 S.Ct. 2525. See also *Thomas v. Carroll*, 581 F.3d 118, 126(III) (3d Cir. 2009) (‘If no counsel is appointed to represent an absented pro se defendant, there is a real danger that the ensuing lack of rigorous adversarial testing that is the norm of Anglo-American criminal proceedings will undermine the accuracy of the truth-determining process by eliminating the trier of fact’s basis for evaluating the truth of the testimony. Further, a criminal trial is not a private matter; the public interest is so great that the presence and participation of counsel, even when opposed by the accused, is warranted in order to vindicate the process itself.’) (citations and punctuation omitted); ABA Standards for Criminal Justice 6-3.9 (2000) (‘If a defendant who is permitted to proceed without the assistance of counsel engages in conduct which is so disruptive ... that the trial cannot proceed in an orderly manner,

the court should, after appropriate warnings, revoke the permission and require representation by counsel. If standby counsel has previously been appointed, the counsel should be asked to represent the defendant.’). Under the circumstances of this case, the trial court did not err in asking previously appointed counsel to represent Haynes in his absence.”

Morman v. State, 356 Ga.App. 685, 848 S.E.2d 165 (September 3, 2020). Armed robbery and related convictions affirmed. Where defendant refused to wear clothes to court from holding cell, but also refused to waive his appearance at trial; trial court properly had him brought in “naked, wrapped in a blanket, shackled, and strapped to a chair.” At the beginning of trial, defendant refused to dress in either street clothes or even a jail uniform, stated that he was naked and strapped to a chair, and “indicated that he did not wish to attend the trial.” “The court and prosecution subsequently agreed that Morman would be brought to court each morning and after lunch each day, always outside the presence of the jury, so the court could inquire if he had changed his mind about attending trial. The court then proceeded to conduct *voir dire* and later, outside the presence of the jury, brought Morman back into the courtroom to again ask if he had changed his mind about attending trial. Once again, Morman indicated that he did not wish to attend the trial and was returned to jail.” The next day, after initially indicating that he still did not wish to attend, defendant refused to respond further. Because he would not confirm his desire not to attend after the court explained the proceedings so far, the court “the trial court ensured Morman was positioned behind the defense table in a manner she believed would block the jury’s view of his shackles,” and proceeded with trial. Defendant made no objection, and appeared to sleep through the session. “In the break that followed, while using the restroom, Morman removed the clothes he had been wearing[fn] and refused to redress. And after returning to the courtroom, Morman was wrapped in a blanket outside of the jury’s presence. The deputy in charge of Morman advised the court that, during the break, Morman expressed that he did not wish to be in the courtroom,” but defendant refused to confirm this to the court. In the absence of such confirmation, the trial court had defendant covered with a blanket and proceeded with trial. The court had photos of defendant as situated inserted into the record. “As this happened, Morman continued to make comments on the record about being ‘a free man,’ but he made *no* indication on the record that he did not wish to remain in the courtroom.” The court instructed the jury not to give adverse consideration to defendant’s silence in the courtroom. When the lunch break arrived, the trial court indicated that it would not continue to have defendant in the courtroom, unclothed with a blanket over him because it was more prejudicial than not being in the courtroom. The court again offered to let defendant sit at the defense table if put on street clothes; “Morman responded that he ‘[did] not wish to participate in this lynching.’ At this point, the court determined that Morman had elected not to participate in the trial, ordered his return to the jail, and said it ‘[did] not intend to bring him back over other than in the event that the jury convicts for sentencing.’ Nevertheless, the court also ordered that if Morman changed his mind while in the jail, it should be notified immediately and Morman returned to the courtroom in street clothes or his orange jumpsuit because the court would not allow him to return in a blanket.” **1. No due process violation in trying defendant “shackled at the feet and strapped to a chair during trial” where “the photographs in the record show that these restraints on Morman were not visible to the jury, and there is no indication that the jury was otherwise made aware of them. As a result, Morman has failed to show that these forms of restraint interfered with his ability to receive a fair trial.”** **2. Defendant waived his right to be tried in street clothes by refusing to wear them, “and the trial court did not err by requiring him to appear in court wrapped in a blanket.”** **3. No abuse of discretion in having defendant appear before the jury wrapped in a blanket, when he refused to dress or waive his right to be present. “[O]n the record before us, the trial court may very well have concluded that Morman waived his right to attend the proceedings at the outset by his disruptive conduct in refusing to dress. See *Illinois v. Allen*, 397 U.S. 337, 343, (90 S.Ct. 1057, 25 L.Ed.2d 353) (1970) (explaining that a**

criminal defendant may waive his right to be present at trial if, ‘after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom’); accord *Weaver v. State*, 288 Ga. 540, 542-43(3), (705 S.E.2d 627) (2011); see also *LaGon v. State*, 334 Ga.App. 14, 19(2), 778 S.E.2d 32 (2015) (‘In addition to an express waiver of his right to be present at trial, a defendant can implicitly waive his right to be present by conducting himself in a disruptive manner before the trial court or by voluntarily absenting himself from the proceedings.’). But the court admirably did its best to balance Morman’s rights to appear in street clothes,[cits] represent himself,[cits.] and be present during his own trial.[Cits.] As a result, under the particular facts and circumstances of this case, we conclude that the trial court did not abuse its discretion when Morman appeared before the jury in the manner previously described for a brief portion of his multi-day trial.”

E. SILENCE/TESTIMONY BY DEFENDANT

1. COMMENTARY ON DEFENDANT’S SILENCE

Glover v. State, 309 Ga. 102, 844 S.E.2d 743 (June 16, 2020). Malice murder and false statements convictions affirmed. **Prosecutor’s comment in closing argument, referencing defendant’s decision to waive his *Miranda* rights and make a statement, was not improper.** “Glover contends that his trial counsel should have objected to the following portion of the prosecutor’s closing argument, which addressed the charge of making a false statement: ‘One thing [Glover] could do is invoke and [say] I just don’t want to talk to you guys anymore. Instead he just goes video schmideo. Nope. He’s still insisting he’s not there. Because he doesn’t know what else they know, right? He doesn’t know there’s going to be DNA. And, of course, he won’t ever find out until much later. So he – though counsel wants to distance himself from this horrendous statement [-] is of all the things in America he could say, one of which is, no thanks. I want a lawyer, which you’re allowed to say.[fn]’ Characterizing these remarks as ‘prohibited,’ **Glover argues that any comment upon the right to counsel or the right to remain silent is improper and objectionable.** In support of this proposition, Glover cites only one case, *Anderson v. State*, 285 Ga.App. 166, 645 S.E.2d 647 (2007), but the facts of *Anderson* are clearly distinguishable from those present here. In *Anderson*, the trial court declared a mistrial after the prosecutor elicited on direct examination testimony from a police officer that the defendant, during a post-arrest interview, refused to sign a waiver-of-rights form and invoked both his right to remain silent and his right to counsel. *Id.* at 167, 645 S.E.2d 647. But *Anderson* does not stand for the sweeping proposition that any comment or evidence on the right to silence or right to counsel is per se improper, as Glover argues. **Instead, it is argument or evidence about the defendant’s exercise of those rights that is generally considered improper.**” Thus, no ineffective assistance in failing to object to the argument.

State v. Orr, 305 Ga. 729, 827 S.E.2d 892 (May 6, 2019). *Vacating* 345 Ga.App. 74, 812 S.E.2d 137 (2018) and grant of new trial on defendant’s convictions for family violence battery and related offenses. 1. “[T]he categorical rule this Court announced in Division 5 of *Mallory v. State*, 261 Ga. 625, 630, 409 S.E.2d 839 (1991), which excludes evidence of a criminal defendant’s pre-arrest ‘silence or failure to come forward’ to law enforcement on the ground that such evidence is always ‘far more prejudicial than probative,’” was statutorily abrogated by adoption of the 2013 Evidence Code. “[T]he new Evidence Code, which took effect on January 1, 2013, precludes courts from promulgating or perpetuating judge-made exclusionary rules of evidence like the one we created in *Mallory*, and instead generally requires trial courts to determine the admissibility of evidence based on the facts of the specific case and the rules set forth in the Evidence Code, including OCGA § 24-4-403.” Prosecutor here elicited testimony about defendant’s failure to call police about his claim that victim assaulted him. 2.

Mallory was expressly not decided based on the constitution, but arose from the U.S. Supreme Court's invitation in *Jenkins v. Anderson*, 447 U.S. 231, 240, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980) "to formulate evidentiary rules defining the situation in which silence is viewed as more probative than prejudicial." *Mallory* pointed to OCGA § 24-3-36, but that section contained no express exclusion of evidence. It was, thus, a judge-made policy decision. **3.** The U.S. Supreme Court has yet to decide whether pre-arrest silence is constitutionally excluded. **4. The 2013 Evidence Code prohibits judge-made rules of exclusion.** Instead, it provides for the general admissibility of relevant evidence in Rule 402, subject to certain following rules of exclusion, Rules 404-418. "Only one rule, however, authorizes the exclusion of relevant evidence based on the court's evaluation of the 'prejudice' such evidence could cause: OCGA § 24-4-403 (Rule 403), which grants the trial court discretion to exclude relevant evidence 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" But Rule 403 requires case-by-case analysis of probative value and prejudice. "It is therefore clear that Rule 403 provides no authority for an appellate court to direct the exclusion of entire categories of evidence." **5.** In dicta, discusses possibilities that pre-arrest silence may be excluded under various theories under the 2013 Evidence Code, including Rule 403 analysis. **A.** While *Mallory* discussed whether "failure to come forward" amounted to an **adoptive admission**, that theory under new Rule (d)(2)(B) requires a statement by another to which defendant "could be considered to have responded to or acquiesced in by not calling the police"; in this case, the State has pointed to no such statement ... The State likewise presented no evidence that Orr remained silent in response to any specific statement by the police before or after he was arrested. The State did not call an arresting officer to testify, and Orr testified that, rather than remaining silent, he told the police about his head injury after he was arrested." **B.** Silence may be an admission in some circumstances, under Rule 801(d)(2)(A). "The party seeking to introduce evidence under Rule 801(d)(2)(A) must identify the specific **nonverbal conduct** of the opposing party and the fact or facts that it was allegedly intended to assert. Vaguely pointing out that the defendant 'failed to come forward' after a crime will not suffice." **C.** "Certain aspects of a defendant's failure to come forward to the police might also be offered not as a particular assertive statement subject to the hearsay rules, but rather as **circumstantial evidence of guilt. As the Eleventh Circuit has recognized, "[i]t is today universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, [is] admissible as evidence of consciousness of guilt, and thus of guilt itself."** *United States v. Borders*, 693 F.2d 1318, 1324-1325 (11th Cir. 1982) (citation omitted). See also *Renner v. State*, 260 Ga. 515, 517, (397 S.E.2d 683) (1990) ('The fact that a suspect flees the scene of a crime points to the question of guilt in a circumstantial manner.')." *Accord, Torres (January 23, 2020), above.* **D.** "[W]e note the **United States Supreme Court's admonition that '[i]n most circumstances silence is so ambiguous that it is of little probative force,' especially if the defendant does not later testify inconsistently.** *United States v. Hale*, 422 U.S. 171, 176, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975). See also *Johnson v. State*, 151 Ga. 21, 24, 105 S.E. 603 (1921) ('When under arrest and confronted by another in the presence of an arresting officer, silence by the accused is as consistent with the theory that the accused prefers to exercise his right to await trial by the proper tribunal as it is of the consciousness of guilt.')." **E.** "Courts have also cautioned against giving significant weight to certain evidence that a defendant did not come forward to the police after a crime, such as evidence of flight. '[W]e have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime. ... "[I]t is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that "the wicked flee when no man pursueth, but the righteous are as bold as a lion."' *Wong Sun v. United States*, 371

U.S. 471, 483 n.10, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) (citations omitted). See also *Borders*, 693 F.2d at 1325 (explaining that ‘the interpretation to be gleaned from an act of flight should be made cautiously and with a sensitive to the facts of the particular case,’ including whether the defendant was aware that he was under investigation or had other reasons to flee and the timing of the flight).” 6. Questions, but doesn’t decide, whether *Mallory* remains viable as to cases decided under the pre-2013 Evidence Code. “There are good reasons to doubt that this Court had the authority to promulgate such exclusionary evidence rules at all, at least after 1983. See Ga. Const. of 1983, Art. VI, Sec. I, Par. IX (‘All rules of evidence shall be as prescribed by law.’).” *Still not decided, Taylor v. State*, 308 Ga. 57, 838 S.E.2d 774 (February 10, 2020).

2. SELF INCRIMINATION/ NON-VERBAL

Dunbar v. State, 309 Ga. 252, 845 S.E.2d 607 (June 29, 2020). Malice murder and firearm convictions affirmed; no plain error in admitting evidence that defendant refused consent to search her home. Defendant “She asserts that this testimony violated her right against self-incrimination” under the federal and state constitutions. **1. Fifth Amendment.** “It is well-established that **the Fifth Amendment’s protection against self-incrimination is limited to testimonial evidence.** See *Doe v. United States*, 487 U.S. 201, 207, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988). **As law enforcement’s request to search Dunbar’s home did not seek testimonial evidence from Dunbar, her Fifth Amendment argument is unavailing.** See *id.*; see also, e.g., *Gilbert v. California*, 388 U.S. 263, 266-267, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); *Schmerber v. California*, 384 U.S. 757, 760-765, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).” **2. Georgia Constitution.** “Dunbar relies on our holding in *Elliott v. State*, 305 Ga. 179, 824 S.E.2d 265 (2019), to argue that gathering evidence through a search of her home equates to compelling Dunbar to be a witness against herself, and admission of her refusal to consent to that search, therefore, violates her right against self-incrimination. But, *Elliott* is of no help to Dunbar. **While it is true that *Elliott* held that admission of a refusal to consent to a breath test violated the defendant’s right against self-incrimination under Paragraph XVI, our holding did not extend to the refusal to consent to any search as Dunbar indicates. ... *Elliott* and our underlying decision in *Olevik v. State*, 302 Ga. 228, 806 S.E.2d 505 (2017), were careful to distinguish that their scope does not extend to all types of searches, but is limited to breath tests. Thus, Dunbar fails to show that the trial court’s admission of this testimony was plain error, as her argument would require extending the existing precedent embodied in *Elliott* and *Olevik* beyond its current scope.**” **3. Due process.** “Dunbar does not argue that the trial court’s admission of testimony regarding withdrawal of consent violates her right to **due process** under the Fifth and Fourteenth Amendments to the United States Constitution, so we do not address it here. **But see *United States v. Runyan*, 290 F.3d 223, 249 (5th Cir. 2002).**” ***Runyan*: “the circuit courts that have directly addressed this question have unanimously held that a defendant’s refusal to consent to a warrantless search may not be presented as evidence of guilt.”**

Boynton v. State, 355 Ga.App. 590, 845 S.E.2d 327 (June 18, 2020). Convictions for armed robbery and related offenses affirmed. Trial court erred, but harmless, by “requiring [defendant] to stand and display his tattoos for the jury in violation of his right against self-incrimination,” twice so a State’s witness could see them and identify him, and once during prosecutor’s closing argument.

III. CONTEMPT

In re: Ragas, 359 Ga.App. 670, 859 S.E.2d 827 (June 8, 2021). Physical precedent only. Evidence didn’t support criminal contempt finding against defense attorney. Ragas represented defendant Taylor, who pled guilty in three criminal proceedings. “Among other things, Taylor’s sentence

required him to complete a twelve-month Extension Residential Recovery Program. As part of the sentence, Taylor was to 'remain in jail until accepted and space is available.'" "Ragas picked up Taylor [from jail] and drove him to a treatment center where he was interviewed but not accepted into a rehabilitation program due to a lack of available bed space. Ragas then drove Taylor to a restaurant and left him there with Taylor's brother." Taylor never reported back to jail. Ragas didn't report what happened to the court until a week later, after Taylor failed to report to probation. Ragas was found in contempt based on failing to return Taylor to jail, and for his "lack of candor" with the court during the week before reporting the incident to the court. **1. "The sentencing order in this case was not directed to Ragas. ... The sentencing order did not require Ragas to take any action or refrain from any action; it did not mention Ragas at all. Generally '[a] person cannot be found in contempt of a court order or writ which was not directed to him.'** *American Express Co. v. Baker*, 192 Ga.App. 21, 23 (2), 383 S.E.2d 576 (1989)." But "[i]n *The Bootery v. Cumberland Creek Props.*, 271 Ga. 271, 517 S.E.2d 68 (1999), our Supreme Court adopted rules in force in 'the majority of foreign jurisdictions' setting out the circumstances in which 'the violation of a court's order by one who was not a party to the proceedings can be punished as a contempt.' Id. at 272 (2), 517 S.E.2d 68. It must be 'alleged and proved that the contemnor had *actual* notice of the order for disobedience of which is sought to be punished [and that] the nonparty be in privity with, aid and abet, or act in concert with the named party in acts constituting a violation of the order.' Id. at 272(2), 517 S.E.2d 68 (citations and punctuation omitted; emphasis in original)." *Distinguishing* cases which "involved express commands or prohibitions that the contemnors, in their capacities as legal representatives of the persons to whom the orders were directed, were obliged to follow": *Murphy v. Murphy*, 330 Ga.App. 169, 176-177(6)(a)(ii), 767 S.E.2d 789 (2014) (affirming "a contempt judgment against an attorney in a child custody case for discussing the case with his client's minor children ... when the trial court had ordered his client not to discuss the case with them") and *Sullivan v. Bunnell*, 340 Ga.App. 283, 290-291(2), 797 S.E.2d 499 (2017) ("contempt action could proceed against a person who, acting under a power of attorney, caused payments required by the principal's divorce decree not to be paid"). "It may be that Ragas was given specific obligations, responsibilities, or authority in connection with transporting Taylor. But aside from the sentencing order, which assigns no such responsibilities or authority to Ragas, the state presented no evidence of any order or direction that it claims Ragas disobeyed." **2. "Lack of candor": "[T]he trial court determined that Ragas was in criminal contempt for not informing her that Taylor, whom the jail had released to him to transport to the rehabilitation facility, had in fact not been admitted to the facility and currently was in violation of the terms of Taylor's sentence. 'A court is authorized to find an attorney, as an officer of the court, in contempt for misbehavior in his or her official transactions [under OCGA § 15-1-4(a)(2)].' [In re Dillon, 344 Ga.App. 200, 202, 808 S.E.2d 436 (2017)]. ... But the evidence does not show that Ragas was engaged in an official transaction with the court when he took Taylor to the rehabilitation facility. There is no evidence that Ragas was still providing Taylor with legal representation at that time. More fundamentally, responsibility for enforcing a sentencing order or transporting a convicted defendant to and from jail generally is not imposed upon an attorney. It is true that attorneys' tripartite responsibilities to their client, opposing counsel, and the court are often in tension. But calling upon an attorney to enforce a criminal sentence of incarceration is a difference not merely in degree but in kind. As there is no evidence that Ragas had been ordered or had agreed to assume such responsibilities, or that he otherwise was assigned some sort of official capacity in transporting Taylor, we should not step in to establish and set out the parameters of such responsibilities or such a capacity." "While Rule 3.3 of Georgia's Rules of Professional Conduct speaks to an attorney's duty of candor to the court, we do not undertake to extend that rule beyond the scope of an attorney's conduct as an attorney. And we have found no authority supporting the imposition of criminal liability upon an attorney based solely on a breach of a rule of professional conduct."**

IV. DEFENSES

A. AFFIRMATIVE DEFENSES, GENERALLY

Calmer v. State, 309 Ga. 368, 846 S.E.2d 40 (July 1, 2020). Malice murder and related convictions affirmed. **Any error in failing to charge on self-defense and no duty to retreat was harmless. “Here, any weak inference that Calmer acted to prevent death or great bodily injury to himself is wholly undercut by other evidence to the contrary.** Calmer’s mother testified that Calmer had stated that he wanted police to come to the house so he could shoot them. The deputies were dressed in their uniforms and announced their presence by calling out Calmer’s first name, even assuming that the sound McRae heard thereafter was the sound of the deputies loudly opening the door. And after shooting Deputy Norris in the head, Calmer stepped over his body and came outside to continue to shoot at Deputy Wilson.”

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

McClure v. State, 306 Ga. 856, 834 S.E.2d 96 (October 7, 2019). *Vacating and remanding* 347 Ga.App. 68, 815 S.E.2d 313 (2018). Following defendant’s convictions for aggravated assault, Court of Appeals erred in its analysis of whether defendant was entitled to jury charges on justification in defense of self and justification in defense of habitation. *Overruling* numerous prior cases, Supreme Court holds that **“[a] criminal defendant is not required to ‘admit’ anything, in the sense of acknowledging that any particular facts are true, in order to raise an affirmative defense.** To the extent a defendant in raising an affirmative defense accepts for the sake of argument that he committed the act alleged in a charge, the defendant may do so only for the limited purpose of raising the affirmative defense at issue.” 1. “OCGA § 16-1-3(1) provides in pertinent part: **“Affirmative defense” means, with respect to any affirmative defense authorized in [Title 16], unless the state’s evidence raises the issue invoking the alleged defense, the defendant must present evidence thereon to raise the issue.**’ This provision defines ‘affirmative defense’ only in terms of the defendant’s burden of production.” *Accord, Calmer v. State*, 309 Ga. 368, 846 S.E.2d 40 (July 1, 2020). 2. **“Criminal defendants, like other litigants, are entitled to pursue alternative theories, even when those theories are inconsistent.”** 3. “As is the case generally, [t]o authorize a requested jury instruction, there need only be slight evidence supporting the theory of the charge.’ *Garner v. State*, 303 Ga. 788, 790(2), 815 S.E.2d 36 (2018).[fn] And the defendant need not present evidence to support the theory of an affirmative defense if the State’s evidence raises the issue. *Adams v. State*, 288 Ga. 695, 697(1), 707 S.E.2d 359 (2011); *Chandle*, 230 Ga. at 576(3), 198 S.E.2d 289; OCGA § 16-1-3(1).” Vacated and remanded to determine whether slight evidence supported defendant’s

charge requests here. *Accord, Pennington v. State*, 306 Ga. 854, 834 S.E.2d 63 (October 7, 2019); *Henry v. State*, 307 Ga. 140, 834 S.E.2d 861 (October 21, 2019). *Followed, Pennington (March 23, 2020), above.*

B. IMMUNITY

1. JUSTIFIED USE OF FORCE

State v. Copeland, 310 Ga. 345, 850 S.E.2d 736 (November 2, 2020). In prosecution of sheriff's deputies for felony murder and related offenses, trial court's grant of immunity motion vacated and remanded for proper analysis. Deputy encountered Martin walking along a road after a suspicious person call. Martin ignored the deputy's questions and kept walking, so the deputy called for backup. Ultimately, three deputies accosted Martin and repeatedly tased him when he refused to comply with commands and continued attempting to walk away. Martin died as a result. **Trial court improperly used the standard for officers' justification under OCGA § 16-3-20(2) and (4) in analyzing immunity under OCGA § 16-3-24.2.** "Law enforcement officers may seek immunity from prosecution under OCGA § 16-3-24.2 when they are indicted based on their threats or use of force. See *Thompson v. State*, 288 Ga. 165, 169 (702 S.E.2d 198) (2010); *Bunn [v. State]*, 284 Ga. 410, 413(3) (667 S.E.2d 605) (2008)]. When they do, their evidentiary burden is identical to that of any other defendant. See *Thompson*, 288 Ga. at 169." "[W]hether officers used reasonable force in effectuating a lawful detention or arrest is a separate inquiry from whether their use of force was in defense of themselves or each other under OCGA § 16-3-21(a) such that they were entitled to immunity under OCGA § 16-3-24.2. The proper inquiry in determining whether to grant such immunity is whether the force used by each of the deputies was based on his reasonable belief that 'such threat or force is necessary to defend himself ... or a third person against such other's imminent use of unlawful force; however, ... a person is justified in using force which is intended or likely to cause death or great bodily harm only if he ... reasonably believes that such force is necessary to prevent death or great bodily injury to himself ... or a third person or to prevent the commission of a forcible felony.' OCGA § 16-3-21(a)." *Disapproving State v. Hall*, 339 Ga.App. 237 (793 S.E.2d 522) (2016) to the extent it conflicts by considering officer justification under OCGA § 16-3-20(2), (4).

State v. Jenkins, 355 Ga.App. 39, 840 S.E.2d 742 (March 10, 2020). In prosecution for aggravated assault and related offenses, trial court's grant of pretrial immunity affirmed in part and reversed in part. Evidence supported finding that aggravated assault on one party was justified, as that party was pointing a gun at others; but second person shot by Jenkins, Williams, was unarmed. "And the factual findings and credibility determinations that the trial court did make and we are required to accept because they are supported by the record ... do not support a conclusion that the defendant 'reasonably believed at the time he fired his ... gun [at Williams] that his action was necessary to prevent death or great bodily injury to [a third person],' " quoting *State v. Bunn*, 288 Ga. 20, 22 n.5, 701 S.E.2d 138 (2010). Thus also reversing grant of immunity as to charge of possession of firearm in commission of felony.

C. RESIST UNLAWFUL ARREST/DETENTION, RIGHT TO

Glenn v. State, 310 Ga. 11, 849 S.E.2d 409 (October 5, 2020). *Reversing* 350 Ga.App. 12, 827 S.E.2d 698 (2019); probation revocation vacated and remanded. 1. "[T]he common-law right to resist an unlawful arrest includes the right to use proportionate force against government property to escape an unlawful detention following the arrest." Defendant here was detained by officers for loitering and prowling, and resisted arrest by both assaulting the officers and kicking (and damaging) the door of a patrol car. At probation revocation hearing based on the incident, trial court found that officers had no probable cause for arrest, and that defendant was justified in resisting the arrest, but held that he had no right to damage government property in

doing so. Court of Appeals agreed, but Supreme Court reverses. 2. Tracing the history of the right to resist arrest and unlawful detention, the Court holds that nothing in Georgia constitutional or statutory law modifies the common-law right. Analogizes to the catchall provision of the justification statute, OCGA § 16-3-20(6). “Although the Code provides little guidance regarding when a defense stands upon the same footing of reason and justice as those enumerated in Article 2, in light of the broad range of interests protected in the enumerated justification defenses, we conclude that a jury could find that repelling an unlawful invasion of one’s liberty with proportionate force causing damage to property does stand on such footing. See *Tarvestad v. State*, 261 Ga. 605, 606, 409 S.E.2d 513 (1991) (A jury could have found that the defendant’s decision to drive without a license in order to seek medical help for his wife and their soon-to-be-born child stands on the same footing of reason and justice as the enumerated justification defenses, and the defendant was therefore entitled to his requested jury instruction on the defense of justification under OCGA 16-3-20(6)).[fn] Consequently, we see no basis for concluding that any Code section in Article 2 displaced the common-law right.” 3. The common-law right “acted to mitigate the defendant’s culpability for murder. However, when the rule was applied in cases where the defendant was charged with crimes other than homicide related to resistance to an arrest, a finding that a person committed an otherwise criminal act in the course of resisting an unlawful arrest served as a complete defense to such criminal charges.” The right, under common law, requires that “the person uses no more force than is necessary to achieve such purpose.” Provides a lengthy historical review of Georgia, and common-law England, cases. 4. **“In the context of the common-law right to resist an unlawful arrest, we have found no controlling authority for distinguishing between conduct that may harm an officer and conduct that may damage government property. When a person uses injurious force against an officer to resist being arrested, damage to government property, such as the officer’s uniform being pierced by a bullet or a blade, the officer’s radio being damaged during a struggle with the arrestee, or even the officer’s patrol car being damaged, are secondary concerns and less likely to result in separate criminal charges. Notwithstanding the dearth of case law on point, because the common-law right to resist an unlawful arrest or detention is framed in terms of the proportionate use of force necessary to resist the force used to arrest or detain a person, we conclude that the right does not distinguish between the use of force against an arresting officer’s person and the use of force against objects, including government property.”** “Although many states have limited or eliminated the common-law right to resist an unlawful arrest or detention,[fn] after reviewing this State’s constitutional and statutory provisions relevant to detentions and arrests, we conclude that the Georgia General Assembly has not done so and that the common-law rule remains in effect in Georgia, at least with respect to charges of obstruction or interference with government property.[fn] And we conclude that **the mere passage of time between an unlawful arrest and an attempt to escape from the ensuing detention has no bearing on whether the use of force was proportionate or necessary.** Under Georgia law, therefore, a person may damage government property in an attempt to resist an unlawful, warrantless arrest or escape an unlawful, warrantless detention, using no more than proportionate force, even where, as in this case, officers handcuff an arrestee and place him in a patrol car before the arrestee’s property-damaging conduct.” Vacated and remanded for determination of “whether Glenn used force to resist the officers’ actions that was proportionate under the circumstances.”

Calmer v. State, 309 Ga. 368, 846 S.E.2d 40 (July 1, 2020). Malice murder and related convictions affirmed. Trial court properly declined to charge on right to resist an unlawful arrest. “There was ... no evidence that the [victim] deputies were at the residence for the purpose of arresting Calmer or that the deputies attempted to arrest him before he opened fire.” Rather, evidence showed that deputies came to Calmer’s residence because his parents reported that he was threatening suicide. “Deputy Wilson testified at trial that he had been on numerous suicide

calls; that he was at the Calmer residence to ‘help’ as a ‘first responder;’ and that ‘[s]uicide is not a crime.’ According to Deputy Wilson, he and Deputy Norris had drawn their weapons for their own protection, but they were not there to make an arrest.”

V. DUI

A. IMPLIED CONSENT AND CHEMICAL TESTS

1. INDEPENDENT TEST, REQUEST FOR, WHAT CONSTITUTES

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

Ladow v. State, 256 Ga.App. 726, 569 S.E.2d 572 (July 11, 2002). On de novo review of facts following bench trial, Court of Appeals holds that trial court erred in finding that defendant did not request independent test. As officer finished reading first sentence of implied consent warning, defendant said “I want a blood test.” Officer finished reading warning, specifying that the state test would be a blood test. Defendant took the state blood test, never again mentioning an independent test, and none was given. Held, defendant’s words were sufficient to invoke her right to independent testing. Contrary to state’s argument, officer could not reasonably have believed defendant was attempting to designate the type of state-administered test to be used, as that choice belongs to the officer, not the defendant. **As the implied consent warning does not**

specify “to the accused any requirements for requesting that test – linguistically, temporally, or otherwise... [a]n accused’s right to have an additional, independent chemical test or tests administered is invoked by some statement that reasonably could be construed, in light of the circumstances, to be an expression of a desire for such test.” See also *Johnson* (June 12, 2003), above. *Accord, Henry v. State*, 355 Ga.App. 217, 843 S.E.2d 884 (May 27, 2020) (defendant’s question after reading of implied consent notice, “so you are saying I can take, my blood, my blood, my doctor can do my blood test and all that?” “reasonably could be construed to be an expression of a desire for such a test”) (*cert. granted on this issue, S20G1339, December 7, 2020*). Distinguished in *State v. Gillaspay*, 270 Ga.App. 111, 605 S.E.2d 835 (October 19, 2004) (Statement “I’ll take a blood test,” was clearly, in context, a response to officer’s request for a state-administered test, not a request for an independent test); *Anderton v. State*, 283 Ga.App. 493, 642 S.E.2d 137 (February 7, 2007) (same as *Gillaspay*); *Brooks v. State*, 285 Ga.App. 624, 647 S.E.2d 328 (May 31, 2007) (trial court could determine that defendant’s questions about a blood test were not a request for an independent test, in context); *Fowler v. State*, 294 Ga.App. 864, 670 S.E.2d 448 (November 4, 2008) (request for breath test instead of officer’s designated blood test was not a request for independent test). *Followed, but criticized, Wright* (July 15, 2016), above.

2. REFUSAL OF STATE TEST

State v. Bradberry, 357 Ga.App. 60, 849 S.E.2d 790 (October 7, 2020). In DUI prosecution, trial court erred in denying motion to suppress refusal of alco-sensor test. **“We recognize that the issue before us involves an alco-sensor preliminary breath test, rather than the type of breathalyzer breath tests involved in *Elliott* and *Olevik*. Nevertheless, we do not find that distinction to be controlling since the evidence plainly shows that Bradberry would have been required to perform the affirmative act of blowing into the alco-sensor device for a sustained period of time.** Because Bradberry had the right to refuse to provide incriminating evidence by performing such an affirmative act under Paragraph XVI, the admission of evidence of his refusal violates the state constitutional right against self-incrimination.” *Cert. granted on this issue, Adams v. State, S20G1409, January 11, 2021.*

State v. Johnson, 354 Ga.App. 447, 841 S.E.2d 91 (March 12, 2020). In DUI prosecution, trial court properly excluded other acts evidence to the extent it showed refusal of State implied consent breath tests, but erred in suppressing other acts evidence of refusal of State implied consent blood tests. Nothing in *Elliott*, *Olevik*, or the U.S. Constitution excludes evidence of blood test refusal. “Indeed, *Birchfield* acknowledged that many jurisdictions permit introduction of evidence of refusal of a blood test into evidence at trial, and did not note any problem with such practice. 136 S.Ct. at 2179(V)(C)(1).” *Accord, Hinton v. State*, 355 Ga.App. 263, 842 S.E.2d 67 (April 9, 2020) (jury charge on adverse inferences from refusal of blood test proper); *State v. Voyles*, 355 Ga.App. 903, 846 S.E.2d 170 (June 29, 2020).

B. SEARCH AND SEIZURE, GENERALLY

Birchfield v. North Dakota, 14-1468, ___ U.S. ___, 136 S.Ct. 2160, 195 L.Ed.2d 560, 2016 WL 3434398 (June 23, 2016). *Reversing* North Dakota Supreme Court; *affirming* Minnesota Supreme Court. **A state-administered breath test is allowable as a search incident to arrest, but a blood test is not.** Based on *Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed.2d 430 (June 25, 2014) (rejecting searches of cell phones incident to arrest, balancing suspect’s privacy interest with State’s interest in immediate officer safety/evidence preservation concerns). **1. Facts.** North Dakota and Minnesota criminalize refusal of state implied-consent testing upon a DUI arrest. Defendant Birchfield refused a blood test in North Dakota and was criminally charged; defendant Bernard refused a breath test in Minnesota and was criminally charged.

Defendant Beylund consented to a blood test in North Dakota based on the implied consent warning that he would be criminally charged upon refusal. **2. Both breath and blood tests are Fourth Amendment searches.** “[O]ur cases establish that the taking of a blood sample or the administration of a breath test is a search. See *Skinner v. Railway Labor Executives’ Assn.*, 489 U.S. 602, 616–617, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); *Schmerber v. California*, 384 U.S. 757, 767–768, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).” **3. Search incident to arrest analysis:** “we engage in the same mode of analysis as in *Riley*: we examine ‘the degree to which [they] intrud[e] upon an individual’s privacy and ... the degree to which [they are] needed for the promotion of legitimate governmental interests.’ *Ibid.*” **4.** “Years ago we said that **breath tests do not ‘implicat[e] significant privacy concerns.’** *Skinner*, 489 U.S., at 626, 109 S.Ct. 1402. That remains so today. First, **the physical intrusion is almost negligible.** Breath tests ‘do not require piercing the skin’ and entail ‘a minimum of inconvenience.’ *Id.*, at 625, 109 S.Ct. 1402. ... **Humans have never been known to assert a possessory interest in or any emotional attachment to any of the air in their lungs,**” including deep lung air, contrary to defendant’s argument. “Just recently we described the process of collecting a DNA sample by rubbing a swab on the inside of a person’s cheek as a ‘negligible’ intrusion. *Maryland v. King*, 569 U.S. 435, 446, 133 S.Ct. 1958, 1969, 186 L.Ed.2d 1 (2013). We have also upheld scraping underneath a suspect’s fingernails to find evidence of a crime, calling that a ‘very limited intrusion.’ *Cupp v. Murphy*, 412 U.S. 291, 296, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973). A breath test is no more intrusive than either of these procedures.” **Breath tests also reveal no personal information beyond “the amount of alcohol in the subject’s breath,” and “[n]o sample of anything is left in the possession of the police.** Finally, participation in a breath test is not an experience that is likely to cause any great enhancement in the **embarrassment** that is inherent in any arrest. See *Skinner*, *supra*, at 625, 109 S.Ct. 1402 (breath test involves ‘a minimum of ... embarrassment’).” *Accord*, *Olevik v. State*, 302 Ga. 228, 806 S.E.2d 505 (October 16, 2017) (breath tests are also searches incident to arrest under Georgia Constitution, Art. I, Sec. I, Par. XIII; thus, “there is no need to obtain consent for a breath test to support a warrantless search for Fourth Amendment purposes after a valid arrest.”); *Fazio v. State*, 302 Ga. 295, 806 S.E.2d 544 (October 16, 2017); *McMaster v. State*, 344 Ga.App. 222, 809 S.E.2d 478 (January 10, 2018). **5. Defendants do have a significant privacy interest in blood samples. “Blood tests are a different matter. They ‘require piercing the skin’ and extract a part of the subject’s body.** *Skinner*, *supra*, at 625, 109 S.Ct. 1402; see also [*Missouri v. McNeely*, 569 U.S. 141, 133 S.Ct. 1552, 1558, 185 L.Ed.2d 696 (April 17, 2013)] (opinion of the Court) (blood draws are ‘a compelled physical intrusion beneath [the defendant’s] skin and into his veins’); *id.*, at 174, 133 S.Ct. at 1573 (opinion of ROBERTS, C.J.) (blood draws are ‘significant bodily intrusions’).” “In addition, a blood test, unlike a breath test, **places in the hands of law enforcement authorities a sample that can be preserved** and from which it is possible to extract information beyond a simple BAC reading. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested.” **6. “The States and the Federal Government have a ‘paramount interest ... in preserving the safety of ... public highways.’** *Mackey v. Montrym*, 443 U.S. 1, 17, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979).” This interest extends beyond merely removing impaired drivers from the road, but also collecting evidence to support their prosecution. “After pegging inebriation to a specific level of blood alcohol, States passed implied consent laws to induce motorists to submit to BAC testing. ... The laws at issue in the present cases—which make it a crime to refuse to submit to a BAC test—are designed to provide an incentive to cooperate in such cases, and we conclude that they serve a very important function.” The fact that, in some cases, it may be possible for officers to obtain timely search warrants is inapposite, because “search incident to arrest” analysis is categorical, unlike the case-by-case analysis conducted to determine exigent circumstances (see *McNeely*). “If a search warrant were required for every search incident to arrest that does not involve exigent circumstances, the courts would be swamped. ... In light of this burden and our

prior search-incident-to-arrest precedents, petitioners would at a minimum have to show some special need for warrants for BAC testing.” Defendants can’t do this as to breath testing, given the limited privacy interest at stake as described above. **Results: “Having assessed the effect of BAC tests on privacy interests and the need for such tests, we conclude that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. The impact of breath tests on privacy is slight, and the need for BAC testing is great. We reach a different conclusion with respect to blood tests. Blood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test. [The States] have offered no satisfactory justification for demanding the more intrusive alternative without a warrant.”** Thus, *Birchfield* couldn’t be criminally prosecuted based on refusal to give a blood sample, and *Beylund*’s consent to a blood test based on the threat of criminal prosecution was coerced, not voluntary. *Bernard*, however, could be criminally prosecuted for refusal of breath test, analogous to prosecution for obstruction.

7. **Implied consent suspensions are still reasonable. “Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. See, e.g., *McNeely*, supra, at 160-161, 133 S.Ct., at 1565–1566 (plurality opinion); [*South Dakota v. Neville*, 459 U.S. 553, 560, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983)]. [Defendants] do not question the constitutionality of those laws, and **nothing we say here should be read to cast doubt on them.** It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads.”** That limit is reasonableness, which “is always the touchstone of Fourth Amendment analysis, see *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). And applying this standard, we conclude that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense.” *Accord, State v. Baddeley*, 348 Ga.App. 844, 823 S.E.2d 373 (February 6, 2019) (Physical precedent only; “license suspension is a true and legitimate consequence of refusing to submit to or submitting and failing the test.”).

C. SELF-INCRIMINATION

State v. Awad, 357 Ga.App. 255, 850 S.E.2d 454 (October 20, 2020). In DUI prosecution, **trial court erred by granting motion to suppress evidence of urine test refusal based on *Elliott* and *Olevik*. *Elliott* “made clear that the holdings of *Olevik* and *Elliott* are limited to chemical tests of a driver’s breath.” Controlling authority remains *Green v. State*, 260 Ga. 625, 626(2), 398 S.E.2d 360 (1990), which “established that use of a suspect’s urine sample does not violate the suspect’s right against self-incrimination under Paragraph XVI” of the Georgia Constitution. “[S]ee also *Robinson v. State*, 180 Ga.App. 43, 50-51(3), 348 S.E.2d 662), reversed on other grounds by *Robinson v. State*, 256 Ga. 564, 350 S.E.2d 464 (1986) (holding that ‘procurement’ of a suspect’s urine did not violate his right because there was no evidence that he was forced to produce the urine sample).” Of course, “the production of bodily fluid samples is not communicative or testimonial in nature and thus does not implicate a defendant’s privilege against self-incrimination under the Fifth Amendment. See *Schmerber v. California*, 384 U.S. 757, 765(II), 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) (holding that a DUI suspect’s privilege against self-incrimination was not violated by the extraction of a blood sample without his consent); *Hearn v. Bd. of Public Ed.*, 191 F.3d 1329, 1333(II) (11th Cir. 1999) (the production of urine is not testimonial in nature for purposes of the Fifth Amendment).”**

Fofanah v. State, 355 Ga.App. 895, 846 S.E.2d 154 (June 26, 2020). DUI and related convictions affirmed. Trial court properly denied motion to suppress implied consent breath test, finding that defendant’s consent to testing was not coerced. **The statutory warning read by the officer (in**

2014) was “not per se coercive,” citing *Olevik*, and under the totality of the circumstances, trial court properly found “that Fofanah ‘voluntarily consented to the breath test,’ noting his unequivocal agreement to submit to testing, his ability to comprehend the conversation with the officers, his coherent responses to questioning, and his ability to follow instructions. The court also found that the officers were not threatening, yelling, or hostile, nor did they make any threats or promises to obtain Fofanah’s consent. The court acknowledged that the officers’ advisement to Fofanah that a refusal to submit to the test could be offered into evidence against him at trial was misleading, but nevertheless concluded that the ‘advisement does not render the consent in this case involuntary. [Fofanah] did not appear frightened or nervous, and even after being advised of his right to independent tests, made no request for anything other than the breath test given, a minimal intrusion on [his] liberty. It is also notable that he did not once, either at the scene or on the drive to the Sheriff’s office, attempt to withdraw his consent to this testing.’” “[T]he trial court considered the impact of the misleading informed consent notice as instructed by this Court and concluded that, given the totality of the circumstances, Fofanah’s consent was voluntary.”

Kallon v. State, 355 Ga.App. 546, 845 S.E.2d 348 (June 18, 2020). Following convictions for DUI and related offenses, trial court’s denial of motion to suppress breath test vacated and remanded for further reconsideration under *Elliott v. State*, 305 Ga. 179, 824 S.E.2d 265 (2019). Defendant was arrested for DUI in 2017 and took a breath test. He now contends that the implied consent warning was unconstitutionally, inherently coercive. But *Elliott* “explained at length that its decision was not nullifying its numerous prior holdings — including *Olevik*’s holding — that the implied consent notice itself is not per se coercive. *Elliott*, supra, 305 Ga. at 222(IV)(E), 824 S.E.2d 265. Regarding the implied consent notice, the Court merely noted, ‘[t]his decision may well have implications for the continuing validity of the implied consent notice as applied to breath tests.’ *Id.* **Clearly, the Supreme Court in *Elliott* never held that the former implied consent notice is unconstitutionally coercive. And if the Supreme Court in *Elliott* was careful to *deliberately* leave open the question of the impact of its decision on the validity of the implied consent notice, this Court will not take it upon itself to construe the Supreme Court’s decision as a ruling that the notice is unconstitutionally coercive.** Indeed, while ‘this [C]ourt may treat a statute as unconstitutional if it has already been held so by ... the Supreme Court of this state,’ “this [C]ourt ha[s] no authority to declare an Act of the legislature unconstitutional.’ (Citation omitted.) *Pitts v. Gen. Motors Acceptance Corp.*, 130 Ga.App. 333, 335(1), 203 S.E.2d 281 (1973).” And defendant’s argument that *Elliott* necessarily means “that the former implied consent notice has always been unconstitutional ... directly undercuts our Supreme Court’s repeated cautioning ‘that [its] decisions stand only for the points raised by the parties and *decided by the [C]ourt.*’ (Emphasis supplied.) *State v. Walker*, 295 Ga. 888, 893, 764 S.E.2d 804 (2014).” “Therefore, we vacate the trial court’s ruling on Kallon’s motion to suppress and motion in limine and remand this case for the trial court to reconsider **whether Kallon’s consent was voluntary under the totality of the circumstances** in light of *Elliott*.” *Accord, State v. Henderson*, 356 Ga.App. 473, 847 S.E.2d 833 (August 25, 2020) (trial court erred in suppressing breath test results based solely on the wording of the implied consent warning, and not on the totality of the circumstances); *State v. Bradberry*, 357 Ga.App. 60, 849 S.E.2d 790 (October 7, 2020).

Leggett v. State, 354 Ga.App. 877, 842 S.E.2d 313 (April 20, 2020). Convictions for DUI and related offenses vacated and remanded for consideration of voluntariness of defendant’s consent to breath test. “**Determining the voluntariness of (or lack of compulsion surrounding) a defendant’s incriminating statement or act involves considerations similar to those employed in determining whether a defendant voluntarily consented to a search[,]’ including such factors as ‘the age of the accused, his education, his intelligence, the length of**

detention, whether the accused was advised of his constitutional rights, the prolonged nature of questioning, the use of physical punishment, and the psychological impact of all these factors on the accused. In determining voluntariness, no single factor is controlling.’ *Olevik v. State*, 302 Ga. 228, 251(3)(b) (806 S.E.2d 505) (2017).” *Accord, Fofanah* (June 26, 2020), *above*.

State v. Turnquest, 305 Ga. 758, 827 S.E.2d 865 (May 6, 2019). In DUI prosecution, trial court erred by granting motion to suppress. “[W]e hold that neither the Georgia right against compelled self-incrimination, the Georgia right to due process, nor a Georgia statute prohibiting compelled self-incrimination requires law enforcement to provide [*Miranda* or] similar warnings to persons arrested for DUI before asking them to submit to a breath test.” *Overruling* line of cases beginning with *Price v. State*, 269 Ga. 222, 498 S.E.2d 262 (1998), requiring reading of *Miranda* warnings before field sobriety evaluations while in custody.

Elliott v. State, 305 Ga. 179, 824 S.E.2d 265 (February 18, 2019). In DUI prosecution, trial court erred by denying defendant’s motion to suppress refusal of state breath test. Since blowing into a breath-testing machine is an affirmative act, and thus cannot be compelled under the Georgia Constitution’s privilege against self-incrimination, Art. I, Sec. I, Par. XVI (“Paragraph XVI”), *see Olevik v. State*, 302 Ga. 228, 806 S.E.2d 505 (October 16, 2017), refusal to take a test may not be used against a defendant at trial. **“Paragraph XVI generally prohibits admission of a defendant’s pretrial refusal to speak or act. And we conclude that OCGA §§ 40-5-67.1(b) and 40-6-392(d) violate the Georgia Constitution by allowing the admission of a defendant’s refusal to submit to a breath test to prove that the defendant had been drinking alcohol.”**

Olevik v. State, 302 Ga. 228, 806 S.E.2d 505 (October 16, 2017). DUI and related convictions affirmed. Contrary to trial court’s holding, and prior case law, **the Georgia Constitution’s right against compelled self-incrimination applies to breath tests pursuant to implied consent, overruling *Klink v. State*, 272 Ga. 605, 533 S.E.2d 92 (2000).** 1. Art. I, Sec. I, Par. XVI (“Paragraph XVI”) of the Georgia Constitution has historically been construed to apply to compelled acts, not merely testimony, since the 1877 Constitution and *Day v. State*, 63 Ga. 668, 669(2) (1879). The Georgia Constitution was construed to embody “the common law principle that ‘no man is bound to accuse himself of any crime or to furnish any evidence to convict himself of any crime[.]’ Recognizing that the constitutional guaranty against compelled self-incrimination was as broad as the common law right from which it was derived, we noted that **the right ‘protects one from being compelled to furnish evidence against himself, either in the form of oral confessions or incriminating admissions of an involuntary character, or of doing an act against his will which is incriminating in its nature,’”** quoting *Calhoun v. State*, 144 Ga. 679, 681, 87 S.E. 893 (1916). 2. “In contrast, the right against compelled self-incrimination is not violated where a defendant is compelled only to be present so that certain incriminating evidence may be procured from him,” such as by removing his clothing, taking evidence from his body, or taking photographs of him. *Batton v. State*, 260 Ga. 127, 130 (3) (391 S.E.2d 914) (1990); *Drake v. State*, 75 Ga. 413, 414-415 (2) (1885) (taking blood-stained clothes from defendant); *Ingram v. State*, 253 Ga. 622, 634 (7) (323 S.E.2d 801) (1984) (right was not violated by requiring defendant to strip to the waist to allow police to photograph tattoos on his body); *State v. Thornton*, 253 Ga. 524, 525 (2) (322 S.E.2d 711) (1984) (taking impression of defendant’s teeth did not compel defendant to perform an act); and others. 3. And **no violation occurs where defendant consents to perform the act.** “See, e.g., *Scott v. State*, 274 Ga. 476, 478(2)(b) (554 S.E.2d 488) (2001) (accused’s right against compelled self-incrimination was not violated when he agreed to hold up sleeve to allow police to photograph tattoos on his arm); *Whippler v. State*, 218 Ga. 198, 203(6) (126 S.E.2d 744) (1962) (defendant’s right against

compelled self-incrimination not violated where he voluntarily and without objection cooperated in giving fingerprints to police); *Foster v. State*, 213 Ga. 601, 604(3) (100 S.E.2d 426) (1957) (suspect's right was not violated when he agreed to go with police to the crime scene for identification purposes); see also *State v. J.T.*, 155 Ga.App. 812 (273 S.E.2d 214) (1980) (student complied with assistant principal's instruction to 'empty her pockets'). In sum, Paragraph XVI prohibits compelling a suspect to perform an act that itself generates incriminating evidence; it does not prohibit compelling a suspect to be present so that another person may perform an act generating such evidence." As noted in *Birchfield*, a state breath test "requires the cooperation of the person being tested because a suspect must blow deeply into a breathalyzer for several seconds in order to produce an adequate sample. [Cit.] As the State conceded at oral argument, merely breathing normally is not sufficient. ... If the State sought to capture and test a person's naturally exhaled breath, this might well be a different case. But this is not how a breath test is performed. **Sustained strong blowing into a machine for several seconds requires a suspect to breathe unnaturally for the purpose of generating evidence against himself.**" 4. Blood tests, however, do not implicate self-incrimination, citing *Strong v. State*, 231 Ga. 514 (202 S.E.2d 408) (1973) ("Nothing we say here should be understood as casting any doubt on *Strong's* self-incrimination holding."). 5. "[T]he totality of the circumstances test to determine the voluntariness of an incriminating statement or act for due process purposes is the same test used to determine the voluntariness of a consent to chemical testing in the DUI context." 6. **Georgia's implied consent warning is not inherently coercive on its face. Contrary to defendant's argument, the notice does advise defendants of their right to refuse testing; and while the notice regarding the likelihood of suspension "is not entirely accurate," this "does not, by itself, render the notice per se coercive regardless of other circumstances."** And "Olevik points to no law requiring a full and explicit explanation of all possible consequences no matter how obvious," such as the fact that test results will be used against him at trial. "Olevik's facial claim rests on the premise that the notice would deceive a reasonable person. On the record before us, although Olevik points out deficiencies in the implied consent notice, [FN14: The General Assembly may wish to amend the implied consent notice statute; if it does, among the changes it may consider would be a clearer explication of the right to refuse testing, and a more accurate articulation of the likelihood of license suspension.] there is no evidence that OCGA § 40-5-67.1(b) creates widespread confusion about drivers' rights and the consequences for refusing to submit to a chemical test or for taking and failing that test. *Accord, Fazio v. State*, 302 Ga. 295, 806 S.E.2d 544 (October 16, 2017); *Schmitz v. State*, 302 Ga. 473, 807 S.E.2d 361 (October 30, 2017); *Bergstrom v. State*, 347 Ga.App. 295, 819 S.E.2d 84 (September 14, 2018) ("There is no law requiring a full and explicit explanation of all possible consequences of refusal in this context."); *Fofanah v. State*, 351 Ga.App. 632, 832 S.E.2d 449 (August 15, 2019). 7. **Defendant points to no other coercive circumstances in this case.** "Determining the voluntariness of (or lack of compulsion surrounding) a defendant's incriminating statement or act involves considerations similar to those employed in determining whether a defendant voluntarily consented to a search. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (93 S.Ct. 2041, 36 L.Ed.2d 854) (1973) ... Just as the voluntariness of consent to search includes an assessment of the 'psychological impact of all the factors on a defendant,' a significant factor in a due process inquiry is whether a deceptive police practice caused a defendant to confess or provide an incriminating statement. See *United States v. Lall*, 607 F.3d 1277, 1285 (11th Cir., 2010) ('While we look to the totality of the circumstances to determine the voluntariness of [a defendant's] confession, a significant aspect of that inquiry here involves the effect of deception in obtaining a confession.');

[*State v. Chulpayev*, 296 Ga. 764, 779(3)(a) (770 S.E.2d 808) (2015)] (citing *Lall*, 607 F.3d at 1285)). And although 'knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent.' *State v. Tye*, 276 Ga. 559, 560(1) (580 S.E.2d 528) (2003) (citation and punctuation omitted); see also *Schneckloth*, 412 U.S. at 227 ('While the state of the accused's

mind, and the failure of the police to advise the accused of his rights, were certainly factors to be evaluated in assessing the “voluntariness” of an accused’s responses, they were not in and of themselves determinative.’)” *Accord, Diaz v. State*, 344 Ga.App. 291, 810 S.E.2d 566 (January 23, 2018) (knowledge of the right to refuse not required or determinative). **8. No Georgia *Miranda* warning exists.** FN13: “To the extent Olevik argues that we should impose a *Miranda*-style prophylactic rule to protect suspects’ Paragraph XVI rights (rights the scope of which, as we have explained, were well-established long before the Supreme Court’s decision in *Miranda*), he does not point us to a single decision of this Court or any textual or historical basis supporting such a step. In the absence of a more complete argument, we decline to address this issue.”

VI. EVIDENCE

A. FOUNDATION REQUIREMENTS *See also subheadings BUSINESS RECORDS, above, POLICE REPORTS, below, and SCIENTIFIC EVIDENCE, below*

1. INTERNET PAGES

Intemann v. State, 358 Ga.App. 488, 855 S.E.2d 666 (February 22, 2021). Armed robbery convictions affirmed; **Twitter posts were properly authenticated.** Defendant’s friend testified to defendant’s Twitter handles; officer testified that he thus located the account, which had defendant’s name on it, and printed out Tweets from that account. “[T]he trial court was authorized to find that the State established a prima facie case that the printouts accurately reflected the contents of the Tweets and that Intemann posted them.” “To the extent that Intemann claims that someone else could have hacked into his Twitter account and posted the Tweets, ‘this argument goes to weight, not authenticity.’ *Holzheuser v. State*, 351 Ga.App. 286, 290(1)(a)(i), 828 S.E.2d 664 (2019).”

B. HEARSAY

1. FORFEITURE

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

2. MEDICAL DIAGNOSIS AND TREATMENT

Smith v. State, 309 Ga. 240, 845 S.E.2d 598 (June 29, 2020). Felony murder and firearm convictions affirmed. Defendant presented expert witness, a psychologist, to testify that defendant suffered from battered person syndrome (BPS) and PTSD, “how Appellant developed these mental health issues, and how they affected her prior to and on the day of the shooting.” Trial court refused to allow the witness to repeat what defendant’s non-testifying family members told her about abuse inflicted on defendant by victim over the years of their relationship, finding that the statements “do not qualify as statements made for the purpose of medical diagnosis or treatment” under OCGA § 24-8-803(4). The State argued that the statements “were made in anticipation of litigation and not for the purposes of a medical diagnosis.” **Held, statements made to experts retained to testify at trial are not categorically excluded; they should be analyzed on a case-by-case basis to determine if they qualify under the test adopted in *Almanza* (October 9, 2018), below: “In determining whether a statement is admissible under Rule 803(4), we ask whether: (1) the declarant’s motive in making the statement is consistent with the purposes of treatment; and (2) the content of the statement is the type reasonably relied upon by a physician in treatment or diagnosis. See *Almanza*, 304 Ga. at 561(3), 820 S.E.2d ‘[A]ssessing the validity of the declarant’s “motive” is critical’ under this test. Id. at 562(3), 820 S.E.2d 1.” Also citing *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980) and the Fed. R. Evid. 803(4) Advisory Committee Note (explicitly rejecting the prior rule excluding statements to expert witnesses from admission under this hearsay exception). But any error in excluding the statements here was harmless: the defense was able to present plenty of evidence of her abuse, and the State acknowledged that she had been abused. *Notes that such evidence presented by the State may raise Confrontation Clause issues.***

McEady v. State, 355 Ga.App. 820, 846 S.E.2d 94 (June 25, 2020). Rape and related convictions affirmed. Ruling admitting statements made by the victim to a sexual assault nurse examiner (SANE) “as statements made for purposes of medical diagnosis or treatment” was “questionable,” but not grounds for reversal. **Rule 803(4). Court questions whether the statements were admissible under the rule because SANE took statements from the victim and examined her for purposes of “a head-to-toe documentation of injuries, including the collection of DNA evidence for analysis seeking the identity of any foreign DNA found. Based on this record — including the fact that hospital staff had independently evaluated E.A., had gathered enough information to make treatment decisions, and had made the decision to admit E.A. for trauma treatment independent of the SANE interview — it is questionable whether the hearsay elicited by the SANE interview in this case was reasonably pertinent to diagnosis and treatment, as opposed to gathering evidence.”** *Comparing United States v. Williams*, 578 Fed. Appx. 872, 876(III) (11th Cir. 2014) (unpublished; “holding that a victim’s initial disclosure made to a treating nurse that the victim was ‘raped’ was admissible); *United States v. Iron Thunder*, 714 F.2d 765, 772-773(II)(B) (8th Cir. 1983) (‘Even though [the treating physician’s] examination and questioning of [the victim] were pursuant to a standardized protocol designed in large measure to prepare for criminal prosecution, Rule 803(4) applies to statements made for the purpose of medical diagnosis as well as to statements made for the purpose of medical treatment. [The victim] responded to questions by [the treating physician,] which were intended not only to shed light on her physical, emotional, and mental condition, but which also could serve as a basis for treatment.’).” **Harmless** because victim didn’t identify defendant in the interview; the facts disclosed in the interview (the rape, the victim’s injuries) were not in dispute, “did not materially undermine” the defense, and were cumulative of other evidence.

C. OTHER ACTS

1. SIMILARITY OF OFFENSES -- DUI

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

D. PHOTOGRAPHS, RECORDINGS AND VIDEOTAPES

1. AUDIO/VIDEO RECORDINGS – EAVESDROPPING

Nuckles v. State, 310 Ga. 624, 853 S.E.2d 81 (December 21, 2020). In prosecution for depriving an elder person of essential services and concealing his death, trial court properly denied motion to suppress; rehab facility resident had right to place video camera in his room, and facility employee had no expectation of privacy in resident's room under OCGA § 16-11-62(2)(B). OCGA § 16-11-62 generally prohibits admission of recordings made in private places without consent of all persons depicted, but subsection (2)(B) provides a "security exception" "[f]or an owner or occupier of real property to use for security purposes, crime prevention, or crime detection any device to observe, photograph, or record the activities of persons who are on the property or an approach thereto in areas where there is no reasonable expectation of privacy[.]" Video camera here was placed by resident and his family, who suspected that persons were entering his room at night and taking his property, and that staff were mistreating him. The recording showed that defendant and others failed to respond appropriately when he was found unresponsive, and hid evidence of a faulty oxygen canister. **1. A resident of a rehab facility like victim Dempsey is an "occupier of real property" as contemplated in the security exception, applying the ordinary meaning of the word "occupier."** Rejects defendant's contention that

the provision only applies to “a person who has ultimate control over the property and is responsible for its maintenance, protection, and guests”; rather, “we interpret the term ‘occupier of real property’ as used in OCGA § 16-11-62(2)(B) to be broad enough to encompass someone like Dempsey, who had the legal right to occupy, and indeed reside in, the area captured on the video recording.” **2. Defendant, an employee in the facility, had no reasonable expectation of privacy in victim’s room.** Applies Fourth Amendment case law to determine legislature’s intent regarding reasonable expectation of privacy “because that phrase had developed into a term of art relating to privacy rights by the time the Security Exception was enacted.” “The General Assembly adopted the Security Exception in 2000, see Ga. L. 2000, p. 876, § 2, more than 30 years after courts began recognizing that the phrase ‘reasonable expectation of privacy’ signaled an individualized approach to privacy rights under the Fourth Amendment. ‘The primary determinant of a text’s meaning is its context,’ and ‘[f]or context, we may look to other provisions of the same statute, the structure and history of the whole statute, and the other law—constitutional, statutory, and common law alike—that forms the legal background of the statutory provision in question.’ *Gray v. State*, 310 Ga. 259, 850 S.E.2d 36 (October 19, 2020) (citations and punctuation omitted). Thus, we presume that the General Assembly was aware of this jurisprudence when it chose to employ that language in the exception. See *id.*; *Davis v. Kaiser Foundation Health Plan of Ga., Inc.*, 271 Ga. 508, 509, 521 S.E.2d 815 (1999).” “[C]ourts must consider an individual’s status in relation to the location, as one person present in a particular area may have a reasonable expectation of privacy, while another person may not,” such as a registered guest in a hotel room vs. a casual visitor. “Also, whether an individual has a reasonable expectation of privacy may depend on factors such as the conduct occurring, or other people present, at the time of the recording.” A worker such as Nuckles may have an expectation of privacy in areas on their workplace “over which [the] employee had exclusive authority, including areas where an employee kept his or her personal belongings,” but Dempsey’s room was not such a place: “Nuckles never exercised exclusive control over Dempsey’s room and never used it for personal reasons. She testified that she did not pay any rent for the use of the room; she never slept or changed clothing there; she never used Dempsey’s bathroom; and she never kept her personal items in his room. Instead, it appears that Nuckles was engaged in her work duties at the time the recording was made, and there is nothing to suggest that she would not have been subject to supervision or observation by other rehab facility employees in the performance of her duties.”

2. AUDIO/VIDEO RECORDINGS -- GENERALLY

Robinson v. State, 308 Ga. 543, 842 S.E.2d 54 (April 20, 2020). Convictions for malice murder, armed robbery, and related offenses affirmed; admission of two police bodycam videos was an abuse of discretion, but harmless in light of overwhelming evidence of guilt. **1. Video of defendant’s arrest, a month after the offenses, was irrelevant.** Contrary to State’s argument, “the video did not show Robinson’s flight; it did not provide any evidence of Robinson’s guilt or demeanor at the time he fled to Waycross.” But because the jury already knew that defendant had been arrested and charged with murder, “it is highly probable that the arrest video alone did not contribute to the verdict.” **2.** Video of the crime scene, including the victim’s body lying in a pool of blood minutes after the shooting, was relevant and admissible, though gruesome, *citing* “*Davis v. State*, 306 Ga. 140, 145(3)(b), 829 S.E.2d 321 (2019) (video of deceased victim relevant to show manner of death and to corroborate witness testimony)” and *Plez v. State*, 300 Ga. 505, 508(3), 796 S.E.2d 704 (2017).” **3. “By contrast, the last three minutes of the video showed little of the home and yard, nothing of Moore, and focused primarily on the emotional turmoil of Moore’s five-year-old daughter and seven-year-old son. In this portion of the video, the officer picks up the crying children, and takes them outside to a patrol car. The young children asked the officer, ‘who shot my daddy?’ and repeatedly said, ‘I want my**

daddy.’ The prosecutor repeated these requests and questions from the children in opening and closing arguments, and acknowledged to the jury the prosecutor’s purpose in introducing the evidence,” namely, to “stir your emotion.” “This portion of the video did not have even the remotest shred of relevance. [Cit.] Even viewing the video in the light most favorable to admission, there was no conceivable probative value to the video, so the probative value was substantially outweighed by the danger of unfair prejudice from its emotionally charged content. Admitting the last three minutes of the recording was plainly an abuse of discretion, particularly when considered in light of the State’s problematic closing argument,” which was “clearly inappropriate.” And unfair prejudice is “more likely ... when the video had no other purported purpose,” and “a close call due to the complete lack of probative value for which this video could have been admitted, but ultimately, we conclude that the admission of this portion of the video was harmless in the light of the compelling evidence of Robinson’s guilt.” “FN5: Although we hold in this case ... that the other evidence of the defendant’s guilt was strong enough to render harmless the erroneously admitted portions of an officer’s body-camera video recording, that will not always be so. The admissibility of these sorts of recordings – and each portion of them – must be considered with care.”

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

prejudicial impact of this portion of the recording was unfair.” **Balancing.** While most of the videos was not unfairly prejudicial, “the scant probative value of the last four minutes of the second video-recording was substantially outweighed by the danger of unfair prejudice from its emotionally charged content and ... admitting that portion of the recording was an abuse of discretion.” **Harmless error** because “the video-recordings played a minor role in both the State’s case and Morgan’s theory of defense given that both the State and Morgan relied predominantly on expert testimony. ... And, to the extent that the four minutes of CPR in the second video showed how ‘horrific’ the crime was, Morgan’s defense counsel made use of the inherent horror of the crimes to argue that Morgan had to be insane to do what she did. Given the evidence presented, we see no likelihood that the jury would have weighed the case differently had the trial court excluded the last portion of the second video-recording.” **Comment on the dangers of unredacted police videos.** “When used as evidence in a criminal trial, body-camera recordings may provide clear proof of pertinent facts – but they also **may pose significant risks to the defendant’s right to a fair trial.** A major concern is that a body camera records everything within its range. Some of the recorded images and sounds will likely be relevant to the matter the officer was there to investigate, but some may be entirely irrelevant, even recognizing the need to provide context for the relevant portions. See OCGA § 24-4-401. The audio-recorded statements of the officer, those with whom he or she interacts, and those of people simply talking in the background may be inadmissible hearsay. See OCGA § 24-8-802.[fn] In addition, video and audio of an event is often **much more emotionally powerful than testimony or even still photographs, so the prejudicial impact of relevant body-camera evidence may substantially outweigh its probative value, particularly in cases involving violent crimes.** See OCGA § 24-4-403. Finally, a video recording is the equivalent of a series of still images, so the playing of a length of body-camera video may be needlessly cumulative. See *id.* For these reasons, **simply playing a full body-camera recording for a jury will often create unnecessary risks of reversible evidentiary errors. Although it requires more work for the parties and the court before trial, efforts should be made to identify the specific segments of a body-camera recording (which may be only the video or audio component of certain portions) that are properly admissible under the Evidence Code, so that only those segments are admitted into evidence and presented to the jury.**” *Accord, Robinson (April 20, 2020), above (video of victim’s young children crying minutes after their father’s murder “did not have even the remotest shred of relevance.”); Young v. State, S21P0078, ___ Ga. ___, 860 S.E.2d 746, 2021 WL 2585420 (June 24, 2021) (defendant not entitled to “stipulate or admit his way out of the full evidentiary force of the case as the State chooses to present it.”).*

E. STATEMENTS BY DEFENDANT

1. REINITIATION OF INTERROGATION BY DEFENDANT AFTER INVOKING RIGHTS

Russell v. State, 309 Ga. 772, 848 S.E.2d 404 (September 8, 2020). Malice murder and related convictions affirmed; **trial court properly admitted defendant’s custodial statement made after invoking right to silence and right to counsel, then reinitiating discussions.** “[C]onsidering the totality of the circumstances, including, but not limited to, the lack of any evidence of police coercion, Russell’s clear and intentional reinitiation of communications with law enforcement, the re-reading of his rights under *Miranda*, and Russell’s execution of the waiver-of-rights form, we conclude that Russell voluntarily, knowingly, and intelligently waived his rights before the second interrogation began.” Agent confirmed on the record that defendant had reached out to officers despite previously invoking his rights, “then re-read Russell his rights under *Miranda* from a waiver-of-rights form. In completing that form, both before and after reading Russell his rights, Agent Duttry asked questions seeking biographical information, including Russell’s address, age, date of birth, and

education level, and whether he could read and write.[fn] After Russell initialed and signed the waiver-of-rights form, Agent Duttry began the interrogation by asking Russell what he wanted to tell her.”

2. VOLUNTARINESS – DEFENDANT IN PAIN/ INTOXICATED/ DRUGGED/ SLEEP-DEPRIVED/EMOTIONAL

Lowery v. State, 310 Ga. 360, 851 S.E.2d 538 (September 28, 2020). Felony murder and related convictions affirmed. **Trial court properly admitted defendant’s custodial statements despite defendant’s complaint that “he was suffering from fatigue and a gunshot wound when he made those waivers.”** “During the [first] recorded conversation, Appellant complained of pain and discomfort, but his ability to communicate, reason, and remember events leading up to his arrest did not appear to be affected.” “Appellant was advised of his rights and waived them three separate times, recounted events clearly, did not appear impaired to questioning officers, assisted officers in searching for his discarded weapons through thick brush without aid, received non-sobriety-affecting medical attention for his relatively minor gunshot wound, and eventually invoked his right to an attorney.”

Griffin v. State, 309 Ga. 860, 849 S.E.2d 191 (September 28, 2020). Felony murder and related convictions affirmed. **Trial court properly admitted defendant’s custodial statement despite his claim that he was “too drunk and sleepy to knowingly and voluntarily waive his rights prior to his police interview.”** “Griffin’s custodial interview commenced at 3:00 a.m., about three hours after the police responded to Richard’s 911 call. The detectives testified that, once the interview began, Griffin responded directly and promptly to their questions and appeared to understand where he was, what he was doing, and that the interview was being recorded. One of the detectives read Griffin his *Miranda* rights and handed him a printed waiver of rights form for him to sign. Griffin picked up the form, read it, and commented that ‘he had always learned not to ever sign anything before he read it.’ After he signed the waiver form, Griffin told the detectives that he and Cheeley got into an argument, that Cheeley attacked him, and that he stabbed Cheeley with a kitchen knife in the course of defending himself. Griffin did not request counsel, invoke his right to remain silent, or ask to stop the interview. Although one of the detectives smelled the odor of an alcoholic beverage on Griffin’s breath, he thought that Griffin was ‘functional,’ and that his communication was clear and intelligent. The detectives testified that Griffin’s answers were responsive to the questions posed and that he never ‘went off on a tangent[.]’” **“Considering the totality of the circumstances surrounding Griffin’s custodial statement, including the detectives’ testimony concerning Griffin’s demeanor, conduct, and responses to their questions during the interview, as well as our de novo review of the video recording of the interview, we conclude that the trial court did not err in finding that Griffin’s statement was voluntarily made.”**

Russell v. State, 309 Ga. 772, 848 S.E.2d 404 (September 8, 2020). Malice murder and related convictions affirmed; trial court properly admitted defendant’s custodial statement despite his claim that he was under the influence of methamphetamine at the time. **“To determine whether a statement was made involuntarily due to intoxication or the influence of drugs, courts look to the totality of the circumstances and consider factors including lucidity, coherency, manner of speech, and awareness of circumstances.”** *Evans v. State*, 308 Ga. 582, 587(3)(a), 842 S.E.2d 837 (2020). “During his custodial interviews, Russell told investigators that after assaulting Waller and before leaving the apartment, he had consumed the last of the methamphetamine in his possession by injecting it intravenously. Russell left the apartment at least ten hours before he returned and was detained by law enforcement.[fn] The first interview occurred shortly thereafter, and **the recordings of Russell’s subsequent statements**

demonstrate that he was coherent and aware enough to invoke his right to counsel on two separate occasions. Russell was talkative and although he sometimes skipped from topic to topic, his manner of speech was clear and understandable. He was responsive to the interviewers' questions, and when one of them said something Russell considered incorrect, he corrected the statement and pointed to factors that supported his version of events. At one point during the first interview, Russell withheld information, stating that it was 'nothing I need to talk about.' And although Russell made some unusual statements regarding Waller during that interview, he later admitted in the second interview that he lied in that regard as part of a strategy to cover up his fault in her death. We conclude that even if Russell was under the influence of methamphetamine, the evidence supports the trial court's determination that he made his statements voluntarily with an understanding of his rights."

VII. JURIES AND JURORS

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

1. MISCELLANEOUS REASONS FOR STRIKES

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

B. CHARGE

1. ACCOMPLICE TESTIMONY

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

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

was no plain error.”

Horton v. State, 310 Ga. 310, 849 S.E.2d 382 (October 5, 2020). Malice murder, arson, and related convictions affirmed. No plain error in failing to charge on corroboration of accomplice testimony. **Defendant’s mother’s participation was more in the nature of an accessory after the fact than accomplice:** “Here, in contrast, the evidence does not show that Horton’s mother aided or abetted the commission of the crimes or advised Horton to do so, that she was ever at the crime scene, or that she witnessed, participated in, or was even aware of the incident until Horton appeared at her door covered in blood and announced that he had killed Hagan. Horton’s mother then helped Horton clean up and washed his clothes.[fn] While she did not immediately call police then or when Horton said he was going back to the house, and initially denied to investigators that she knew anything, she shortly afterwards volunteered her story to deputies, albeit at the urging of her daughter. These actions are more typical of an accessory after the fact than an accomplice. Horton has pointed to no law clearly demonstrating that his mother can be considered an accomplice, nor to any argument by his trial counsel or the State suggesting that she was an accomplice. ‘[Horton] cites no precedent requiring an accomplice-corroboration instruction under circumstances similar to those presented here,’” quoting *Walter v. State*, 304 Ga. 760, 767(3)(b), 822 S.E.2d 266 (2018).

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

2. FLIGHT

Seminal case: Renner v. State, 260 Ga. 515, 518, 397 S.E.2d 683 (1990).

Bully v. State, 357 Ga.App. 663, 849 S.E.2d 271 (October 28, 2020). Convictions for rape and related offenses affirmed; charge on flight wasn't plain error under *Renner* because not obviously erroneous: "Evidence of alleged flight has been introduced. Such evidence is governed by the rules concerning circumstantial evidence that you have already been given. Furthermore, you may only consider it if you find more likely than not that Appellant actually committed such act, and that the reason was to evade the charge now on trial." "[T]he Supreme Court has explained that '[t]he prohibited charge is one that states that an inference of guilt may be drawn from the fact of flight.' *Shadron v. State*, 275 Ga. 767, 771(5), 573 S.E.2d 73 (2002). The charge given in this case does not so state."

Rawls v. State, 310 Ga. 209, 850 S.E.2d 90 (October 19, 2020). Malice murder and feticide convictions affirmed; **jury instruction on flight was clear and obvious error; reaffirms viability of *Renner v. State*, 260 Ga. 515, 518, 397 S.E.2d 683 (1990)**. Contrary to State's argument, adoption of the 2013 Evidence Code didn't abrogate *Renner's* holding that **trial courts shouldn't charge juries on flight**. "*Renner's* holding was about *jury instructions*, not about the admission or exclusion of *evidence*." Rejects comment in Suggested Pattern Jury Instructions, § 1.36.10, to the contrary. No prejudice shown, however, so plain error analysis fails: "the instruction given in this case stated that evidence of 'alleged flight' had been 'introduced' and could be considered as circumstantial evidence of Appellant's guilt, under the instructions concerning circumstantial evidence in general, *if* the jury found that he committed acts of flight and that his purpose was to avoid arrest. There is no reason to believe that this particular instruction caused the jury to give undue weight to the flight evidence, particularly given the other strong evidence against Appellant."

3. OTHER ACTS

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

4. VERDICT/VERDICT FORM

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

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

C. EXCUSAL/STRIKE FOR CAUSE

1. JUROR MISCONDUCT

Delgado v. State, 356 Ga.App. 625, 848 S.E.2d 665 (September 10, 2020). Methamphetamine trafficking conviction reversed; **trial court erred by removing lone holdout juror during deliberations, instead of granting defendant's motion for mistrial based on hung jury.** "[T]he testimony of the jurors from Delgado's trial showed that the holdout juror had participated in deliberations for several hours before making up his mind. ... Indeed, the record shows that the holdout juror deliberated for approximately five hours before disengaging from the deliberations, an amount of time which surpassed the evidence portion of Delgado's trial. ... Significantly, Delgado's holdout juror's differing opinion was based on his belief as to the credibility of a witness, which is undoubtedly an appropriate basis for a juror to reach an opinion on the guilt or innocence of the accused. ... Thus, we find that **Delgado's holdout juror ... did not fail to fulfill his obligations as a juror, but rather had reached a decision, which was based on his review of the testimony and the witnesses' credibility, after meaningfully deliberating and trying to reach a verdict.** The holdout juror testified that he had attempted to deliberate with the other jurors, but believed that they were unwilling to accept his differing opinion and the deliberations were no longer productive." (Cits. om.) "And our previous holdings make clear that **the holdout juror was not required to continue deliberating in perpetuity once he reached his opinion,**" citing Semega v. State, 302 Ga.App. 879, 882(1), 691 S.E.2d 923 (2010).

VIII. PLEAS

A. COMPETENCY

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

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

IX. POST-CONVICTION RELIEF/APPEALS

A. APPEALS, OUT OF TIME

McDaniel v. State, 311 Ga. 367, 857 S.E.2d 479 (April 5, 2021). Following guilty pleas to malice murder and related offenses, trial court properly denied defendant's motion for out-of-time appeal. Trial court properly concluded that plea counsel's performance was not deficient, although counsel never consulted with defendant about his right to appeal from his guilty plea. **Supreme Court cites four factors:** "First, plea counsel testified that **McDaniel never expressed to her an interest in appealing** from his guilty plea, either immediately following the plea or at any time before she left the public defender's office about a year later. Second, a 'highly relevant factor in this inquiry' is that McDaniel's convictions **followed his plea of guilty**. Moreover, McDaniel **'received the sentence bargained for** as part of the plea.' Indeed, plea counsel explained to McDaniel during the plea proceedings that he could seek to withdraw his plea, but McDaniel never indicated to plea counsel a desire to do so. Finally, we note that, at the guilty plea hearing, McDaniel apologized to the victims' families, saying that he was 'so sorry for what happened,' and apologized to his mother, telling her that he was sorry that he had disappointed her. He also added that '[t]he time that I have to serve I will serve it with my head focused, with my spirit focused.' Plea counsel and the trial court could have reasonably viewed such a statement as indicative of a defendant who was pleading guilty to **'seek[] an end to judicial proceedings.'** For these reasons, we conclude that the trial court did not err when it determined that plea counsel would not have had reason to think that a rational defendant would have wanted to appeal, or that McDaniel reasonably demonstrated to counsel that he was interested in appealing." *Quoting Roe v. Flores-Ortega*, 528 U.S. 470, 480, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). Trial court thus "did not abuse its discretion in denying McDaniel's motion for out-of-time appeal."

Davis v. State, 310 Ga. 547, 852 S.E.2d 517 (December 7, 2020). Following guilty pleas to felony murder and related offenses in 1997, trial court properly denied out-of-time appeal in 2020. **1. Defendant wasn't entitled to appointment of counsel "to assist him in preparing and filing his motion for an out-of-time appeal. ... See *Pierce v. State*, 289 Ga. 893, 894 (1), 717 S.E.2d 202 (2011) ('[B]ecause a motion for an out-of-time appeal cannot be construed as part of a criminal defendant's first appeal of right, [defendant] was not entitled to the assistance of appointed counsel.' (citations and punctuation omitted)).** **2. Defendant wasn't entitled to out-of-time appeal based on plea counsel's failure to consult with him about his right to appeal from the conviction.** "In this case, the record shows that Davis got the benefit of the plea bargain offered by the prosecutor. He did not express any dissatisfaction with the plea agreement, and he reserved no grounds for an appeal. There is no evidence that Davis ever wavered in his desire to plead guilty. To the contrary, Davis was the one who sought to end the judicial proceedings to save his family the trauma of a trial and to avoid the possibility of a harsher sentence after a trial. Nothing in the record before the trial court supported a finding that a rational convicted defendant would have sought an appeal under these circumstances. Moreover, it is clear from the record that, even if counsel had advised Davis of his right to appeal from a conviction entered following a guilty plea, Davis would not have pursued an appeal. For 22 years, Davis expressed no interest whatsoever in challenging his conviction. Davis expressed only satisfaction with his counsel's performance. It appears his true complaint is that he has been twice denied parole." *Citing "Fields v. United States*, 577 Fed. Appx. 916, 919 (11th Cir. 2014) (per curiam) (The district judge did not

err in finding that plea counsel had no duty to consult under the circumstances, including that ‘no rational convicted defendant would have wanted to appeal in these circumstances, because of the guilty plea and Fields having received the sentence he had sought.’)”

Collier v. State, 307 Ga. 363, 834 S.E.2d 769 (October 21, 2019). Nine years after guilty plea to felony murder, defendant filed a pro se motion for out-of-time appeal. **1. Trial court dismissed the motion without a hearing. Supreme Court vacates and remands for hearing, *overruling long line of cases holding that “the trial court must hold an evidentiary hearing to determine whether defense counsel’s unprofessional conduct was the cause of the untimeliness only where the motion raises an issue that would have been meritorious on the existing record had a timely appeal been taken.*’** (Citations omitted.) *Stephens v. State*, 291 Ga. 837, 839(2), 733 S.E.2d 266 (2012).” *Following Garza v. Idaho*, 17-1026, ___ U.S. ___, 139 S.Ct. 738, 203 L.E.2d 77 (2019); *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 145 L.E.2d 985 (2000); and *Ringold v. State*, 304 Ga. 875, 823 S.E.2d 342 (2019). **2. Also overruling “a peculiar line of cases where we have held that a criminal defendant’s right to appeal directly from a judgment entered on a guilty plea is qualified in scope; that is, the right to appeal is limited to those cases in which the issue on appeal can be ‘resolved by facts appearing in the record.’** That line of cases has its genesis in *Morrow v. State*, 266 Ga. 3, 3-4, 463 S.E.2d 472 (1995) (affirming the denial of a defendant’s motion for an out-of-time appeal from his conviction entered on a guilty plea).” **In fact, the right to appeal from a conviction is unequivocal whether following a trial or a guilty plea. “Nothing in OCGA § 5-6-33(a)(1) makes any distinction between judgments entered on a guilty plea or on a verdict after trial.** Likewise, OCGA § 5-6-34(a) provides that ‘[a]ppeals may be taken to the Supreme Court and the Court of Appeals from the following judgments and rulings of the superior courts, the constitutional city courts, and such other courts or tribunals from which appeals are authorized by the Constitution and laws of this state: (1) All final judgments, that is to say, where the case is no longer pending in the court below, except as provided in Code Section 5-6-35[.]’ Again, judgments on guilty pleas are not excepted.” **3. However,** “we hold that the State may raise the defense of ‘prejudicial delay’ to out-of-time appeal motions filed in the trial court.” “‘Prejudicial delay,’ often referred to as ‘laches,’ is widely recognized in the common law and in a number of statutes,[cits.] including the habeas statute,[cit.] and has been applied to many categories of remedies in Georgia, including equitable and extraordinary remedies.[cits.] While the doctrine of laches is based on more than the mere passage of time, laches is often applied ‘in obedience and in analogy to the statutes of limitations, in cases where it would not be unjust and inequitable to do so.’ (Emphasis omitted.) *Grant v. Hart*, 192 Ga. 153, 165(a), 14 S.E.2d 860 (1941).[fn] When a defendant files a motion for an out-of-time appeal in the trial court, the State may argue that the defendant’s delay in doing so has unduly prejudiced the State’s ability to respond to the motion. Although a motion for an out-of-time appeal is not directly barred by the application of any statute of limitation, the State may argue and the trial court may consider the time periods, factors, and other criteria set out in the most analogous limitation and laches provisions – those found in the Habeas Corpus Act – in determining whether the State’s defense has merit and the defendant’s motion should be dismissed. See OCGA §§ 9-14-42(c); 9-14-48(e). See also *Wiley v. Miles*, 282 Ga. 573, 577(3), 652 S.E.2d 562 (2007).” Leaves for future determination “the exact parameters of the prejudicial delay defense when raised in motions filed in the trial court, as the State did not raise this defense below. Further, it is not necessary in this case to categorize the out-of-time appeal remedy, to decide more about the process for obtaining it, or to determine whether the process in the trial court should be maintained. In particular, we do not address whether a motion for an out-of-time appeal may be categorized as an extraordinary or equitable remedy or whether the availability of habeas corpus relief, pursuant to OCGA § 9-14-40 et seq., constitutes an ‘adequate remedy at law.’” **Peterson (joined by Blackwell, Boggs and Bethel), concurs specially, noting “that a granted motion for out-of-time appeal from a guilty plea**

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

B. NEW TRIAL

1. FILING, HEARING AND PROCEDURE

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

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

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

Hinkson v. State, 310 Ga. 388, 850 S.E.2d 41 (October 19, 2020). Felony murder conviction affirmed. Attempted amendment to motion for new trial was untimely when made after court had already ruled on the motion. "See OCGA § 5-5-40(b) (providing that a motion for new trial 'may be amended any time on or before the ruling thereon')."

X. PROCEDURE

A. DEAD DOCKET

Seals v. State, 311 Ga. 739, 860 S.E.2d 419 (June 18, 2021). Jury convicted defendant of child molestation, but deadlocked on a charge of rape. The court sentenced defendant on the conviction, declared a mistrial on the rape charge, and subsequently entered an order dead-docketing the rape count. Defendant then sought direct appeal of the child molestation conviction. **Held**, the Court of Appeals properly dismissed the appeal; because of the dead-docketed count, the case remained pending in the trial court, and defendant thus wasn't entitled to direct appeal. "[D]ead-docketing, while a common and longstanding practice in Georgia courts, has almost no statutory authority and none that would allow different treatment here. And precedent from our Court of Appeals has for decades made clear that when a count is dead-docketed, the case remains pending in the trial court. Accordingly, we hold that dead-docketing a count leaves that count undecided and, thus, leaves the entire 'case pending in the court below.' Such a case cannot be appealed as a final judgment under OCGA § 5-6-34(a)(1); instead, it requires a certificate of immediate review." "Dead docket" is a misnomer, inasmuch as a dead-docketed case remains pending. Rejects the argument that each count may be considered a separate "case." "Placing cases on the dead-docket is a procedural tool by which 'the prosecution is postponed indefinitely but may be reinstated any time at the pleasure of the court.'" *Beam v. State*, 265 Ga. 853, 855(3) n.3, 463 S.E.2d 347 (1995) (citation and punctuation omitted)." LaGrua, writing for Melton, dissents, expressing concern for the due process implications of defendants' inability to appeal in this situation. Both majority and dissent urge legislative amendment of OCGA § 5-6-34 to correct the problem.

B. DISMISSAL

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

State v. Banks, 348 Ga.App. 876, 825 S.E.2d 399 (February 28, 2019). In misdemeanor prosecutions, trial court could dismiss without prejudice, but not with prejudice, based on State's failure to provide witness lists pursuant to defense discovery requests under OCGA § 17-16-21. Here, the court's dismissal orders didn't specify whether they were with or without prejudice; those where the statute of limitations had not yet expired were deemed without prejudice, but

those where the statute had expired were deemed with prejudice, and reversed. *Accord, State v. Walker*, 356 Ga.App. 170, 846 S.E.2d 438 (July 2, 2020) (trial court couldn't dismiss DUI prosecution where State's witness failed to appear, but statute of limitation had run, effectively a dismissal with prejudice; seven judges dissent, would overrule *Banks*) (*Cert. granted on this issue in Walker, S20G1471, March 1, 2021*).

C. EXPERTS, MOTION FOR FUNDS TO HIRE

Duke v. State, 311 Ga. 135, 856 S.E.2d 250 (March 15, 2021). In murder prosecution, trial court erred in denying motion seeking funds for state paid investigator and experts. Defendant is indigent, but represented by private, pro bono counsel. Counsel requested that the Georgia Public Defender Council (GPDC) "provide funding for the defense team to hire a DNA True Allele expert, a forensic psychologist, an expert in false confessions, and an investigator, arguing that Duke was entitled to such funding under the IDA [Indigent Defense Act of 2003] by virtue of his indigency. The director of the GPDC formally denied the request in a detailed letter, explaining that, because Duke was represented by private counsel, Duke did not qualify for financial assistance, even though defense counsel were representing him pro bono." Defense counsel then moved in the trial court for funds to hire the same experts and investigator, but the trial court agreed with GPDC "that there was no mechanism within the IDA that would allow private, pro bono counsel to contract with the GPDC in order to access state funding for experts and investigators. Further, [local public defender] Mobley testified that his office determines whether a defendant qualifies for public defender services based upon whether that person meets the IDA's definition of 'indigent.' See OCGA § 17-12-2(6)(C). Mobley testified that, because Duke had retained private counsel, he no longer met that definition." **1. Having pro bono counsel doesn't prevent a defendant from being "indigent" under the IDA.** "OCGA § 17-12-2(6)(C) defines an 'indigent defendant' for purposes of the IDA as '[a] person charged with a felony who earns or, in the case of a juvenile, whose parents earn, less than 150 percent of the federal poverty guidelines unless there is evidence that the person has other resources that might reasonably be used to employ a lawyer without undue hardship on the person, his or her dependents, or, in the case of a juvenile, his or her parents or the parent's dependents.' (Emphasis supplied)." Supreme Court concludes that "employ" means "hiring a person for pay." "Simply put, when a defendant is represented by pro bono counsel, that lawyer is not an 'other resource' available to 'employ a lawyer.' Further, the fact that a defendant has pro bono counsel is not evidence that he has 'other resources that might reasonably be used to employ a lawyer' for the purpose of determining indigence under OCGA § 17-12-2(6)(C). The trial court's adoption of an interpretation to the contrary was error." **2. The IDA allows GPDC to provide resources to indigent defendants with pro bono counsel.** "The IDA ... requires the director of the GPDC to 'work with and provide support services and programs for circuit public defender offices and other attorneys representing indigent persons in criminal or juvenile cases in order to improve the quality and effectiveness of legal representation of such persons and otherwise fulfill the purposes of this chapter. Such services and programs shall include, but shall not be limited to, technical, research, and administrative assistance; educational and training programs for attorneys, investigators, and other staff; assistance with the representation of indigent defendants with mental disabilities; assistance with the representation of juveniles; assistance with death penalty cases; and assistance with appellate advocacy.' (Emphasis supplied.) OCGA § 17-12-5(b)(1). ... The text and structure of the IDA therefore indicate that the GPDC and its director will support attorneys who represent indigent defendants but are not in a circuit public defender office." "Duke argues that the legislature intended 'other attorneys' to extend generally to counsel outside the public defender system who represent criminal defendants who qualify as indigent under the IDA. As a textual matter, we agree with Duke that 'other attorneys' is best read broadly." **3.** "To be clear, we do not hold that an indigent defendant who has pro bono counsel is entitled to more favorable conditions

in terms of ancillary services under the IDA through a contract with the GPDC or a circuit public defender than any other indigent defendant who is represented by counsel under the IDA. Instead, we merely hold that there is a mechanism under state law for pro bono counsel representing an indigent defendant to access public funding for ancillary services. This also means that we need not conclusively decide at this time whether, in this case, the United States Constitution requires provision of ancillary services for indigent defendants by some other mechanism outside the IDA.” **Peterson concurs specially**, joined by Boggs and Warren, noting that **A. “the federal right to choice of counsel extends to pro bono counsel.** See *Caplin & Drysdale v. United States*, 491 U.S. 617, 624-25, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989) (“[T]he Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds.”) and **B. “The other right at issue in this case, an indigent criminal defendant’s right to publicly funded ancillary defense services, is clearly established by the United States Supreme Court.** See *McWilliams v. Dunn*, ___ U.S. ___, ___, 137 S.Ct. 1790, 198 L.Ed.2d 341 (2017) (*Ake v. Oklahoma*, 470 U.S. 68, 83, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985)] clearly established that a defendant must receive the assistance of a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively ‘assist in evaluation, preparation, and presentation of the defense.’”).[FN10: We have held that this right extends beyond psychiatric experts. See *Bright v. State*, 265 Ga. 265, 270(2)(c), 455 S.E.2d 37 (1995); *Roseboro v. State*, 258 Ga. 39, 40(3)(b), 365 S.E.2d 115 (1988). **An indigent criminal defendant generally is entitled to state funds for an expert to examine ‘critical evidence, which, in light of its novelty, is likely to be the subject of varying expert opinions.’** *Thornton v. State*, 255 Ga. 434, 435(2), 339 S.E.2d 240 (1986); see also *Finn v. State*, 274 Ga. 675, 677(2), 558 S.E.2d 717 (2002). In order to obtain funds for an expert witness, a motion on behalf of an indigent criminal defendant ‘should disclose to the trial court, with a reasonable degree of precision, why certain evidence is critical, what type of scientific testimony is needed, what that expert proposes to do regarding the evidence, and the anticipated costs for services.’ *Williams v. State*, 303 Ga. 474, 476(2), 813 S.E.2d 384 (2018) (quoting *Roseboro*, 258 Ga. at 41(3)(d), 365 S.E.2d 115).] This right is rooted in the Due Process Clause, not merely derivative of the Sixth Amendment right to appointed counsel. See *Ake*, 470 U.S. at 76-83, 105 S.Ct. 1087 (Fourteenth Amendment Due Process Clause confers a right to access to a psychiatrist to assist defense where sanity at time of offense is to be a significant factor at trial). The right of expert assistance thus is distinct from the right to choice of counsel and must be safeguarded independently.” And **C. “budgetary concerns alone are insufficient to relieve the State of its obligations to safeguard both the right to counsel of choice and the right to ancillary defense services for indigent defendants.”** Bethel dissents.

XI. SEARCH AND SEIZURE

A. ARREST

1. WHAT CONSTITUTES

Torres v. Madrid, 19-292, ___ U.S. ___, 141 S.Ct. 989, 209 L.Ed.2d 190 (March 25, 2021). In civil § 1983 action, Tenth Circuit erroneously upheld summary judgment for defendant police officers. Plaintiff Torres contended that the officers used excessive force against her by shooting her as she fled an apartment complex; she contended that the shooting constituted an unreasonable seizure under the Fourth Amendment. District and Circuit Courts held that the shooting did not amount to a seizure because Torres was not apprehended; she successfully drove away and was only arrested later when she went to the hospital. Supreme Court holds, however, that **“the application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued.”** Based on *California v. Hodari D.*, 499 U.S. 621, 624, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991) (explaining that the common law

treated “the mere grasping or application of physical force with lawful authority” as an arrest, “whether or not it succeeded in subduing the arrestee.”). **Common law recognized two manners of arresting someone, the application of force, as here, and “a show of authority, such as an order for a suspect to halt. The latter does not become an arrest unless and until the arrestee complies with the demand. As the Court explained in *Hodari D.*, “[a]n arrest requires either physical force ... or, where that is absent, submission to the assertion of authority.’** 499 U.S., at 626, 111 S.Ct. 1547 (emphasis in original). *Hodari D.* articulates two pertinent principles. First, common law arrests are Fourth Amendment seizures. And second, the common law considered the application of force to the body of a person with intent to restrain to be an arrest, no matter whether the arrestee escaped.” “We stress, however, that the application of the common law rule does not transform every physical contact between a government employee and a member of the public into a Fourth Amendment seizure. A seizure requires the use of force *with intent to restrain*. Accidental force will not qualify. See *County of Sacramento v. Lewis*, 523 U.S. 833, 844, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). Nor will force intentionally applied for some other purpose satisfy this rule. In this opinion, we consider only force used to apprehend. ... Moreover, the appropriate inquiry is whether the challenged conduct *objectively* manifests an intent to restrain, for we rarely probe the subjective motivations of police officers in the Fourth Amendment context.” “The rule we announce today is narrow. In addition to the requirement of intent to restrain, a seizure by force—absent submission—lasts only as long as the application of force. That is to say that the Fourth Amendment does not recognize any “*continuing* arrest during the period of fugitivity.” *Hodari D.*, 499 U.S., at 625, 111 S.Ct. 1547. **The fleeting nature of some seizures by force undoubtedly may inform what damages a civil plaintiff may recover, and what evidence a criminal defendant may exclude from trial.** See, e.g., *Utah v. Strieff*, 579 U.S. ___, ___, 136 S.Ct. 2056, 2060-61, 195 L.Ed.2d 400 (2016). But brief seizures are seizures all the same. Applying these principles to the facts viewed in the light most favorable to Torres, the officers’ shooting applied physical force to her body and objectively manifested an intent to restrain her from driving away. We therefore conclude that the officers seized Torres for the instant that the bullets struck her.” Gorsuch, writing for Thomas and Alito, dissents.

B. DETENTION BEYOND INITIAL STOP

Hill v. State, A21A0264, ___ Ga.App. ___, 859 S.E.2d 891, 2021 WL 2659266 (June 29, 2021). In drug prosecution, trial court erred by denying motion to suppress. Officer’s detention of defendant extended beyond traffic stop without probable cause, and defendant’s consent to search was therefore not voluntary. Officer stopped defendant for speeding, noted defendant’s extreme nervousness, and called for backup. A sergeant arrived while the officer was writing the ticket. “Once [Officer] Young was finished writing the citation a few minutes later,[fn] he approached Hill’s vehicle and asked him to exit and stand at the back of his vehicle. Hill complied, and Young patted him down to determine the presence of any weapons. Finding none, Young then explained the citation to Hill, advised him of his court date, and handed him the citation along with his license and registration. At that point, Young considered the traffic stop to be over, but he did not expressly tell Hill that he was free to leave. Immediately after handing Hill the citation and his license, Young asked Hill ‘if there was anything illegal inside the vehicle.’ Hill replied, ‘no,’ and then Young asked Hill if he could search Hill’s vehicle, and Hill replied, ‘go ahead.’ Young searched Hill’s vehicle and discovered a plastic bag containing approximately 28.3 grams of a white powder he suspected to be cocaine.” **Held**, defendant’s “consent to the search was not voluntarily given at a time when a reasonable person would have appreciated that the roadside encounter had become consensual.” **1. While the officer was entitled to have defendant exit his vehicle, “it does inform the totality of the circumstances that ensued, particularly in light of the delayed timing of asking Hill to exit his vehicle, the pat-down, and the arrival and presence of a backup officer on the scene,”** citing *State v. Allen*, 298 Ga. 1, 10(2)(c), 779

S.E.2d 248 (2015) (“weighing the relative intrusiveness of waiting for a records check in a personal vehicle compared to being asked to exit the vehicle and noting that ‘many people would find providing their identification to a police officer for a computer records check far less intrusive than being ordered out of the car to stand on the shoulder of a busy highway or on the side of a street in their neighborhood”). “Nothing up to that point indicated to Hill that the stop was de-escalating; instead, the circumstances objectively indicated the opposite.” 2. “Further, that Young’s inquiry and request to search immediately followed the return of Hill’s license does not require a different result because it is the unsupported additional detention to investigate other crimes and ‘to request consent to search [that] violated his Fourth Amendment rights.’ [State v. Drake, 355 Ga.App. 791, 794(1), 845 S.E.2d 765 (2020)], citing Rodriguez [v. United States, 575 U. S. 348, 356-357(II), 135 S.Ct. 1609, 191 L.Ed.2d 492 (2015)]. ‘If an officer continues to detain an individual after the conclusion of the traffic stop and interrogates him or seeks consent to search without reasonable suspicion of criminal activity, the officer has exceeded the scope of a permissible investigation of the initial traffic stop.’ (Punctuation omitted.) Heard v. State, 325 Ga.App. 135, 138(1), 751 S.E.2d 918 (2013).”

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

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

C. EXPECTATION OF PRIVACY

1. COMPUTERS, TELEPHONES, AND OTHER ELECTRONIC DEVICES

Lofton v. State, 310 Ga. 770, 854 S.E.2d 690 (February 15, 2021). Malice murder and firearms convictions affirmed; trial court properly denied motion to suppress defendant's cell phone records, voluntarily produced by his cell provider at detective's emergency request. 1. At time of defendant's 2014 trial, prevailing authority held that a phone user/subscriber had no privacy interest in records kept by a service provider. The Stored Communications Act (SCA) allowed service providers to voluntarily provide user information to law enforcement in emergency situations. 18 U.S.C. § 2702(c)(4), and *Registe v. State*, 292 Ga. 154, 734 S.E.2d 19 (2012) held that users/subscribers had no privacy interest in the records. 2. In 2018, *Carpenter v. United States*, 16-402, ___ U.S. ___, 138 S.Ct. 2206, 201 L.Ed.2d 507, 2018 WL 3073916 (June 22, 2018), held that "accessing seven days of [historical] CSLI constitutes a Fourth Amendment search." *Carpenter*, ___ U.S. at ___ & n.3 (II), 138 S.Ct. at 2217. The Court did not reach the question "whether there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny, and if so, how long that period might be." *Id.* In arguing for this Court to reverse the trial court's denial of Lofton's motion to suppress the first tranche of cell phone records, and evidence derived from those records, Lofton seeks an extension of the holding in *Carpenter*: from a government-compelled production of cell phone records under 18 USC § 2703(c)(1)(B) and (d) to a request under 18 USC § 2702(c)(4) for the voluntary disclosure of records to address an emergency, and from seven days of historical CSLI to four days of historical CSLI." 3. "[W]e conclude that the detective's communications with MetroPCS supported a good faith belief that its voluntary disclosure of the requested records was authorized under the SCA and binding appellate precedent at the time." Thus, two good faith exceptions to the exclusionary rule apply. A. Reliance on statute not obviously unconstitutional. "In *Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987), the United States Supreme Court examined the admissibility of "evidence obtained by an officer acting in objectively reasonable reliance on a statute" that is later declared unconstitutional. *Id.* at 349(II)(B), 107 S.Ct. 1160." B. Reliance on binding appellate authority. "More recently, in *Davis [v. United States]*, 564 U.S. 229, 231, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011)], the United States Supreme Court applied the same reasoning to searches conducted in objectively reasonable reliance on binding appellate precedent that is later overruled." "Because, at the time of Lofton's trial, a federal statute, 18 USC § 2702(c)(4), and binding appellate precedent, *Registe*, 292 Ga. at 157, 734 S.E.2d 19, authorized the investigatory conduct at issue, reversing the trial court's decision in this case would have little, if any, additional benefit in deterring future violations of the privacy interests recognized in *Carpenter*. We therefore affirm the trial court's ruling." *Accord*, *Swinson v. State*, 311 Ga. 48, 855 S.E.2d 629 (March 1, 2021); *Gialenios v. State*, 310 Ga. 869, 855 S.E.2d 559 (March 1, 2021) (exigent circumstances: officers knew suspect's name and cell number, but not his address, and feared that other potential victims might be targeted); *Outlaw v. State*, 311 Ga. 396, 858 S.E.2d 63 (May 3, 2021) (*disapproving Lofton, Swinson and Gialenios* to the extent they suggest that the law in effect at some time other than the search itself is pertinent to good-faith analysis).

D. FIRST TIER ENCOUNTERS – NO STOP/NO COERCION

Williams v. State, 359 Ga.App. 809, 860 S.E.2d 109 (June 16, 2021). Convictions for cocaine trafficking and marijuana possession reversed; trial court erred by denying motion to suppress. Officers lacked articulable suspicion for second-tier detention of defendant based on anonymous tip about drug sales from a hotel room. "Here, when Officer Ridley initially approached Williams and asked to 'talk to [him] for a second,' he initiated a mere first-tier encounter.

Black v. State, 281 Ga.App. 40, 44(1), 635 S.E.2d 568 (2006) (first-tier encounter initiated when the police approached a person and asked if they could ‘talk to him for a second[.]’). **Encounter escalated to second-tier, however, when “Officer Cowell came to back-up Officer Ridley, and together they backed Williams up against the wall.** See *Cutter v. State*, 274 Ga.App. 589, 592(1), 617 S.E.2d 588 (2005) (‘Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would [include] the threatening presence of several officers[.]’) (citation omitted); see also *In re: J.B.*, 314 Ga.App. 678, 681(1), 725 S.E.2d 810 (2012) (encounter between police and citizen was found in part to be a second-tier encounter when the officers blocked the exit and did not allow the citizen to leave). At that point, law enforcement had also taken possession of Williams’ ID and hotel room key and had not returned his room key. See *State v. Connor*, 288 Ga.App. 517, 519, 654 S.E.2d 461 (2007) (‘In looking to the totality of the circumstances to determine whether a reasonable person would have felt free to leave’, [we have] given particular scrutiny [to] whether the [person’s] documents have been returned to him.... It is clear that ‘an encounter initiated by [the police] may not be deemed consensual unless the [person’s] documents have been returned to him.’). Given the totality of the circumstances, no reasonable person in Williams’ position would have felt free to leave and terminate the encounter at that point, and therefore the officers’ stop of Williams was a second-tier encounter that required the officers to have an articulable suspicion that Williams was involved in criminal activity.”

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

E. MOTION TO SUPPRESS

1. HEARING, GENERALLY

Runnells v. State, 357 Ga.App. 572, 851 S.E.2d 196 (November 2, 2020). Convictions for possession of methamphetamine, and related offenses, reversed; trial court erred by denying motion to suppress. Officer’s stop of defendant’s vehicle lacked particularized suspicion of wrongdoing. 1. Contrary to State’s argument, defendant didn’t waive argument regarding legality of stop by failing to raise it at hearing. “At the suppression hearing, Runnells’s counsel told the trial court that the basis of the motion to suppress was ‘that there was not probable cause to search the vehicle and there was not any lawful exception to search the vehicle.’ Thus, the State argues that by focusing only on the probable cause to search the vehicle at the hearing, Runnells waived his challenge to the lawfulness of Sergeant Llewellyn’s investigatory stop.” “We find that where (1) Runnells raised the issue specifically in his written motion, (2) the parties questioned Sergeant Llewellyn sufficient to create a record on the issue, (3) the trial court’s ruling denied the motion to suppress in full and was based on arguments presented at the hearing ‘and others,’ and (4) the trial court did not find a waiver when presented with the issue in the motion for new trial, Runnells properly raised this argument below and received a ruling by the trial court sufficient to allow for appellate review.[fn] Compare *Smith v. State*, 205 Ga.App. 848, 848-849(2), 424 S.E.2d 60 (1992) (appellant waived issue that was not included in written motion to suppress, but did not waive issues that were ‘adequately raise[d]’ in written motion), *Wingate v. State*, 347 Ga.App. 341, 342(1), 819 S.E.2d 502 (2018) (issue not raised in written motion to suppress, but raised in

post-hearing brief was properly preserved for appellate review), with *Bryant v. State*, 326 Ga.App. 385, 387, 756 S.E.2d 621 (2014) (where appellant did not raise an argument ‘in his motion to suppress *or* at the hearing on the motion,’ issue was waived on appeal) (emphasis supplied).” 2. **“We do note, however, that the focus of the motion to suppress hearing does necessarily limit the record in this case, as Llewellyn was questioned only briefly about her decision to detain and question Runnells. Our holding on the lawfulness of the stop is therefore limited to the facts as they were developed in the record.”**

F. SEARCHES

1. COMMUNITY CARETAKING EXCEPTION

Caniglia v. Strom, 20-157, ___ U.S. ___, 141 S.Ct. 1596, 209 L.Ed.2d 604, 2021 WL 1951784 (May 17, 2021). In civil § 1983 action, First Circuit erroneously upheld summary judgment for defendant police officers. Plaintiff Caniglia sued officers who entered his home and took his guns after he agreed to go to the hospital for a psychiatric evaluation. There was no imminent danger to anyone, no consent, and no court order. First Circuit wrongly relied on the “community caretaking exception” to the warrant requirement mentioned in *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973) (warrantless search of an impounded vehicle for an unsecured firearm did not violate the Fourth Amendment). “*Cady* expressly contrasted its treatment of a vehicle already under police control with a search of a car ‘parked adjacent to the dwelling place of the owner.’ *Id.*, at 446–448, 93 S.Ct. 2523 (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)).” Roberts, Alito, and Kavanaugh all write separately, pointing out that the decision doesn’t eliminate police power to enter homes in exigent circumstances to help someone who may be injured or who has threatened suicide.

2. CURTILAGE

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

3. DELAY

Nelson v. State, S21A0773, ___ Ga. ___, ___ S.E.2d ___, 2021 WL 4067274 (September 8, 2021). Interlocutory appeal in murder prosecution. Trial court properly denied motion to suppress based on delay in searching cell phones for “more than two years between the date on which the electronic devices were seized.” **1.** Applying analytical framework adopted in *Rosenbaum* (*March 11, 2019*), *below*. While two year delay here is extraordinarily long, **defendant’s “possessory interest in the devices was greatly diminished by the combination of his incarceration for the entire period of the delay and his failure to request the devices’ return.”** “‘Where individuals are incarcerated and cannot make use of seized property, their possessory interest in that property is reduced.’ *United States v. Sullivan*, 797 F.3d 623, 633 (9th Cir. 2015) (citing *Segura v. United States*, 468 U.S. 796, 813, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984) (plurality opinion)).” **2.** “Nelson argued to the trial court that his counsel’s request for discovery of data contained on his phone was akin to requesting a return of the device. The trial court rejected that argument, saying that ‘[a] request for discovery and the subsequent disclosure of discoverable materials by the State does not result in the release of physical evidence.’ We agree.”

State v. Rosenbaum, 305 Ga. 442, 826 S.E.2d 18 (March 11, 2019). Interlocutory appeal in murder prosecution; trial court properly granted motion to suppress based on “the State’s delay in obtaining search warrants for data contained in electronic devices when those devices were originally seized in a warrantless, but lawful, manner by police.” Police seized defendants’ computer and cell phones at or just before their arrest, but failed to examine the devices, or seek a search warrant, for 539 days, during which time defendants repeatedly asked for return of their devices. **1. Adopts analytical framework** developed by Eleventh Circuit in *United States v. Mitchell*, 565 F.3d 1347, 1350-1351 (11th Cir. 2009), and *United States v. Laist*, 702 F.3d 608, 613-614(II) (11th Cir. 2012). “In *Mitchell*, *supra*, the Eleventh Circuit considered unreasonable delay in obtaining a search warrant, using as its starting point the United States Supreme Court’s holding in *United States v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984), that ‘a seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment’s prohibition on “unreasonable searches.”’ *Id.* at 124(III), 104 S.Ct. 1652, citing *United States v. Place*, 462 U.S. 696, 709(III), 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). ... The Eleventh Circuit further elaborated on this analysis in *Laist*, *supra*, establishing a framework for balancing governmental and private interests under the ‘totality of the circumstances’: ‘In the past, courts have identified several factors highly relevant to this inquiry: **first, the significance of the interference with the person’s possessory interest; second, the duration of the delay; third, whether or not the person consented to the seizure; and fourth, the government’s legitimate interest in holding the property as evidence.**’ (Citations and parenthetical omitted.) 702 F.3d at 613-614(II). As the trial court noted, *Laist* and other decisions elaborate on these four factors, but ‘[g]iven the complex interactions of these factors, this balancing calculus is fact-intensive.’ *Id.* at 614(II).” *Accord, Nelson* (*September 8, 2021*), *above*. **2. Application.** Here, the State concedes that defendants’ possessory interest in the computer and phones is high; the duration of the delay is extensive, especially considering the defendants’ repeated efforts to have their property returned; the defendants did not consent to the seizure; and the State legitimate interest in holding the evidence weighed “strongly” in the State’s favor. Notably, the lengthy delay “did not result from the complexities of the case nor any overriding circumstances, but from oversights that caused the State not to pursue their investigation into the contents of the devices with sufficient diligence.” The trial court properly balanced the factors in favor of the defendants. **3. No good-faith exception applies** “to an unreasonable delay in obtaining a search warrant,” *quoting United States v. Burgard*, 675 F.3d 1029, 1036(III) (7th Cir. 2012): “‘[a] well-trained officer is presumed to be aware that a seizure must last no longer than reasonably necessary for the police, acting with

diligence, to obtain a warrant. When police fail to act with such diligence, exclusion will typically be the appropriate remedy.’ (Citation and punctuation omitted.) The Seventh Circuit also noted: ‘Furthermore, removing this sort of police misconduct from the ambit of the exclusionary rule would have significant implications: it would eliminate the rule’s deterrent effect on unreasonably long seizures. Police could seize any item—a phone, a computer, a briefcase, or even a house—for an unreasonably long time without concern for the consequences, evidentiary and otherwise.’ *Id.* at 1035(III).”

4. EXIGENT CIRCUMSTANCES

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

5. PROBABLE CAUSE

Gowen v. State, A21A0651, ___ Ga.App. ___, 860 S.E.2d 828, 2021 WL 2621442 (June 25, 2021). Interlocutory appeal in prosecution for possession of methamphetamine; trial court properly denied motion to suppress. Officer searched defendant’s van in part based on the odor of

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

XII. SENTENCING

A. LIFE WITHOUT PAROLE

Moss v. State, 311 Ga. 123, 856 S.E.2d 280 (March 15, 2021). You’re a State Court Judge. Don’t sentence people to life without parole. Or even life with parole. Just don’t.

B. MERGER

1. MERGER – SEXUAL OFFENSES, GENERALLY

Edvalson v. State, 310 Ga. 7, 849 S.E.2d 204 (September 29, 2020). *Reversing* unpublished Court of Appeals opinion. **Multiple counts of sexual exploitation of children, based on possession of digital images of minors engaged in sexually explicit conduct, should have merged.** OCGA § 16-12-100(b)(5) makes it “unlawful for any person knowingly to create, reproduce, publish, promote, sell, distribute, give, exhibit, or possess with intent to sell or distribute *any visual medium* which depicts a minor or a portion of a minor’s body engaged in any sexually explicit conduct.” “Here, the term ‘any visual medium’ in OCGA § 16-12-100(b)(5) must be read in light of the definition provided by the General Assembly in OCGA § 16-12-100(a)(5): “‘Visual medium’ means *any* film, photograph, negative, slide, magazine, or other visual medium.’ (Emphasis supplied.) Accordingly, ‘any visual medium’ in subsection (b)(5) cannot refer to the qualitative sense of ‘any,’ as that meaning is provided by the definition in subsection (a)(1). Instead, ‘any’ in the phrase ‘any visual medium’ must be interpreted as a quantitative term,

implying no specific quantity and having no limit. ... [T]he offense is the possession of any prohibited 'visual medium' at all, whether one or one hundred.[fn] Accordingly, we conclude that OCGA § 16-12-100(b)(5) is unambiguous and permits only one prosecution and conviction for the simultaneous possession of multiple items of 'visual media.'"

C. MODIFICATION

Murrell v. State, 359 Ga.App. 538, 859 S.E.2d 506 (May 20, 2021). Following defendant's convictions for child molestation and related offenses, trial court erred by granting State's "motion to clarify terms of sentence." The order, entered two years after the court finally adopted the remittitur from the Court of Appeals, attempted to make one count consecutive to the others; however, the trial court's power and jurisdiction to modify a sentence is limited by OCGA § 17-10-1(f) to "one year of the date upon which the sentence is imposed, or within 120 days after receipt by the sentencing court of the remittitur upon affirmance of the judgment after direct appeal, whichever is later." Even then, the court may only "correct or reduce the sentence and to suspend or probate all or any part of the sentence imposed"; the order here had the effect of increasing defendant's sentence (which was concurrent, no other intention being stated, pursuant to OCGA § 17-10-10(a)).

XIII. WITNESSES

A. PRIVILEGES

1. ATTORNEY-CLIENT PRIVILEGE

Volkova v. State, 311 Ga. 187, 855 S.E.2d 616 (March 1, 2021). Malice murder and related convictions affirmed; no ineffective assistance where counsel failed to object to testimony by State's expert, who "mentioned another expert who had been hired by the defense but whom the defense chose not to call to testify at trial." "Though Volkova speculates that the jury may have drawn some negative inference from the mention of Robinson's name, there was no evidence presented to the jury on which any negative inference could have been based." Notes **that pre-2013 cases on reference to unrepresented defense witnesses "set forth judicially created exclusionary rules based on [attorney-client privilege under] an interpretation of Georgia's old Evidence Code.** [Cits.] As Volkova correctly conceded at oral argument and in a subsequent reply brief, these old Evidence Code cases have been statutorily abrogated by the enactment of our current Evidence Code, which governs this case. See *State v. Orr*, 305 Ga. 729, 738-739(3), 827 S.E.2d 892 (2019)."

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100