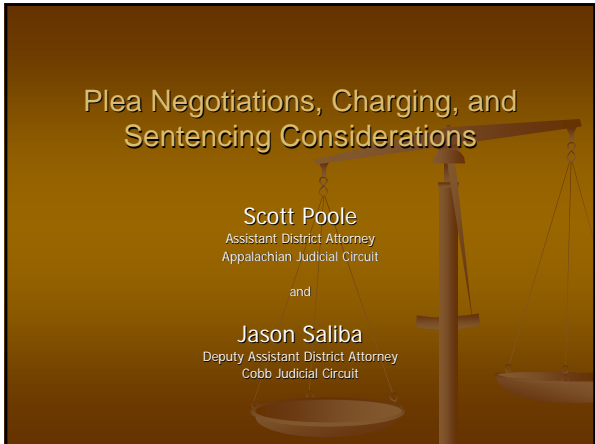


Plea Negotiations, Charging, and Sentencing Considerations

Scott Poole
Assistant District Attorney
Appalachian Judicial Circuit

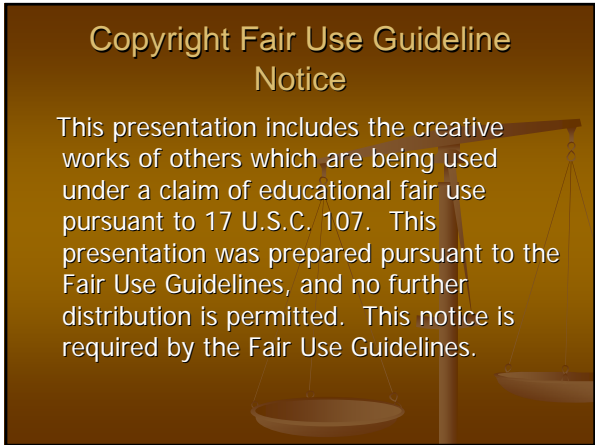
and

Jason Saliba
Deputy Assistant District Attorney
Cobb Judicial Circuit



Copyright Fair Use Guideline Notice

This presentation includes the creative works of others which are being used under a claim of educational fair use pursuant to 17 U.S.C. 107. This presentation was prepared pursuant to the Fair Use Guidelines, and no further distribution is permitted. This notice is required by the Fair Use Guidelines.




Charging Considerations:

Indictments and Accusations

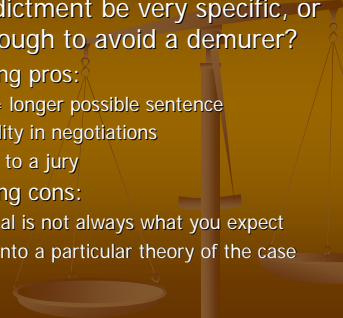


I Am a Prosecutor Clip



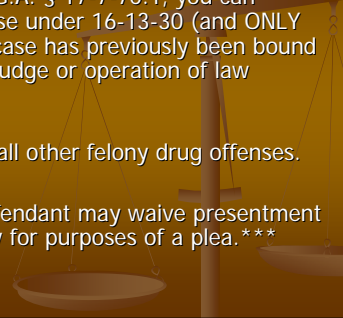
Charging Considerations

- Should your indictment be very specific, or just specific enough to avoid a demurer?
 - Specific charging pros:
 - More counts = longer possible sentence
 - Greater flexibility in negotiations
 - Greater clarity to a jury
 - Specific charging cons:
 - Evidence at trial is not always what you expect
 - May lock you into a particular theory of the case



Indictment or Accusation?

- Pursuant to O.C.G.A. § 17-7-70.1, you can accuse any offense under 16-13-30 (and ONLY 16-13-30) if the case has previously been bound over by either a judge or operation of law (bond).
- You must indict all other felony drug offenses.
- ***However, Defendant may waive presentment to the Grand Jury for purposes of a plea.***



Charging Particulars as to Type of Drug

- You must specifically name the drug and its schedule in your indictment.
- Sentencing is dependant on a finding of a particular schedule of controlled substance.
- **ALWAYS** indict based on crime lab analysis and not on what the warrant says!

Trafficking

O.C.G.A. § 16-13-31

- Statute provides base sentence of 5-30 years imprisonment and \$1 million fine
 - O.C.G.A. § 16-13-31(h)
- Sentence is enhanced from there based on weight of drugs.
- Weight of drugs defendant is convicted of trafficking = Mandatory Minimum

Charging in Trafficking Cases

- Read all of O.C.G.A. § 16-13-31 carefully.
- Must charge and prove weight in all trafficking cases to get mandatory minimum sentencing.
- In Cocaine trafficking cases, you must charge and prove purity of more than 10%.
- Manufacturing Methamphetamine is **TRAFFICKING!**
 - O.C.G.A. § 16-13-31(f)

Recidivism and Aggravation of Punishment

Recidivism and Aggravation of Punishment Notice Requirements

- Formerly covered **only** by O.C.G.A. § 17-10-2 (a):
 - Except in cases in which the death penalty or life without parole may be imposed, upon the return of a verdict of "guilty" by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In the hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or nolo contendere of the defendant, or the absence of any prior conviction and pleas *[, provided that only such evidence in aggravation as the state has made known to the defendant prior to the defendant's trial should be admissible]*.
 - Bracketed language omitted as of July 1, 2005.

Notice Requirement is now a Discovery Issue

- Now covered by O.C.G.A. § 17-16-4(a)(5):
 - The prosecuting attorney shall, no later than ten days prior to trial, or at such time as the court orders but in no event later than the beginning of the trial, provide the defendant with notice of any evidence in aggravation of punishment that the state intends to introduce in sentencing.

What If You Forget?

- O.C.G.A. § 17-16-6
 - If at any time during the course of the proceedings it is brought to the attention of the court that the state has failed to comply with the requirements of this article, the court may order the state to permit the discovery or inspection, interview of the witness, grant a continuance, **or, upon a showing of prejudice and bad faith, prohibit the state from introducing the evidence not disclosed** or presenting the witness not disclosed, or may enter such other order as it deems just under the circumstances.

Helpful Caselaw

- State v. Jones, 283 Ga. App. 539 (2007)
 - In addition to statute, Court filed order compelling State to turn over discovery by a particular date
 - First deadline arrives, Defense does not show, discovery not produced, new date set.
 - Second deadline arrives, defense shows, discovery still not produced (State asked for protective order regarding child porn and was denied)
 - Court excludes evidence, State appeals
 - Court of Appeals REVERSES trial court—No finding of Bad Faith

More Help

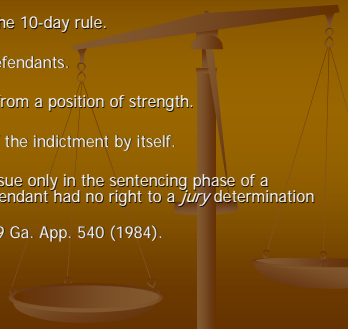
- Thompson v. State, 291 Ga. App. 355 (2008)
 - Defense wanted to exclude statements made by defendant to an officer which were not provided in discovery.
 - Trial court found no bad faith and admitted
 - Court of Appeals agreed with the trial courts' finding which reasoned, in part, that Defendant knew of statements to the officer
 - Same logic can be applied to Defendant's criminal history

Sentencing Clip



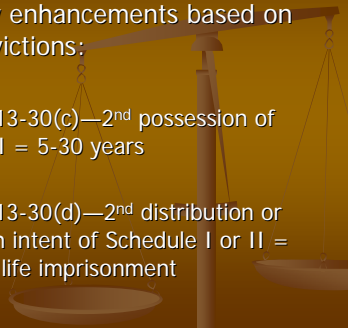
Charging Recidivism and Aggravation of Punishment in the Indictment

- Eliminates violations of the 10-day rule.
- Makes it “real” for the defendants.
- Allows you to negotiate from a position of strength.
- Place on the last page of the indictment by itself.
- “Since recidivism is an issue only in the sentencing phase of a trial..., it follows that defendant had no right to a *jury* determination of this issue.”
 - LaPalme v. State, 169 Ga. App. 540 (1984).



Sentencing Considerations: Specific Recidivism

- Specific penalty enhancements based on number of convictions:
 - O.C.G.A. § 16-13-30(c)—2nd possession of Schedule I or II = 5-30 years
 - O.C.G.A. § 16-13-30(d)—2nd distribution or possession with intent of Schedule I or II = 10-40 years or life imprisonment



Sentencing Considerations: General Recidivism

- O.C.G.A. § 17-10-7(a):

- ...any person convicted of a felony offense in this state ... who shall afterwards commit a felony ... shall be sentenced to undergo the longest period of time prescribed for the punishment of the subsequent offense of which he or she stands convicted, provided that, unless otherwise provided by law, the trial judge may, in his or her discretion, probate or suspend the maximum sentence prescribed for the offense.

General Recidivism (Cont.)

- O.C.G.A. § 17-10-7(c):

- ...any person who, after having been convicted under the laws of this state for three felonies ... commits a felony within this state other than a capital felony must, upon conviction for such fourth offense or for subsequent offenses, serve the maximum time provided in the sentence of the judge based upon such conviction and shall not be eligible for parole until the maximum sentence has been served.

Recidivist Clip

Specific Recidivism: Application

- State v. Jones, 265 Ga. App. 493 (2004) (Cert. denied June 28, 2004)
 - Defendant convicted of his 2nd Possession of Cocaine with Intent to Distribute
 - Judge sentences defendant to 12 to 7.
 - State appeals.

Jones (Cont.)

- It is well settled that OCGA § 16-13-30(d) gives the sentencing judge discretion to impose either a sentence between ten and forty years or life imprisonment for a second or subsequent conviction of possession of cocaine with intent to distribute. Therefore, the trial judge's sentence of 12 years in this case falls within the sentencing guideline. ...

Jones (Cont.)

- ...However, the decision to probate a portion of the sentence, requiring Jones to serve only seven years, is in direct contravention to the statute, which states specifically that a second time offender "shall be imprisoned for not less than ten years..." ***By the plain reading of this statute, a defendant must serve at least ten years in prison.***
 - Jones at 494 (emphasis added).

Interplay of Specific and General

- Butler v. State, 281 Ga. 310 (2006)
 - Defendant convicted of Sale of Cocaine
 - Defendant had 3 prior convictions for Sale of Cocaine
 - State filed notice of intent to sentence pursuant to O.C.G.A. § 16-13-30(d) and O.C.G.A. § 17-10-7(c)
 - Defendant sentenced to Life Imprisonment without parole and appealed
 - At the time the offense was committed, Life Imprisonment was mandated under the drug statute

Butler (Cont.)

- Defendant's argument:
 - Relying on the principle that " 'a specific statute will prevail over a general statute, absent any indication of a contrary legislative intent,' " ... Butler argues that only OCGA § 16-13-30(d), the specific recidivist statute, applied at the time he committed his offense...."
 - Butler (citations omitted)

Butler (Cont.)

- State's argument:
 - The State disagrees, arguing that the Legislature's intent that OCGA § 17-10-7 prevail over specific recidivist statutes was previously expressed in the language of OCGA § 17-10-7(e), which provides that "[t]his Code section is supplemental to other provisions relating to recidivous offenders."

Butler (Cont.)

- Court's Ruling:
 - Accordingly, we must conclude that the Legislature intended after July 1, 1994 that the general recidivist provisions in OCGA § 17-10-7(e) supplement all existing specific recidivist provisions, including the version of OCGA § 16-13-30(d), in effect on July 22, 1994, when Butler committed the crime for which he was convicted and sentenced.

What Qualifies as a Prior Conviction?

- First, the conviction (sentence) must PRE-DATE the new offense.
- Secondly, see O.C.G.A. § 17-10-7(d):
 - For the purpose of this Code section, conviction of two or more crimes charged on separate counts of one indictment or accusation, or in two or more indictments or accusations consolidated for trial, shall be deemed to be only one conviction.

Multiple Cases Plead Together

- Mims v. State, 225 Ga. App. 331 (1997)
Facts:
 - "Three prior convictions were relied upon by the state for purposes of sentencing Mims as a recidivist, a 1988 conviction of the Georgia Controlled Substances Act, and two 1991 indictments to which Mims pled guilty and was sentenced on October 17, 1991, one for three counts of theft by taking and one for three counts of burglary. ...[I]t is conceded that the two 1991 indictments bore separate numbers and that separate sentencing forms were used for each."
 - Mims at 332.

Mims (Cont.)

- Defendant argued:
 - "Mims contends that, because the sentencings occurred on the same day, the two indictments had been "consolidated for trial" pursuant to OCGA § 17-10-7(d), and could only be considered one conviction for recidivist sentencing purposes, giving the court the option to sentence him to life with possibility of parole."
 - Mims at 332.

Mims (Cont.)

- Court's Ruling:
 - "However, 'the fact that the sentences were entered on the same day and that the sentences on the possession charges ran concurrent with the [other] sentence does not require the conclusion that the three prior convictions had been 'consolidated for trial' within the meaning of OCGA § 17-10-7(c)."
 - Mims at 332.

Admitting Certified Convictions

- Nash v. State, 271 Ga. 281 (2002).
 - [T]he burden is on the State to prove both the existence of the prior guilty pleas and that the defendant was represented by counsel in all felony cases and those misdemeanor proceedings where imprisonment resulted.... (State carries burden of proving counseled plea by adducing "a docket entry or other affirmative statement that the defendant waived the right to counsel. If the record does not so show, the State bears the burden of showing waiver").
 - Nash at 285.

Nash (Cont.)

- "Upon such a showing, the presumption of regularity is then applied and the burden shifts to the defendant to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea."
- "A silent record or the mere naked assertion by an accused that his prior counseled plea was not made knowingly and intelligently is insufficient."
- If the defendant is able to present evidence that a constitutional infirmity exists, then the burden of proving the constitutionality of the plea shifts to the State.

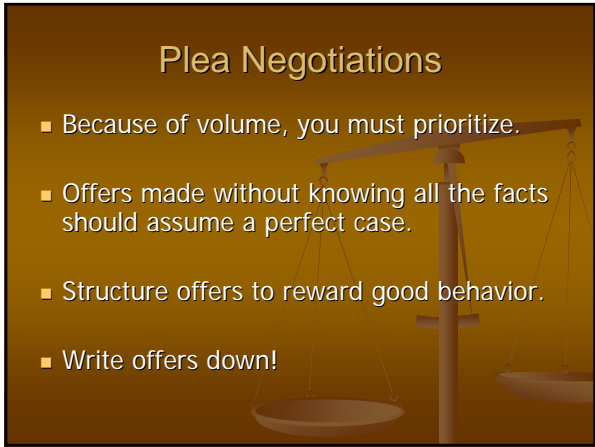
Nash (Cont.)

- The State will meet its burden of proof if it introduces a "perfect" transcript of the taking of the guilty plea, one which reflects a colloquy between judge and defendant wherein the defendant was informed of and specifically waived his right to trial by jury, his privilege against self incrimination, and his right to confront his accusers. If the State introduces anything less than a "perfect" transcript, --- the judge then must weigh the evidence submitted by the defendant and by the State to determine whether the State has met its burden of proving that defendant's prior guilty plea was informed and voluntary, and made with an articulated waiver of the three *Boykin* rights.

Possession of a Firearm by a Convicted Felon

- For purposes of Recidivism pursuant to O.C.G.A. § 17-10-7, you can use EITHER a Possession of a Firearm by a Convicted Felon conviction OR the underlying felony conviction, but you can't use both.
- See Nelson v. State, 210 Ga. App. 249 (1993) for a summary.







Co-operating Witnesses

- When should they plea?
 - Before trial of Co-defendant with negotiation
 - Pros:
 - Locks them into their story under oath
 - Truthful testimony a condition of sentence
 - Transcript may lead to co-defendant plea
 - One more closed case
 - Cons:
 - Sentencing deal admissible at trial
 - Transcript can be used to impeach witness

Co-operating Witnesses

- When should they plea?
 - After trial of co-defendant with negotiation
 - Pros:
 - They have an incentive to be a good witness—their deal depends on it.
 - Cons:
 - Less recourse if their story changes
 - They may change their mind

Co-operating Witnesses

- Plea after co-defendant's trial without prior negotiation
 - With Immunity / without immunity
 - *****Must truly by "no negotiation"*****
 - Pros:
 - Least offensive as impeachment
 - Gives the defendant the opportunity to "earn" a better deal
 - Cons:
 - Defense attorney (of witness) has to trust you
 - Possible for defendant to sabotage your trial

Co-operating Witnesses

- What do you do when a defendant wants to “work” for a better deal?
 - Work prior to plea and sentencing
 - Work after plea but before sentencing
 - Work after plea and sentence with possibility of modification
 - Defendant can be released to voluntarily report at a later date pursuant to O.C.G.A. § 17-10-9.1
 - Cannot be used in trafficking cocaine or marijuana, or in distribution or intent to distribute Schedule I or II cases.

Conditions of Probation

- If defendant agrees to it, you can negotiate anything your judge will agree to.
 - You cannot whip defendants, nor banish them from the state
 - Constitution of the State of Georgia, Art. I, § I, Par. XXI.

Suggested Probation Conditions in Drug Cases

- Waiver of their 4th Amendment rights under both the U.S. and Georgia Constitutions.
 - See Harrell v. State, 253 Ga. App. 440 (2002)
- That they testify freely and truthfully in all matters arising out of the facts of the case.
- That they have no contact with their co-defendants.

