



CaseLaw

Update

Prosecuting Attorneys' Council of Georgia

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Trial Services Director

Fay McCormack
Traffic Safety Coordinator

Patricia Hull
Traffic Safety Prosecutor

Tom Hayes
Staff Attorney

Gary Bergman
Staff Attorney

Tom Jones
Staff Attorney

Tony Lee Hing
Staff Attorney

Rick Thomas
Staff Attorney

Donna Sims
Staff Attorney

Jill Banks
Staff Attorney

Al Martinez
Staff Attorney

Troy Golden
Staff Attorney

Clara Bucci
Staff Attorney

CaseLaw This Week

Week Ending February 13, 2004

- **Constitutionality**
- **Out of Time Appeal**
- **Evidence – Hearsay**
- **Evidence – Similar Transaction**
- **Ineffectiveness Assistance of Counsel**
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- **Jury Charges – Defense of Habitation**
- **Jury Charges – Aggravated Assault**
- **Jury Charges – Self-Defense and Accident**
- **Jury Charges – Alibi**
- **Jury Charges – Recharge of Jury**
- **Jury Charges – Child Cruelty**
- **Jury Charges – Confidential Police Informants**
- **Jury Charges – DUI**
- **Jury Charges – Voluntary vs. Involuntary Manslaughter**
- **Jury Charges – Lesser Included Offenses**
- **Jury Charges – Felony Obstruction of Police Officer**
- **Jury Selection**
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- **Jury Trial Waiver**
- **Right to Speedy Trial**
- **Sentencing – Recidivists**
- **Misdemeanors – Scope of Georgia Boating Laws**
- **Criminal Contempt**
- **Miranda**
- **Search and Seizure**
- **Defendants' Right to Open and Close Argument**

ALERT:

Please do not attempt to try another case where you intend to use a Hearsay Exception without first reading Crawford v. Washington, 2004 U.S. LEXIS 1839, March 8, 2004, Decided.

Constitutionality of OCGA § 16-13- 49(s)(1)

Banks v. State, S03A1282; S03A1414 (02/02/04), 04 FCDR 419, 2004 Ga. LEXIS 71

Defendant appealed after trial court denied his motion to suppress the search warrant of his home. Basis of the search warrant was the hearsay statements of the defendant's neighbor that defendant was a drug dealer and that the defendant had admitted to the neighbor that defendant sold large amounts of marijuana. Defendant attacked the constitutionality of OCGA § 16-13-49(s)(1) in that "by authorizing consideration of hearsay at a forfeiture hearing, [the] statute violated the constitutional right of the accused to face his accusers." The court found that admission of hearsay at a probable cause hearing does not violate the constitutional right of a defendant to confront the accusing witnesses, because guilt or innocence is not the issue for determination. **The Supreme Court upheld the constitutionality of this statute stating: "Under OCGA Sect. 16-13-49(s)(1), hearsay is not admissible to prove the truth of its contents. It is admitted for the limited purpose of showing the information relied upon to establish the existence of probable cause to conduct the search."**

Out of Time Appeal

Cody v. State, S03A1594 (02/02/04), 04 FCDR 415, 2004 Ga. LEXIS 68

Defendant's out-of-time appeal was dismissed. The defendant missed the

30 day deadline for notice of appeal after conviction. Upon grant of extension to file, defendant missed the extended deadline. This denied the appellate courts subject matter jurisdiction. The courts' power to grant an out-of-time appeal is found in **O.C.G.A. § 5-6-39 (a) (1) which states in part that courts may, one time, grant an extension of time to file notice of appeal. O.C.G.A. § 5-6-39 (c) requires that such extension be no longer than the time allowed for notice of appeal initially B 30 days.** In *Cody*, the trial court granted defendant a *de facto* 11-month extension, in violation of O.C.G.A. § 5-6-39 (c).

Evidence – Hearsay

Lowenthal v. State, A03A1971 (01/23/04), 04 FCDR 484, 2004 Ga. App. LEXIS 87

Defendant's conviction for DUI was affirmed. The trial court properly allowed a witness' testimony from a prior trial to be read into the record on the grounds that the declarant was unavailable. **"To prove unavailability, the proponent must show that the declarant could not with due diligence be found in the state."** The state proved due diligence by proof that the police had sent a subpoena to his last known address, called the declarant's ex-wife, and driven to the declarant's residence. **The court held that the failure of the police to find the declarant's mother was not evidence of a lack of diligence.**

Banks v. State, S03A1282; S03A1414 (02/02/04), 04 FCDR 419, 2004 Ga. LEXIS 71

The Supreme Court reversed the trial court's order of forfeiture of

\$29,940. The State had relied upon hearsay of defendant's neighbors that defendant was a drug dealer and had admitted to the neighbor that he dealt drugs. The Supreme Court upheld the uses of hearsay pursuant to OCGA § 16-13-49(s)(1) but found that hearsay can be the basis for issuance of a warrant so long as there is a substantial basis for crediting the hearsay. However, nothing in the officer's testimony stated objective facts which would corroborate as both true and current the information supplied by the neighbors. **Considering that the affidavit and testimony contained only mere suspicion that contraband was being kept on the premises, the search warrant for drugs was not supported by probable cause.**

Evidence – Similar Transactions

Salahuddin v. State, S03A1675 (02/02/04), 04 FCDR 430, 2004 Ga. LEXIS 65

Defendant's conviction for four counts of felony murder was affirmed. The defendant had entered the home of a car mechanic with whom defendant had an argument and shot five men, killing four of them. At trial, the trial court admitted, over objection, evidence of aggravated assaults for which appellant had been previously convicted, which assaults stemmed from a parking lot shoot-out involving several people. **The prior acts were admissible because defendant had been convicted for them, admitted committing them, and they were more probative than prejudicial because they showed a specific course of aggressive conduct that rapidly escalated into appellant's use of a handgun to resolve his disputes with others.**

Lowenthal v. State, A03A1971 (01/23/04), 04 FCDR 484, 2004 Ga. App. LEXIS 87

Defendant's conviction for DUI was affirmed. Trial Court properly denied Defendant's motion in limine attempting to prevent the state from introducing evidence of the Defendant's prior DUI conviction. **"[E]vidence of a prior DUI offense, regardless of the circumstances surrounding its commission, is logically connected with a pending DUI charge as it is relevant to establish that the defendant has the bent of mind to get behind the wheel of a vehicle when it is less safe to do so."** Therefore, it is not error to use a prior DUI charge as similar transaction evidence in the trial of a later DUI charge.

Rudisail v. State, A04A0016 (01/26/04), 04 FCDR 463, 2004 Ga. App. LEXIS 92

Defendant's convictions for one count each of child molestation and aggravated child molestation were affirmed. Pursuant to SCR 31.1 the State is required to give defense 10 days notice of similar transactions. Eight days before trial and as soon as possible after receiving the information, the State gave defense notice of intention to introduce similar transaction. **Noting that the notice was provided as soon as possible to defendant, defendant had the opportunity to interview the similar transaction witness, and defendant's attorney admitted that he had actual notice of the allegations months before trial, the Court held that the trial court did not abuse its discretion in ruling that notice was sufficient under the circumstances.**

Ineffective Assistance of Counsel

Heyward v. Humphrey, S04A0040 (02/02/04), 04 FCDR 416, 2004 Ga. LEXIS 67

Denial of Defendant's Petition for Habeas Corpus was reversed for ineffective assistance of counsel. To prove ineffective assistance a defendant must show deficient performance of counsel and prejudice to defendant arising from such deficient performance. The defendant was able to **show deficient performance by proof that council: (1) ignored or did not have knowledge of facts pointing to a justification defense, (2) ignored the fact that the state admitted an inability to procure any witnesses against defendant, and (3) interrupted the defendant's plea hearing after defendant initially plead "not guilty" to convince defendant to plead guilty.** The court found **prejudice** in that **if defendant had known of the problems in the state's case, he reasonably would have insisted on going to trial.**

Juror Misconduct

Hammock v. State, S03A1604 (02/02/04), 04 FCDR 421, 2004 Ga. LEXIS 69

Defendant's conviction for felony murder and a firearms offense was reversed because of juror misconduct. A juror measured "the dimensions of her own bed to fill in the gap left by the blood spatter expert's testimony" and told the rest of the jury about her test. The court held that this information was central to the case because the jury's verdict became

unanimous only after it learned of the extra-judicial information. **If there is a reasonable probability that a juror's collection and relay of "extra-judicial information" contributed to defendant's conviction, then "a new trial will be granted."**

Headspeth v. State, A03A2494 (1/26/04), 04 FCDR 466, 2004 Ga. App. LEXIS 91

Defendant's convictions for involuntary manslaughter, reckless conduct, contributing to the deprivation of a minor and four counts of cruelty to children were affirmed. During the trial defendant's bond was revoked. Upon questioning by the court one juror advised that he had heard of the revocation. The defendant claimed she was denied due process when the juror was allowed to remain on the jury. **The Court held that any potential harm was cured as: "(1) the juror stated he could put aside what he heard and the information did not affect him in any way, (2) there was no evidence that the juror shared this information with the other jury members, and (3) the court instructed the jury that it could not consider anything it heard outside of court as such information was not evidence."**

Jury Charges – Defense of Habitation

Hammock v. State, S03A1604 (02/02/04), 04 FCDR 421, 2004 Ga. LEXIS 69

Defendant was convicted of felony murder and a firearms offense. She appealed the trial court's denial of her request to charge the jury on the

defense of habitation. Defendant shared a home with the victim. However she claimed only the master bedroom as her habitation and stated that for several weeks prior to the shooting she locked herself in the master bedroom in order to get away from the victim. This Court upheld the trial court's ruling. **The Court determined that even though OCGA 16-3-23(1&3) does apply between co-inhabitants, the act of locking the victim out of the master bedroom was insufficient to establish a clear agreement that the victim could not enter the bedroom.** The case was reversed on other grounds.

Jury Charges – Aggravated Assault

Chase v. State, S03A1685 (02/02/04), 04 FCDR 424, 2004 Ga. LEXIS 66

Defendant's conviction for felony murder with aggravated assault as the underlying felony was reversed for improper jury charge on aggravated assault. The trial court charged: "[I]n order for there to be a conviction for aggravated assault, you must find either an intention to commit injury on the other person or that the other person was intentionally placed in reasonable apprehension of immediately receiving a violent injury." The defense claimed error because the charge did not say "violent injury." **The Court held: "[The] trial court was responsible for the correct exposition of the law and the trial court is not excused from ensuring that it accurately and completely states Georgia law for all issues on which it instructs the jury."**

Jury Charges – Self-Defense and Accident

Byrd v. State, S03A1599 (02/02/04), 04 FCDR 426, 2004 Ga. LEXIS 72

Defendant's convictions for felony murder, aggravated assault and a firearms offense were affirmed. Defendant claimed that he had drawn his gun to defend himself against 3rd parties and that when he turned to see if someone was behind him, his arm accidentally hit the open door of the car and the gun went off, killing the victim. The Court found that these facts do not give rise to an instruction on both accident and self-defense, stating that while the defendant drew his weapon to defend himself these facts give rise to no inference that the defendant acted in self-defense in actually firing the shot that killed the victim. **The Court held that the trial court properly refused to instruct the jury on self-defense when it had instructed the jury on accident for "it is a rare case in which charges on both accident and justification will be supported by the evidence."**

Jury Charges – Alibi

Salahuddin v. State, S03A1675 (02/02/04), 04 FCDR 430, 2004 Ga. LEXIS 65

Defendant's conviction on four counts of felony murder was affirmed. The trial court did not err in charging the jury on alibi. Defendant argued that the trial court's charge on alibi improperly shifted the burden of proof in stating evidence on time and place must "be such as to reasonably exclude the possibility of

the presence of the defendant." **The Court held that such charge contains no reversible error because the complete charge on alibi ended with the restatement that burden of proof rests on the state to prove guilt beyond a reasonable doubt.**

Jury Charges – Child Cruelty

Headspeth v. State, A03A2494 (1/26/04), 04 FCDR 466, 2004 Ga. App. LEXIS 91

Defendant's convictions for involuntary manslaughter, reckless conduct, contributing to the deprivation of a minor and four counts of cruelty to children were affirmed. Some of the evidence against the defendant showed that her boyfriend beat the children with a belt in the defendant's presence. Defendant argued that she could not be convicted as a party to the crime of cruelty to children where there was no evidence her boyfriend was a guardian of the child. The indictment charged her with cruelty to children in the words of OCGA § 16-5-70(b) "for willfully and maliciously causing excessive physical and mental pain to the children by beating them with a belt." **The Court held that the trial court properly instructed the jury regarding the law of child cruelty because the indictment was based on O.C.G.A. § 16-5-70 (b) which, unlike O.C.G.A. § 16-5-70 (a) does not require that a perpetrator of child cruelty be a parent, guardian, or caregiver of a child.**

Jury Charges – Confidential Police Informants

Baggs v. State, A03A2080; A03A2081; A03A2082 (1/26/04), 04 FCDR 471, 2004 Ga. App. LEXIS 90

Defendants' convictions for methamphetamine trafficking were affirmed. Evidence showed that the confidential informant merely introduced a co-defendant to an undercover police officer. **The Court held that the defendant was not deprived of the right to confront his accuser when all defendants were deprived of the right to cross-examine a confidential informant since the identity of a confidential informant bore no relationship to the defendant's guilt or innocence.**

Jury Charges - DUI

Duelmer v. State, A04A0560 (01/29/04), 04 FCDR 471, 2004 Ga. App. LEXIS 109

Defendant's DUI conviction was reversed for improper jury charge. The trial court charged the jury "that in any criminal trial the refusal of the defendant to permit chemical analysis to be made of his blood, breath, urine or other bodily substance at the time of his arrest shall be admissible as evidence against him. I further charge you that the refusal itself may be considered as positive evidence creating an inference that the test would show the presence of alcohol or other prohibited substance **which impaired his driving**, however, such inference may be rebutted." **The Court held that the phrase "which impaired his driving" invades the province of the jury and shifts the**

burden of proof to the defendant, thus it is reversible error.

Jury Charges – Voluntary versus Involuntary Manslaughter

Fuller v. State, A4A0400 (01/23/04), 04 FCDR 481, 2004 Ga. App. LEXIS 83

Defendant's conviction for Voluntary Manslaughter was affirmed. The State brought forth evidence that the Defendant had admitted to shooting his wife on purpose. In his initial statement to police, defendant claimed that, after he threatened to kill himself, his wife was shot while the two of them struggled for a gun. Defendant requested a jury charge on involuntary manslaughter since he claimed accident in this first statement. He asserts as error failure of the trial court to charge on involuntary manslaughter. The Court found that the jury was authorized to conclude either that Fuller intentionally shot his wife, in which case he was guilty of voluntary manslaughter, or that the gun discharged accidentally, in which case he was guilty of no crime. **The Court held: "Where the evidence shows either the commission of the completed offense as charged or the commission of no offense, the trial court is not required to charge the jury on a lesser included offense."**

Jury Charges – Lesser Included Offense

Gibson v. State, A03A1724 (01/28/04), 04 FCDR 467, 2004 Ga. App. LEXIS 103

Defendant's conviction for fleeing or attempting to allude was

reversed. Defendant contended that the trial court erred "in refusing to give his requested charge on obstruction of an officer as a lesser included charge of fleeing or attempting to elude." Defendant's testimony provided evidence that he merely 'obstructed' or 'hindered' the officer from arresting him immediately by driving away after the officer told defendant he could not do so. **Under this set of facts, the offense of obstruction was a lesser included offense to the offense of fleeing. Upon written request, a charge on a lesser included offense must always be given if there is any evidence that the defendant is guilty of the lesser included offense.**

Goings v. State, A04A0251 (01/26/04), 04 FCDR 474, 2004 Ga. App. LEXIS 95

Defendant's armed robbery conviction was affirmed. Defendant claimed trial court erred in refusing to charge on robbery by intimidation. **Although robbery by intimidation is a lesser included offense of armed robbery, it is not error in an armed robbery case to fail to charge on the lesser charge where there is evidence of robbery by use of an offensive weapon, but no evidence of robbery by intimidation.** Defendant's attorney was not ineffective for failing to request the lesser included charge.

Jury Charges – Felony Obstruction of a Law Enforcement Officer

Elrod v. State, A03A2395 (01/29/04), 04 FCDR 469, 2004 Ga. App. LEXIS 107

Defendant's conviction for aggravated assault on a peace officer was

reversed. **Defendant's requested jury charge on felony obstruction of a law enforcement officer as a lesser included offense should have been given to the jury because defendant and the officer gave differing accounts as to what occurred when defendant's vehicle twice struck the officer's, and there were no other witnesses.**

Jury Selection

Byrd v. State, S03A1599 (02/02/04), 04 FCDR 426, 2004 Ga. LEXIS 72

Defendant's convictions for felony murder, aggravated assault and a firearms offense were affirmed. Defendant claimed trial court improperly refused to strike two prospective jurors for cause. **A trial court is not required to strike a juror for cause merely because she expresses reservations about her ability to set aside her personal experiences or beliefs. Determination of bias turns on live observations regarding "demeanor and credibility," and the appellate court will defer to the trial court where jurors do not express a fixed opinion about Defendant's guilt.**

Headspeth v. State, A03A2494 (1/26/04), 04 FCDR 466, 2004 Ga. App. LEXIS 91

Defendant's convictions for involuntary manslaughter, reckless conduct, contributing to the deprivation of a minor and four counts of cruelty to children were affirmed. The Trial Court did not abuse its discretion in refusing to strike a juror for cause who **expressed reservation regarding hearing any evidence of cruelty to**

children. A juror who expresses empathy for victims of crime regardless of who perpetrated the crime against them is not unalterably prejudiced and thus does not have to be stricken for cause.

Jury Deliberation

Byrd v. State, S03A1599 (02/02/04), 04 FCDR 426, 2004 Ga. LEXIS 72

Defendant's convictions for felony murder, aggravated assault and a firearms offense were affirmed. During deliberations, the jury indicated it was not unanimous on malice murder but had reached a verdict on all other charges. The jury was instructed it could either continue to deliberate or render a partial verdict, and after further deliberation, the jury indicated it was unable to reach a "conclusion." **In this case, the court had the discretion to accept the verdict on the counts on which the jury had reached unanimity and to dead docket the count on which the jury was deadlocked.** The trial court did not improperly cut short the jury's deliberation.

Jury Trial Waiver

Brown v. State, S04A0351 (02/02/04), 04 FCDR 430, 2004 Ga. LEXIS 63

Defendant's conviction for malice murder was affirmed. On appeal, defendant argued that he did not intelligently waive his right to a jury trial because the trial court did not inform him of the **loss of particular appealable issues, i.e. conduct of voir dire and jury instruction, due to his waiver of jury trial rights.** The Supreme Court held that there was no

error because "[t]here is not any requirement that the trial court expressly inform the accused of those particular appellate issues which waiver of jury trial will obviate." The purpose of a trial, with or without a jury, is not to create issues for appeal. In the criminal context, it is to determine guilt beyond a reasonable doubt.

Right to Speedy Trial

Salahuddin v. State, S03A1675 (02/02/04), 04 FCDR 430, 2004 Ga. LEXIS 65

Defendant's conviction for four counts of felony murder was affirmed. The 25-month delay between the defendant's indictment and trial combined with loss of a potential alibi witness was not a violation of the defendant's right to speedy trial. The test for a **violation of a defendant's right to speedy trial balances (a) the length of the delay, (b) the reason for the delay, (c) the defendant's assertion of his right, and (d) the prejudice to the defendant. The 25 month delay of trial raised a "presumption of prejudice."** Although the delay was not deliberate or meant to "hamper the defense," the State's failure to **designate assistant district attorneys who would be dedicated to this case also weighted the second factor against the State.** However, **the defendant did not assert such right until 15 months after indictment making defendant partially at fault for the only discernable prejudice to his defense, the loss of a potential alibi witness.** Defendant was also not prejudiced by any **oppressive pre-trial incarceration** because he was **already serving 30 years for another offense.**

Sentencing - Recidivists

McCorkle v. State, A03A1783 (1/26/04), 04 FCDR 480, 2004 Ga. App. LEXIS 96

Defendant's sentence to life without parole under recidivist statute O.C.G.A. § 17-10-7 was affirmed. Defendant was convicted of armed robbery, aggravated assault, burglary, possession of firearm by a convicted felon, and possession of a firearm during the commission of a felony. Defendant had been previously convicted of three other felonies. **The Court held that the "without parole" portion of the defendant's sentence was proper under O.C.G.A. § 17-10-7 (a) and (c). Subsection (a) requires that recidivist felons be sentenced to the maximum sentence for their subsequent felony. When a three-time recidivist commits a fourth felony for which the maximum penalty is life, parole is not available under subsection (c) until the maximum is served, and life without parole is mandatory.**

Misdemeanors - Scope of Georgia Boating Laws

Meeks v. State, A03A1663 (01/26/04), 04 FCDR 480, 2004 Ga. App. LEXIS 88

Defendant's indictment for Serious Injury by Vessel, Boating Under the Influence and Reckless Boating under the Georgia Boat Safety Act was reversed. It was stipulated that the incidents giving rise to the charges all took place on a privately owned lake not open to the public. **The Georgia Boat Safety Act does not apply to**

privately owned ponds or lakes not open to the public because the statute applies only to "waters of this state" which are defined by statute *not to include* privately owned ponds or lakes not open to the public.

Criminal Contempt

In Re Davis, A03A2547 (01/26/04), 04 FCDR 465, 2004 Ga. App. LEXIS 89

Attorney's conviction for criminal contempt and failure to appear was reversed. The trial court did not give Davis adequate notice of the commencement date for his client's trial. **The trial court's statement to Attorney on June 16 that the case would be called at some point was insufficient to advise him that he was on-call for June 23 or that the case would be set for that day.**

Miranda

Goings v. State, A04A0251 (01/26/04), 04 FCDR 474, 2004 Ga. App. LEXIS 95

Defendant's rights under *Miranda* were not violated when police did not re-give *Miranda* warnings when questioning defendant about another unrelated offense, after defendant had already waived his right to remain silent. Defendant's contention that police are confined to question one offense per *Miranda* warning is without merit. **The validity of a *Miranda* waiver does not depend upon the subject matter of an interrogation but upon a suspect's voluntary decision to submit to interrogation and relinquishment of the 5th Amendment right to silence.**

Serach and Seizure

State v. McKinney, A03A1705 (01/28/04), 04 FCDR 478, 2004 Ga. App. LEXIS

Trial courts grant of defendant's motion to suppress drug evidence and a revolver found on his person was reversed. **The trial court erred in finding that the officer did not have a reasonable articulable suspicion to conduct a limited pat-down search for weapons under the circumstances.** Defendant was in a remote, poorly lit area of a motel parking lot on fenced private property when the officer noticed defendant. Defendant and his companion began to walk away when they saw the officer. The officer also testified that defendant did not have identification and refused to answer questions concerning his presence in the motel parking lot.

Evidence – Hearsay

Banks v. State, S03A1282; S03A1414 (02/02/04), 04 FCDR 419, 2004 Ga. LEXIS 71

Trial Court erred in finding probable cause to search Defendant's residence for drugs. After Defendant was shot during a home invasion, a search warrant was issued based on hearsay statements of the defendant's neighbors that defendant was a drug dealer and that the defendant had admitted to selling large amounts of marijuana. **Hearsay can be the basis of a warrant so long as there is a substantial basis for crediting the hearsay. Nothing in the officer's testimony stated objective facts**

corroborating as both true and current the hearsay information of Defendant's neighbors such that there was a fair probability that Defendant sold drugs from his house and that the contraband would be found there following the incident. Neither the declarant's veracity nor basis of knowledge was shown, and the warrant to search for drugs based on hearsay was not supported by probable cause.

Defendants' Right to Open and Close Argument

West v. State, A04A0442 (01/29/04), 04 FCDR 476, 2004 Ga. App. LEXIS 106

Defendant's convictions for possession of cocaine with intent to distribute, possession of marijuana with intent to distribute, and possession of 3 other controlled substances was affirmed in part and reversed with regard to possession of cocaine with intent to distribute. The defendant was denied the right to open and conclude closing argument after playing portions of a videotape with the audio "on" that the state presented in its case in chief with the audio "off". **The trial court erroneously denied defendant the right to open and conclude closing arguments. Defendant's use of the audio on the state's videotape was not introduction of evidence but merely use of evidence already admitted. Thus, defendant maintained the right to open and conclude closing arguments.**

As many of you now know, Glen Holingshed has resigned from the Prosecuting Attorneys' Council to become Court Administrator of the Paulding County Superior Court. We all wish Glen continued success in his new venture. However, the loss of Glen has slowed production of the Case Law Update which is currently being compiled by our interns. We ask that you bear with us until we are successful in our search for a replacement for Glen. Your patience is appreciated.

*J.F. Burford
Director - Trial Support*

Please visit the bottom right hand corners of each page of the *Case Law Update* and notice our new numbering system. We hope this helps you file the updates. We encourage you to keep sending in suggestions. Thank you.

Prosecuting Attorneys' Council of Georgia

Atlanta
404-969-4001

Albany
229-430-3818

Macon
478-751-6645

Savannah
912-353-3025

***The Prosecuting Attorneys' Council encourages you to add commentary or creative prosecution suggestions for any of this Caselaw. The responses will be published in a PAC publication, please e-mail David Fowler at dfowler@pac.state.ga.us, or Joe Burford at jburford@pac.state.ga.us**