

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING FEBRUARY 2, 2007

## Legal Services Staff Attorneys

**David Fowler**  
Deputy Executive Director  
for Legal Services

**Bob Keller**  
Executive Counsel

**Chuck Olson**  
General Counsel

**Joe Burford**  
Trial Services Director

**Lalaine Briones**  
Trial Support

**Laura Murphree**  
Capital Litigation

**Fay McCormack**  
Traffic Safety Coordinator

**Patricia Hull**  
Traffic Safety Prosecutor

**Tom Hayes**  
Regional Offices Director

**Gary Bergman**  
Staff Attorney

**Tony Lee Hing**  
Staff Attorney

**Rick Thomas**  
Staff Attorney

**Donna Sims**  
Staff Attorney

**Jill Banks**  
Staff Attorney

**Al Martinez**  
Staff Attorney

**Clara Bucci**  
Staff Attorney

**Brad Rigby**  
Staff Attorney

## THIS WEEK:

- **Double Jeopardy- Unsworn Jury**
- **Juvenile Court**
- **Discovery**
- **Closing Argument**

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### *Double Jeopardy- Unsworn Jury*

Spencer v. State, S06A1719

Appellant was convicted of felony murder, aggravated assault, and possession of a firearm during the commission of a felony. Appellant was acquitted of malice murder. Appellant was granted a new trial by the trial court because the jury was never given the oath, as required under O.C.G.A. § 15-12-139. Appellant filed a plea in bar to the malice murder count, claiming that although the jury's unsworn verdict of guilt was a legal nullity, the verdict of acquittal was binding on the state for the purposes of double jeopardy. The trial court denied appellant's contention. The Court affirmed the trial court's denial of the plea in bar. The Court reiterated that jeopardy attaches when the jury is both impaneled and *sworn*, and that a jury which was never administered the oath is without any authority to judge the issues at trial. Therefore, all such decisions rendered are a nullity for the purposes of double jeopardy.

### *Juvenile Court*

State v. Henderson, S06A2040 and S06A2041

Appellees, both juveniles, robbed a convenience store using a BB gun. Appellees were arrested

for armed robbery, and the State chose to prosecute them in superior court. At a pre-indictment bond hearing, the superior court, sua sponte, ordered that both cases be transferred to juvenile court on the basis that it did not have jurisdiction over the cases. The State moved to stay the transfer. The superior court denied the motion, finding that although it had concurrent jurisdiction pursuant to O.C.G.A. § 15-11-28 (b) (1), the statute is unconstitutional in that it violates separation of powers, equal protection, and due process. The Court of Appeals reversed the judgment of the superior court. Once the State elected to pursue the cases in superior court, the court acting on its own, did not have authority to transfer the cases to juvenile court prior to indictment. The Court of Appeals reiterated that the legislature has made it clear that the district attorney, and not the court, makes the election whether to pursue a case against a juvenile in superior court or juvenile court. Where the district attorney properly invokes the superior court's jurisdiction, the court is obligated to retain jurisdiction and is not authorized, sua sponte, to transfer a juvenile case prior to indictment.

### *Discovery*

Cockrell v. State, S06A2053,

Appellant was convicted of malice murder, aggravated assault, and possession of a knife during the commission of a crime. After the State's case-in-chief had begun, the State notified appellant and the court that it had just received the results of DNA testing from a knife and a shirt that had been recovered at the scene. Appellant had opted in to discovery pursuant to O.C.G.A. § 17-6-2, and objected to the admission of testimony regarding the DNA results, claiming that he had not been

timely notified of the results and his defense had been prejudiced. The State informed the trial court that it had made numerous calls to the crime lab, to attempt to expedite testing due to the approach of the trial date. However, the lab was unable to complete the testing and forward the results until after the trial had begun, due to a back-log. Appellant was notified as soon as the results became available, and was allowed to interview the witnesses prior to the presentation of their testimony. The trial court overruled the objection and allowed the testimony. The Court held that the trial court did not abuse its discretion in allowing the admission of the testimony. Under the discovery statute, the absence of a witness from the State's list of witnesses, which must be provided to the defense at least ten days prior to trial, does not automatically preclude the use of that witness. If the State fails to comply with the statutorily mandated time-limits, then the court may allow the defense to inspect the evidence or to interview the witnesses prior to admission, or may grant a continuance. O.C.G.A. § 17-16-6. However, evidence should be excluded only if it is shown that the State has acted in bad faith and the defense has been prejudiced. The Court reasoned that the defense may have been prejudiced, but that there was no showing that the State acted in bad faith. Because both of the required prongs had not been met, and the trial court properly allowed the defense to interview the witnesses prior to their testifying, exclusion of the testimony would not have been proper.

that the trial court failed to perform its duty pursuant to O.C.G.A. § 17-8-75 which provides that, "Where counsel in the hearing of the jury make statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same. On objection made, the court shall also rebuke the counsel and by all needful and proper instructions to the jury endeavor to remove the improper impression from their minds; or, in his discretion, he may order a mistrial if the prosecuting attorney is the offender." Although the trial court's failure can constitute reversible error, the error is subject to application of the harmless error analysis. The Court of Appeals concluded that the trial court's failure did not contribute to the verdict because the State's improper statement involved speculation about a possible defense appellant did not assert; because defense counsel promptly and simultaneously objected as the statement was being made; and because the trial court instructed the jury that the arguments of counsel were not evidence. Therefore, the error was harmless.

## ***Closing Argument***

Walker v. State, S06A1625

During closing statements, the State argued that the appellant would have denied being at the crime scene had not testing performed by the crime lab revealed the presence of the victim's blood on appellant's pants. The prosecutor's argument was not an inference reasonably drawn from the evidence because the record showed that appellant spoke to an eyewitness he knew at the crime scene; left a police report on the victim's chest identifying the appellant by name; and voluntarily called the police shortly after the offense to explain his involvement. Defense counsel objected to the misstatement, and the trial court overruled the objection without comment or instructions. The Court of Appeals found