

# Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING MAY 8, 2009

## Legal Services Staff Attorneys

**David Fowler**  
Deputy Executive Director

**Chuck Olson**  
General Counsel

**Lalaine Briones**  
Legal Services Director

**Joe Burford**  
Trial Services Director

**Laura Murphree**  
Capital Litigation Director

**Fay McCormack**  
Traffic Safety Coordinator

**Gary Bergman**  
Staff Attorney

**Tony Lee Hing**  
Staff Attorney

**Donna Sims**  
Staff Attorney

**Jill Banks**  
Staff Attorney

**Al Martinez**  
Staff Attorney

**Clara Bucci**  
Staff Attorney

**Brad Rigby**  
Staff Attorney

## THIS WEEK:

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- **Plea in Bar; Double Jeopardy**
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### **Defense Experts; Merger**

*Carter v. State, S09A0233; S09A0234*

Appellants were convicted of felony murder, with the underlying felony of distribution of oxycodone, in connection with the death of the victim. They argued that the trial court erred by denying their request for funds to hire an independent forensic toxicologist. The Court held that in order to obtain funds to hire a scientific expert, an indigent defendant must 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.

After reviewing appellants' motions for funds and conducting an ex parte hearing, the trial court granted their requests for funds to hire a forensic pathologist but reserved ruling on their requests for funds to hire an independent toxicologist because they had not demonstrated why their pathologist could not rely on the State's toxicology report in reaching his conclusion as to the cause of death. At no subsequent time did appellants present additional evidence to the court in support of their previously filed motions and they at no time renewed their motion for funds. Thus, appellants failed to provide sufficient information necessary for the trial court to fully consider their requests.

However, the Court remanded the case for resentencing. Appellants were convicted of felony murder, with the distribution of oxycodone count as the underlying felony, and possession of oxycodone with the intent to distribute. During sentencing, the trial court determined that the possession convictions were vacated by operation of law because they served as the underlying felony and appellants each were sentenced to life in prison with a concurrent 30-year sentence to serve for their respective distribution convictions. If a defendant is convicted of felony murder as well as the underlying felony, the underlying felony merges into the felony murder conviction. Here, the distribution conviction was the underlying felony that formed the basis for the felony murder conviction and it, not the separate possession conviction, was vacated by operation of law. Accordingly, the Court vacated the judgments of conviction and sentence for distribution of oxycodone and remanded their cases to the trial court for resentencing.

## Mistrial; Plea in Bar

*Brown v. State, S09A0245*

Appellant was convicted of malice murder in a subsequent trial following a mistrial. Appellant contended that the trial court erred in overruling the plea in bar, because its declaration of a mistrial without considering other available options violated federal and state constitutional protections against double jeopardy. The evidence showed that about one month before the first trial, appellant's sister called a juror named Blackmon and left a message with his wife to the effect that appellant was a good person. Blackmon did not disclose the communication during voir dire or otherwise mention it until the trial court directly questioned him after the State had begun presenting evidence. The trial court excused him from further service. However, Blackmon returned the next morning to a jury area. Upon further questioning of Blackmon and the remaining jurors, it became apparent that, contrary to the trial court's instructions, they had at some point had a conversation concerning evidence in the case and that Blackmon had made negative comments in an apparent effort to discredit the prosecution. The trial court then declared a mistrial.

The Court held that when a trial court determines that a juror has received an improper communication it may, but is not required to, determine whether the communication had in fact prejudiced the juror before granting a mistrial. Discovery of the harmful communication in itself may support a finding that there was manifest necessity to grant a mistrial. Additionally, the trial court's decision to reject alternatives to granting a mistrial is given great deference, and the availability of another alternative, without more, does not mean the mistrial was not necessary. Here, the trial court initially considered and chose the alternative remedy of dismissing Juror Blackmon. However, he returned and further questioning revealed that he may well have had a bias which infected his communications with the other jurors. Therefore, this was one of those "instances where a trial judge has discovered facts during a trial which indicated that one or more members of a jury might be biased against the Government or the defendant. It is settled that the duty of the judge in this event is to discharge the jury and direct a retrial."

## Plea in Bar; Double Jeopardy

*Varner v. State, S09A0321*

Appellant and his co-defendant were indicted on murder and other charges. At trial, each co-defendant's statement implicating the other was excluded from evidence. However, an exhibit consisting of an investigator's notes which contained both statements was inadvertently taken to the jury room. During its deliberations, the jury sent a note out asking whether that exhibit had been admitted into evidence, specifically the last page which summarized what Appellant told the investigator after he was arrested, and whether the jury could consider that statement in its decision. Finding a *Bruton* violation as to each co-defendant, the trial court concluded that curative instructions would not be sufficient, and declared a mistrial sua sponte. Appellant objected, and offered to waive any *Bruton* violation. Appellant thereafter filed a plea in bar, which the trial court denied. Appellant directly appealed from this order.

The Court held that if a mistrial is declared without a defendant's consent or over his objection, the defendant may be retried only if there was a "manifest necessity" for the mistrial. The existence of manifest necessity is determined by weighing the rights of both parties in light of the totality of the surrounding circumstances. Manifest necessity exists when a defendant's right to have the trial completed by a particular tribunal is subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury. Both the defendant and the State are entitled to a fair trial designed to end in a just judgment. The trial court is vested with as much authority to grant a mistrial when an injustice occurs to the State as when it occurs to the defendant. Here, the Court held, the trial court did not abuse its discretion in concluding that the evidence inadvertently taken to the jury room had irreparably prejudiced the State's right to a fair trial. Even assuming that Appellant could waive any error to the extent that it prejudiced his own case, he obviously could not waive error which required a mistrial as a result of irreparable prejudice to the State. Accordingly, the trial court's declaration of a mistrial and rejection of lesser alternatives was not an abuse of discretion.

## Ineffective Assistance of Counsel

*Miller v. State, S08G1952*

The Court granted cert. in this case on the following issue: Whether the Court of Appeals erred by applying an incorrect legal standard to determine prejudice under the second prong of the test for constitutionally ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U. S. 668 (1984). Appellant was convicted of simple battery. He raised an ineffective assistance claim, alleging that defense counsel should have objected to hearsay testimony that he was inebriated when he committed the crime. The Court of Appeals held that even if trial counsel's failure to object to the evidence constituted deficient performance, it was not prejudicial because appellant did not show "how the omission of a passing reference that he was drunk would have somehow resulted in the jury's believing that he was innocent," and "[c]onsequently, [appellant] cannot show but that for counsel's error, the outcome of the case would have been different."

The Court held that the Court of Appeals had diluted the prejudice prong of the *Strickland* test. Under *Strickland*, a defendant must show that there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. The Court held that "[o]ver the years, our appellate courts have on occasion deviated from this standard by eliminating the 'reasonable probability' language and requiring a defendant to show that but for counsel's error, the outcome of the case would have been different." The Court found that this error can be traced back to *Turner v. State*, 245 Ga. App. 294, 295 (4) (2000). It therefore found that to the extent that *Turner* and any other case eliminates or dilutes the "reasonable probability" standard set forth in *Strickland*, those cases are disapproved and will not be followed. The Court then vacated the opinion of the Court of Appeals and remanded the case for consideration of whether appellant was prejudiced by counsel's deficient performance applying the correct *Strickland* standard.

## **Mutually Exclusive Verdicts**

*Dryden v. State, S08G1897*

Appellant was convicted of both aggravated assault on a peace officer and serious injury by vehicle based upon reckless driving. The officer was the named victim of each crime. The Court held that verdicts are mutually exclusive where a guilty verdict on one count logically excludes a finding of guilt on the other. Reckless conduct, OCGA § 16-5-60 (b), like reckless driving, OCGA § 40-6-390, is a crime founded upon an act of criminal negligence, rather than an intentional act. Aggravated assault with a deadly weapon, OCGA § 16-5-21 (a) (2), may be committed either by “[a]ttempt[ing] to commit a violent injury to the person of another,” OCGA § 16-5-20 (a) (1), or by “[c]ommit[ing] an act which places another in reasonable apprehension of immediately receiving a violent injury.” OCGA § 16-5-20 (a) (2). A verdict of guilty as to aggravated assault based on OCGA § 16-5-20 (a) (1) requires a finding of an intentional infliction of injury, which precludes the element of criminal negligence in reckless conduct. A verdict of guilt predicated on OCGA § 16-5-20 (a) (2), does not. Thus, the Court found, a verdict of guilt as to aggravated assault is mutually exclusive with a verdict of guilt as to serious injury by vehicle predicated on reckless driving, if the aggravated assault is based on “[a]ttempt[ing] to commit a violent injury to the person of another” under OCGA § 16-5-20 (a) (1).

Here, the State indicted appellant without specifying which prong of OCGA § 16-5-20 (a) applied, and the trial court instructed the jury that aggravated assault with a deadly weapon could be committed either by attempting to commit a violent injury to the person of another, or by committing an act that places another in reasonable apprehension of immediately receiving a violent injury. Therefore, the verdicts were mutually exclusive because the jury could have found appellant guilty of aggravated assault under OCGA § 16-5-20 (a) (2) by placing the officer in reasonable apprehension of immediately receiving a violent injury.

## **Juror Misconduct**

*Watkins v. State, S09A0472*

Appellant was convicted of murder. He contended that his right to confrontation was violated because the jurors considered

extra-judicial information during its deliberations. Jurors generally are not permitted to impeach their verdict, but this rule must yield to a defendant’s constitutional guarantees. Whether or not an exception should be made must be determined by the circumstances of the case. To set aside a jury verdict solely because of irregular jury conduct, a court must conclude that the conduct was so prejudicial that the verdict was inherently lacking in due process. Appellant contended that after jury deliberations had begun, Sivley, a juror, performed experiments at home with his own personal handgun to determine whether appellant’s version of an accidental shooting was plausible, despite the fact that appellant did not receive any hand injuries from the discharging weapon. Appellant contended that Sivley used the results from this extra-judicial experimentation to convince another juror, Huill, to change her vote from not guilty to guilty. However, Sivley testified at the motion for new trial and directly contradicted appellant’s claims. He did convey his belief to the other jurors that an accidental shooting as contended by appellant could not have happened without an injury to appellant’s hand caused by the sliding mechanism of the gun. This belief, however, was based on Sivley’s past experience with handguns, not any extra-judicial experimentation. The trial court, having heard the testimony, credited Sivley’s testimony that no extra-judicial experimentation occurred. Therefore, the Court held, since it has no power to overturn that credibility determination, the trial court did not err.

## **Jury Selection; Closing Arguments**

*Dixon v. State, S09A0222; S09A0223*

Appellants were convicted of murdering their roommate. They argued that the trial court should have severed their trial because each defendant would have received a greater number of peremptory strikes if they had been tried separately rather than together and that OCGA § 17-8-4 (b), relating to preemptory strikes, unconstitutionally violates their rights to equal protection under the law. The Court disagreed. First, the Court held that appellants were entitled to be tried by an impartial jury, and they did not show that the jury they received was not impartial or that any of the jurors who considered their case were unquali-

fied. Therefore, they failed to show that they were harmed by not receiving more peremptory strikes than they did.

Second, they failed to prove an equal protection violation. The person asserting an equal protection claim has the burden to establish that he is similarly situated to members of the class who are treated differently from him. If the person asserting the violation cannot make such a showing, there is no need to continue with an equal protection analysis. Here, appellants contended that codefendants as a class must be treated the same as the separate class of defendants tried individually. However, the Court held, equal protection does not require identical treatment of different classes. The equal protection clause does not exact uniformity of procedure. Instead, the legislature may classify litigation and adopt one type of procedure for one class and a different type for another. Therefore, the Court held, appellants’ argument failed on this basis.

One appellant also argued that the trial court impermissibly limited the scope of his closing argument by preventing him from referring to another recent local case in which a defendant had been convicted on circumstantial evidence but later cleared after DNA testing. The Court stated that analogizing a defendant or a defendant’s case to another well-known defendant or case is permissible during argument if the analogy is supported by facts in evidence. Counsel may make use of well-established historical facts in his argument and make full use of illustrations as long as he does not introduce “extrinsic and prejudicial matters” which have no basis in the evidence in the case (e. g. Charles Manson or Jim Jones to illustrate how an individual may obtain control of another), are within the wide latitude allowed in closing argument, provided there is an evidentiary basis for these illustrations. Here, however, Appellant provided no evidence that the case he wished to analogize to in closing argument was either so well-known or so well-established that it would fall within this rule.

## **Attorney-Client Privilege; Loss or Destruction of Evidence**

*Davis v. State, S09A0395*

Appellant was convicted of malice murder and two counts of felony murder. The

evidence showed that he murdered a man who was seeing his estranged wife. He argued that the attorney-client privilege protected a letter written by a private investigator and two letters written by his divorce attorneys, and therefore the trial court erred in failing to exclude those letters from evidence. The Court held that the attorney-client privilege protects communications between the client and the attorney that are intended to be confidential; the protection does not extend to communications which are not of a confidential nature. For example, the privilege does not cover the mere fact of employment. The statutes outlining the attorney-client privilege are not broadly construed; the attorney-client privilege embodied in OCGA § 24-9-24 has been confined “to its narrowest permissible limits,” because a narrow construction of the privilege comports with the view that the ascertainment of as many facts as possible leads to the truth, the discovery of which is the object of all legal investigations. Here, the three letters did not involve any communications between appellant and his attorneys. Rather, they were all communications between the private investigator and the attorneys. Moreover, the letters did not contain confidential information, and instead concerned only the fact of the investigator’s employment and the attorneys’ claims that the investigator’s services in the divorce case fell under the attorney-client privilege. Because the letters did not contain confidential communications between appellant and his attorneys, they were not protected by the narrowly construed attorney-client privilege.

Appellant also argued that the indictment should have been dismissed because the State allegedly lost or destroyed exculpatory evidence. Specifically, appellant argued that handgun, a bullet and its casing, a tassel from a hat, two gas cans, a plastic bag, a shotgun, a knife, a flashlight, a key and a telephone caller identification unit were lost or destroyed by the State. The Court held that in dealing with the failure of the State to preserve evidence which might have exonerated a defendant, a court must determine both whether the evidence was material and whether the police acted in bad faith in failing to preserve the evidence. To meet the standard of constitutional materiality, the evidence must possess an exculpatory value that was apparent before it was destroyed, and be of such a

nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. A criminal defendant must both show bad faith on the part of the police, and a failure to preserve potentially useful evidence to constitute a denial of due process of law. The Court held that appellant failed to meet this burden. Thus, other than the tassel and one of the gas cans, all of the other items were found either in the victim’s burned car or home, and were generally not suitable for forensic testing because they had been damaged by fire and doused with water. Furthermore, any testing that was conducted on the items was preserved at trial by witness testimony. In any event, the Court found, appellant failed to show that any of the items were exculpatory and there was no evidence that the State acted in bad faith.

### **Expert Testimony**

*Wright v. State, S09A0324*

Appellant was convicted of the malice murder of her newborn child. She argued that the trial court erred in excluding testimony from her proffered expert witness on police interrogation techniques and false confessions because it would have aided the jury in evaluating the reliability of her inculpatory custodial statement. Specifically, she argued that her expert would have testified as to the use of the “Reid method” by the police interrogators. The State argued that the trial court properly disallowed the testimony because the defense failed to comply with its reciprocal discovery obligations. The Court held that when a defendant fails to comply with discovery requirements under OCGA § 17-16-1 et seq., and specifically that of witness disclosure, the trial court may, under certain circumstances, prohibit the defendant from presenting the witness not disclosed. However, premitting the question of the propriety of excluding appellant’s testimony because of discovery violations by the defense, there was no showing that “false confession theory” and the “Reid method” satisfied the evidentiary test in criminal cases set forth in *Harper v. State*, 249 Ga. 519(1) (1982). Therefore, the testimony was properly excluded.

Appellant also contended that the trial court erred in allowing the medical examiner to testify about the cause or manner of the baby’s death because his opinion was based

solely on appellant’s inculpatory statements made during the police interrogations rather than on his own medical knowledge or scientific examination. The Court disagreed. First, in attempting to determine the cause of death, a medical examiner may consider the circumstances surrounding the death. In this case, such consideration may have been necessary based upon the condition of the remains. Furthermore, the medical examiner’s opinion as to the cause of the infant’s death was not based solely on appellant’s statements. Instead, the medical examiner testified that in reaching the conclusion that the infant died from suffocation, he considered the investigative history in conjunction with the fact that he found, from the autopsy, no other cause for the child’s death.

### **Motion for Directed Verdict**

*Christian v. State, A09A0613*

Appellant was convicted of driving without a valid license after being declared a habitual violator and DUI. He argued that the trial court erred in denying his motion for a directed verdict after the close of the State’s case. The State had charged that appellant “did operate a motor vehicle after having received notice of the revocation of his license to operate a motor vehicle because of his having been declared a habitual violator by the Department of Public Safety of Georgia and his not having thereafter obtained a valid driver’s license, in violation of OCGA § 40-5-58.” However, the evidence showed that appellant had been issued a probationary license by DPS. Although the State claimed that a probationary driver’s license was not a “valid driver’s license” pursuant to OCGA § 40-5-58 (c) (1), the Court held that such a statutory interpretation would mean that any holder of a probationary driver’s license could not operate a motor vehicle without violating OCGA § 40-5-58 (c) (1). The Court further stated that while appellant could have been charged with other violations of OCGA § 40-5-58, such as violating the terms of his probationary driver’s license, when a crime can be committed in more than one way, the State is not permitted to prove that crime in a different manner than that alleged in the indictment. Thus, because there was no conflict in the evidence, and the charge of being a habitual violator operating a vehicle without a “valid driver’s license” demanded

a verdict of acquittal as a matter of law, the trial judge erred in denying his motion for a directed verdict as to that count.

## **Sexual Offender Registration**

*Morrell v. State, A09A0294*

Appellant was initially charged with two counts of child molestation. As part of a plea deal, he pled under *Alford* to two counts of cruelty to children. He appealed the denial of his motion to be removed from the Sex Offender Registry. The Court held that a person must register as a sex offender if, among other things, he is convicted on or after July 1, 1996 of a “criminal offense against a victim who is a minor.” OCGA § 42-1-12 (e) (1). A “criminal offense against a victim who is a minor” with respect to convictions occurring after June 30, 2001, is defined to include any criminal offense under Title 16 which consists of, among other things, “[c]riminal sexual conduct toward a minor,” and “[a]ny conduct, which, by its nature, is a sexual offense against a minor.” OCGA §§ 42-1-12 (a) (9) (B) (iii) and 42-1-12 (a) (9) (B) (xi). “Conviction” includes “a final judgment of conviction entered upon a verdict or finding of guilty of a crime, a plea of guilty, or a plea of nolo contendere.” OCGA § 42-1-12 (a) (8). Here, the record reflected that appellant entered an *Alford* plea to two instances of cruelty to children for “causing mental anguish to [the victim]” by committing the acts alleged in the indictment. Those acts, acknowledged by appellant, involved him touching the breast and buttocks of the 14-year-old victim. Therefore, although appellant did not plead guilty to a sexual offense, he did plead guilty to “conduct, which, by its nature, is a sexual offense against a minor” which is a “criminal offense against a victim who is a minor” under OCGA § 42-1-12 (a) (9) (B) (xi). Because appellant’s acts fell within the purview of OCGA § 42-1-12 (e) (1), the trial court did not err in denying his motion and ordering that he register as a sex offender.

## **Search & Seizure**

*Jackson v. State, A09A0609*

Appellant was convicted of misdemeanor possession of marijuana. He argued that the trial court erred in denying his motion to suppress. The evidence showed that appellant’s vehicle was parked in the lot of a gas station/

convenience store. The investigating officer heard loud music emanating from the vehicle and investigated. OCGA § 40-6-14 (a) makes it a misdemeanor for anyone “operating or occupying a motor vehicle on a street or highway” to operate a sound-making device in a car “so that the sound is plainly audible at a distance of 100 feet or more from the motor vehicle.” Appellant argued that 1) the statute did not apply to the parking lot where his car was sitting and 2) the stop was invalid because the music emanating from his vehicle did not meet the definition of “plainly audible” set forth in regulations promulgated by the Department of Public Safety.

The Court first held that OCGA § 40-6-3 (a) (2) states that “[t]he provisions of this chapter shall apply to a vehicle operated at shopping centers or parking lots or similar areas which although privately owned are customarily used by the public as through streets or connector streets.” Here, it was reasonable for the officer to believe that OCGA § 40-6-14 (a) applied to the parking lot of the convenience store/gas station where appellant’s vehicle was parked, and the officer’s investigatory stop of his vehicle was justified by a reasonable suspicion that he was operating his vehicle in violation of § 40-6-14 (a). The Court also held that even if the loud music did not exceed the sound level of the DPS regulations, the officer here acted in a good faith belief that an unlawful act had been committed, and thus, his actions are not rendered improper by a later legal determination that the appellant’s actions were not a crime according to a technical legal definition or distinction determined to exist in the penal statute.

## **Implied Consent**

*Williams v. State, A09A0836*

Appellant was charged with vehicular homicide, driving while under the influence of a drug, and other serious traffic offenses. He moved to suppress the results of a blood test that police obtained from him without first informing him of his implied consent rights. The trial court denied his motion, but certified the order for immediate review and the Court granted his application. The evidence showed that in May 2006, appellant was involved in a fatal car accident. One of the investigating officers suspected that appellant might be under the influence of drugs. The officer asked him

for a blood sample, but did not advise him of his implied consent rights. Appellant agreed to give the sample, which showed the presence of marijuana in his system.

In the 2006 legislative session, OCGA § 40-5-67.1 was amended to provide that nothing in the implied consent statute “shall be deemed to preclude the acquisition or admission of evidence of a violation of [the DUI laws] if obtained by voluntary consent or a search warrant as authorized by the Constitution or laws of this state or the United States.” The trial court agreed with the State that the statute should be applied retroactively to this case. However, the Court disagreed and reversed. A statutory amendment may be applied retroactively if the changes do not affect constitutional or substantive rights and if the legislature did not express a contrary intention. The implied consent statute grants drivers the right to refuse to take a state-administered test, with one of the consequences of exercising that right being that evidence of such refusal is admissible at trial. Here, the statutory amendment eliminates the need to give the notice where an individual “voluntarily” agrees to testing. “This amendment not only changes the substance of the implied consent warning, it does away with the requirement that the warning be given at all where an officer manages to otherwise lawfully obtain consent to testing. This is not merely a procedural or evidentiary change, but one eliminating a defendant’s substantive right to refuse to submit to testing. Therefore, the trial court erred in applying the amendment retroactively and in denying [appellant’s] motion to suppress.”

## **Judicial Comment**

*Lopez v. State, A09A0647*

Appellant was convicted of eight counts of aggravated assault, two counts of aggravated battery and one count of participation in criminal street gang activity. He contended that the trial court committed plain error by impermissibly commenting on the evidence in violation of OCGA § 17-8-57. During the trial, and without objection, the trial court asked one of the victims if he had sustained a scar as a result of being wounded. When the victim responded that he had, the trial court asked to see the scar and then asked the victim to show his scar to the jury. The Court held

that the trial court's questions were entirely objective, did not suggest a particular answer to the witness, and related to the aggravated battery against the witness. Therefore, the trial court's actions fell within its discretion to ask questions to develop the truth of the case and were not plain error.