

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 15, 2016

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THIS WEEK:

- **Impeachment Evidence; Conflict of Interest**
- **Ineffective Assistance of Appellate Counsel**
- **Mallory; Plain Error**
- **Guilty Pleas; Ineffective Assistance of Counsel**
- **Rule 404(b) Evidence; Domestic Violence**
- **Constitutional Overbreadth Doctrine; OCGA § 16-12-100.2(e)**
- **OCGA § 16-3-24.2; Convicted Felons**
- **Prosecutorial Misconduct; Habeas Corpus**
- **Venue; Jury Instructions**

Impeachment Evidence; Conflict of Interest

Green v. State, S16A0066 (7/5/16)

Appellant was convicted of malice murder, burglary, aggravated assault, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon. The evidence showed that Marshall, accompanied by his friend Augustus, returned to his apartment one evening to find that the front door had been forced open; Marshall entered the apartment and Green struck him 15 or 16 times with a pistol; Green placed the pistol to Marshall's head and directed Marshall to give him money; Augustus distracted Green; Marshall ran to a nearby apartment; Augustus was fatally shot; and Green and another man ran from Marshall's apartment.

Appellant contended that his trial counsel rendered ineffective assistance. The record showed that after the testimony of State's witness Marshall, the jury was excused and, while Marshall was still on the witness

stand, the court questioned the veracity of Marshall's testimony that he was not a drug dealer; after questioning Marshall himself, the court found him in criminal contempt of court for not testifying truthfully, and ordered that he serve 20 days in jail for the contempt. After two other witnesses testified, trial counsel asked the court whether the court's finding of criminal contempt could be used to impeach Marshall's testimony; the court responded that it would not be appropriate to inform the jury that the court had concluded that a witness had lied in his testimony, and that to do so would potentially interfere with the jury's independent determination of Marshall's credibility. Appellant argued that his trial counsel was ineffective when he failed to object to the court's ruling and therefore preserve appellate review of this issue, contending that impeachment of Marshall by the contempt finding would have been appropriate. The Court disagreed.

Without deciding whether under former OCGA § 24-9-84.1(a)(3), a criminal contempt could serve as a basis for impeachment, the Court stated that the trial court was correct to be concerned that its finding that Marshall was in criminal contempt could invade the jury's role and violate former OCGA § 17-8-57. For the trial court to allow the jury to be informed that it had found Marshall to have testified falsely would have directly violated the rule that a court not comment on the veracity of a witness. If the trial court wishes to inquire into the behavior of a witness, the recommended practice is to remove the jury from the courtroom before the trial court holds a witness or party in contempt or otherwise comments on the conduct of a person before the court, and such precaution would have no

value if, as appellant proposed, the jury could then be informed that the court has held a witness in contempt for testifying falsely. Therefore, the Court found, the trial court did not err in informing trial counsel that he could not impeach Marshall's testimony by informing the jury that the court had found Marshall in contempt for falsely testifying, and thus, it was not ineffective assistance to fail to make any objection on this ground.

Appellant also contended that trial counsel was ineffective by virtue of a conflict of interest in that, at the time of trial, counsel not only represented Green, but also represented Anderson, appellant's girlfriend at the time of the crimes, who was facing felony drug charges arising from the search of her car after law enforcement investigators who were questioning her about appellant's use of her car, and his whereabouts on the night Augustus was killed, came to believe that Anderson had illegal drugs in her car; it was uncontroverted that the found drugs were not appellant's and were not connected to any actions on his part that supported the State's prosecution of appellant.

The record showed that when counsel's potential conflict of interest was called to the trial court's attention, the trial court made extensive inquiry of appellant about the matter. Appellant orally declared that he wanted counsel to represent him despite any potential conflict of interest on counsel's part. Thus, assuming that any informed consent to the continued representation was permissible under the Rules of Professional Conduct, appellant argued that his consent to continued representation by counsel did not comply with Rule 1.7 and established ineffective assistance of counsel. However, the Court stated, an ethics violation does not necessarily establish a claim of ineffectiveness of counsel. While noting that compliance with the Rules of Professional Conduct should always be maintained, the Court stated that attorney discipline for a violation of those Rules was not before it, but only the issue of whether appellant had established ineffective assistance of trial counsel in regard to counsel's simultaneous representation of him and Anderson.

Appellant contended that he established that counsel had a conflict of interest that significantly and adversely affected his representation by demonstrating that counsel did not impeach Anderson's testimony by

showing that she was under prosecution at the time of trial, or by use of her prior video-recorded interview with law enforcement investigators. But, based on counsel's testimony at the motion for new trial, the Court found that the reasons for not doing so were strategic. Thus, the Court stated, regardless of who represented Anderson, appellant's trial counsel would not have wanted to introduce her interview with law enforcement investigators, through impeachment or otherwise, and appellant failed to establish that counsel would have acted differently absent the alleged conflict of interest.

Ineffective Assistance of Appellate Counsel

Taylor v. Metoyer, S16A0070 (7/5/16)

In 1999, Metoyer was convicted of numerous counts of armed robbery and related offenses. On direct appeal, Claridge, Metoyer's appellate counsel, argued that the evidence was insufficient to sustain the convictions and that trial counsel was ineffective in the following ways: by failing to investigate and present an alibi defense; by failing to secure the respective *Jackson-Denno* transcripts of Nichols and Daniels (Metoyer's two testifying co-defendants) who allegedly had asserted that their statements to law enforcement were untrue; and, by meeting with Metoyer only once before trial. The Court of Appeals concluded that the evidence was sufficient to sustain Metoyer's convictions and that the claims of ineffective assistance of counsel were meritless or waived. *Metoyer v. State*, 282 Ga. App. 810 (2006).

Metoyer subsequently filed a habeas petition in which he argued that he received ineffective assistance of appellate counsel. Specifically, he contended that appellate counsel raised frivolous or unsupported claims on appeal and failed to raise other, more meritorious claims, such as trial counsel's failure to cross-examine Nichols and Daniels on their respective agreements with the State. The habeas court agreed with Metoyer and granted his petition; the Warden appealed.

The Court stated that a claim of ineffective assistance of appellate counsel requires a showing both that counsel's performance was deficient and that the deficiency prejudiced the outcome of the defendant's appeal. When analyzing whether appellate counsel's performance was deficient, the controlling principle is whether appellate counsel's decision was a reasonable

tactical move which any competent attorney in the same situation would have made. The prejudice prong requires the petitioner to 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 concluded that the habeas court's findings were supported by the record and that those findings were legally sufficient to show that Claridge was ineffective. As an initial matter, the Court agreed that the claims raised by Claridge on appeal were untenable. The record was clear that the alleged alibi witness could not provide an alibi for Metoyer and that any ineffectiveness claim related to trial counsel's failure to call her as a witness was frivolous. Likewise, the Court agreed with the habeas court that no competent attorney would have asserted an ineffectiveness claim based on the *Jackson-Denno* transcripts in the manner in which Claridge presented it on appeal; notably, Claridge presented a one-sentence argument regarding the claim on appeal and failed to support the claim with either the transcripts themselves or an explanation of what the transcripts would have shown. Further, Claridge failed to competently assert the claim that counsel was unprepared for trial. Instead of focusing on trial counsel's level of preparation, Claridge presented the claim in the context of how many times trial counsel had met with Metoyer without any analysis as to prejudice. It is well established that, in the absence of argument and evidence supporting prejudice, an appellant cannot prevail on a claim of ineffectiveness.

The Court also agreed with the habeas court that a stronger claim of ineffectiveness existed which Claridge could have raised. In addition to trial counsel's failure to secure the *Jackson-Denno* transcripts to utilize as impeachment evidence, trial counsel also failed to cross-examine the testifying co-defendants on both the actual terms of their plea agreement and on the fact that the two men had misrepresented the nature of their agreements with the State. Though the scope of cross-examination will rarely support a claim of ineffectiveness, the identification of Metoyer was a key issue at his trial and no reasonably competent attorney would have elected to forgo cross-examination that would have cast doubt on the credibility of both the State and its key witnesses. Trial counsel's deficient performance was significant in light of the underwhelming case against Metoyer, which was based primarily

on the testimony of Metoyer's co-defendants. Trial counsel's failure prevented the jury from hearing what motive the co-defendants had in testifying against Metoyer; it also prevented the jury from learning that the co-defendants and the State had been less than forthcoming about their agreements. Such a claim satisfies both prongs of *Strickland v. Washington*. Thus, the Court held, given that trial counsel's performance was deficient and the deficiency prejudiced Metoyer's defense, had appellate counsel raised this issue on appeal Metoyer would have been entitled to a reversal of his armed robbery convictions. Accordingly, the habeas court correctly granted Metoyer's habeas petition.

Mallory; Plain Error

Simmons v. State, S16A0253 (7/5/16)

Appellant was convicted of malice murder, rape, and aggravated sodomy. He contended that the prosecutor in opening and closing statements, commented on his failure to come forward in violation of *Mallory v. State*, 261 Ga. 625 (1991) (overruled on other grounds, see *Clark v. State*, 271 Ga. 6 (515 SE2d 155) (1999)). The Court, however noted appellant made no timely objection to any of the comments. Therefore, the Court stated, inasmuch as there was no contemporaneous objection made, these allegations of error have not been preserved for review on appeal. Also, there is no authority for the application of plain error review to comments made by lawyers during opening statements or closing argument. Rather, the Court will apply plain error review to the trial court's jury instructions and to the trial court's rulings on evidence. Opening statements and closing arguments are neither instructions by the trial court nor evidence. Accordingly, in the absence of an objection, these allegations of error were not considered by the Court.

Appellant also contended that the prosecutor elicited testimony from a police investigator that commented on his failure to come forward in violation of *Mallory's* "bright-line" rule. As to this allegation, the Court noted that although there was no timely objection, review was not waived, but limited to whether it amounted to plain error pursuant to OCGA § 24-1-103. The Court stated that it has repeatedly noted that *Mallory* was decided on the basis of former OCGA § 24-3-36, a provision was repealed by the enactment of the

new Evidence Code, which became effective January 1, 2013 and applied to appellant's trial in 2014. In doing so, the Court emphasized that it has taken pains to note that the Court "express[ed] no opinion about the continuing validity of *Mallory* under the new Evidence Code." As such, it was not possible to say that for the trial court to permit the testimony at issue was a legal error that was clear or obvious, rather than subject to reasonable dispute. Rather, an error is plain if it is clear or obvious under current law. An error cannot be plain where there is no controlling authority on point. Accordingly, whether the testimony at issue violated *Mallory* must be considered subject to reasonable dispute and thus did not constitute plain error.

Finally, appellant contended that the testimony violated his right against self-incrimination under the Fifth Amendment. But, the Court noted, appellant failed to point to authority showing that admission of the testimony was clearly and obviously legal error of constitutional magnitude. Rather, the Court found, it is clear that testimony about a defendant's failure to come forward is often admissible, citing *Jenkins v. Anderson*, 447 U. S. 231, 235 (II) (100 SCt 2124, 65 LE2d 56) (1980) and *Salinas v. Texas*, ___ U. S. ___ (133 SCt 2174, 186 LE2d 376) (2013). Thus, the Court concluded, the absence of clear authority to support appellant's argument prevented the establishment of plain error as to the admission of this evidence.

Guilty Pleas; Ineffective Assistance of Counsel

Shepard v. Williams, S16A0405 (7/5/16)

In 2011, Williams pled guilty to charges of malice murder, felony murder, hijacking a motor vehicle, armed robbery, two counts of aggravated assault with a deadly weapon, and possession of a firearm during the commission of a felony. The record showed that immediately prior to his scheduled trial, the trial court ruled inadmissible any testimony from the defense's expert on false confessions. Following this ruling, Williams decided to plead guilty. His plea was accepted by the trial court after a plea colloquy during which the State's evidence, including Williams' statement to police, and the nature of the charges set out in the indictment were discussed and after questioning by the trial court as to the voluntariness of the plea.

In 2013, Williams sought habeas corpus contending that his plea was not voluntarily entered and that his trial counsel provided ineffective assistance. The habeas court granted his petition on both contentions and the warden appealed.

As to voluntariness of the plea, the habeas court found that Williams' plea was not voluntary because, faced with a waiting jury and the trial court's evidentiary ruling, Williams "was not of sufficiently sound mind and intelligence to make an informed decision, *on the spot*, whether to proceed with trial or plea." (Emphasis in original). In addition, the habeas court found several factors contributed to a "confluence of circumstances" that rendered Williams' plea not voluntary and therefore, invalid. These factors included the habeas court's finding that Williams had no criminal record; he never admitted in his statement to police that he shot the victim; he was never asked nor did he admit the acts for which he was charged at the plea hearing; he never affirmed the prosecutor's proffer at the plea hearing; counsel had less than two months to prepare for trial; the trial judge did not participate in the plea colloquy; Williams' family encouraged him to enter a plea; and although he was found competent to stand trial, Williams suffered "from some low functioning ability."

The Court found that the habeas court correctly relied on its evaluation of the totality of the circumstances in evaluating whether Williams' plea was voluntarily and intelligently entered. But the Court found that the habeas court erred in its findings and conclusions. First, the Court found that while Williams' decision to plead guilty may have been prompted by the trial court's decision to disallow the testimony of his expert witness and his imminent trial, this circumstance and the unavoidable pressure it produced did not render his plea involuntary. Williams' situation was, in fact, no different than that of any other criminal defendant who must decide whether to proceed to trial and put the State to its proof or plead guilty.

Second, the Court found insufficient evidence to support the habeas court's conclusion that Williams' plea was not entered knowingly. Here, the record showed that Williams was fully informed of the nature of the charges and the consequences of his plea. His plea was entered in open court after he

was made aware of the State's charges against him and the evidence the State expected to present at trial to establish his guilt. The trial court accepted the plea after satisfying itself through its own questioning that the plea was made voluntarily and intelligently and that Williams' admissions were accurate and reliable to prove that he committed the crimes charged. Although Williams' admission to police did not include the precise words, "I shot [the victim]," he undisputedly admitted that he shot the gun "two or three times" with the intention to scare the victim. He also admitted that he committed the acts charged in the indictment when he pled guilty to those crimes. The record further established that Williams was deemed competent to stand trial and was advised by competent counsel with regard to his decision to plead guilty. Plea counsel, in turn, testified at the habeas corpus hearing that Williams entered his plea knowingly and voluntarily and that at the time the plea was entered, she had no doubt that he "understood what was going on." The trial court, in accepting Williams' plea, made a similar determination.

As to the finding that Williams suffered from "some low functioning ability," the Court noted that no evidence was presented at the habeas hearing specifically pertaining to Williams' "functioning ability." More importantly, the only evidence of his functioning ability at the time of the plea was that offered through his trial counsel, demonstrating her belief that Williams made a knowing and voluntary decision to enter his guilty plea. Moreover, the Court stated, even assuming Williams exhibited signs of "low functioning ability," this fact does not lead to the inexorable conclusion that he was incapable of understanding and rationally weighing the advantages of going to trial against the advantages of pleading guilty. And even if it did, the habeas court did not reach this conclusion in its order.

The Court further found that the remaining factors identified by the habeas court in its evaluation of the totality of the circumstances surrounding the entry of Williams' plea similarly did not support the conclusion that his plea was invalidly entered. The State's failure to present the corroborating evidence enumerated in the habeas court's order, while relevant to Williams' evaluation of the strength of the State's case against him, does not

support the conclusion that Williams' plea was entered unknowingly. There is no requirement that a trial judge personally participate in the plea colloquy as long as the trial court makes an independent determination that the plea is voluntarily and intelligently made. And the fact that Williams had no criminal record and his family encouraged him to plead guilty has no bearing on the issue of whether he understood the consequences of his decision. There was no evidence that Williams was coerced into entering his plea, and the normal pressures and insecurities to which a defendant who finds himself within the criminal process is subjected, whether it be his first or fifth prosecution, are generally insufficient to establish the coercion necessary to invalidate a plea. Finally, there was no showing that defense counsel's appointment as substitute counsel two months before trial left Williams with no choice but to plead guilty. "We decline to hold as a matter of law that the appointment of substitute counsel two months before a scheduled trial renders an otherwise valid guilty plea involuntary, especially where there is no evidence that the arguably belated appointment prejudiced the defendant."

The Court also found that the habeas court erred when it granted habeas relief on the ground that the public defender's office provided ineffective assistance by failing to provide "consistent representation." The record showed that Williams did not, either in his habeas petition or at the habeas hearing, assert a claim of ineffective assistance of counsel based on "inconsistent representation." The warden, therefore, was given no notice of and had no meaningful opportunity to investigate or respond to the ground on which the habeas court's grant of relief was based. Therefore, despite the general authority of a habeas court to consider matters *sua sponte*, the habeas court erred by granting relief to Williams on an unasserted ground.

Rule 404(b) Evidence; Domestic Violence

Smart v. State, S16A0393 (7/5/16)

Appellant was convicted of malice murder and related offenses in connection with the beating death of his wife, Lauren Smart. The trial court permitted the State to present the testimony of Katie Tucker, the sister of appellant's ex-wife, Sarah, regarding prior acts of domestic violence committed

by appellant. Tucker testified that appellant would threaten Sarah daily, would hit Sarah in such a way so as to leave no visible injury, and that appellant's "motto" was that "his love is pain." According to Tucker, appellant would ask Sarah "how many" — referencing punches — and if Sarah said "one," appellant would punch her twice. Tucker explained that Sarah did not like having her kneecaps touched but that appellant would often punch her there. Tucker also described an incident in which Sarah, then eight-months pregnant, suspected that appellant was with another woman in the marital residence. Appellant prevented Sarah from entering the residence and, when Sarah attempted to climb through a broken window, appellant shoved her out of the window to the ground. Tucker explained that, when the injured and bloody Sarah managed to enter the house, she was forcefully dragged out of the house by appellant. Appellant argued that the trial court abused its discretion in admitting this testimony. The Court disagreed.

The Court stated that Rule 404 (b) prohibits other acts evidence from being admitted for the sole purpose of proving the character of a person in order to show action in conformity therewith; however, other acts evidence may be admitted under Rule 404 (b) if that evidence is relevant to some issue other than character. To evaluate relevancy, courts must rely on OCGA § 24-4-401, which defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The trial court concluded that the evidence was relevant to show, *inter alia*, motive.

The Court found that while motive was not an element of any of the charged offenses here, Tucker's testimony was relevant to help the jury understand why appellant might have used violence against Lauren. Though Tucker's testimony referenced specific acts of domestic violence, her testimony also revealed the impetus behind that violence: control. Sarah would ask for one punch, but would get two; appellant would hit Sarah where she was most sensitive and in a way that would not reveal that violence; and appellant forcibly removed Sarah from the marital residence when he did not want her there. Accordingly, Tucker's testimony was relevant to the State addressing motive, namely, that appellant used violence to control Lauren.

Second, the Court found that while the evidence against appellant was prejudicial — as almost all evidence presented by the State will be — on balance, it agreed with the trial court that the probative nature of Tucker’s testimony outweighed that prejudice. Tucker’s testimony was not elicited merely to show that appellant had engaged in prior acts of domestic violence, but, instead, it demonstrated that the violence was a mechanism for control of his intimate partners. While the evidence of appellant’s guilt was strong — which tended to lessen the probative value of Tucker’s testimony — there was very little evidence from which a jury could have gleaned why appellant lashed out against his wife. Further, while the evidence in Tucker’s testimony was disturbing, there was nothing inherent in this evidence that would create a risk that appellant would be convicted on a ground different from proof specific to the offense charged.

Finally, the Court turned to the third prong of the test: whether the State offered sufficient proof for the jury to conclude that appellant committed the acts described by Tucker. The Court noted that Tucker testified that she spent considerable time in the marital residence with appellant and Sarah — summers and weekends— and that she witnessed the acts about which she testified; this was sufficient. Accordingly, the trial court did not abuse its discretion when it permitted the State to present Tucker’s testimony.

Constitutional Overbreadth Doctrine; OCGA § 16-12-100.2(e)

Scott v. State, SI6A0323 (7/6/16)

Appellant was indicted on two counts of violating the Computer or Electronic Pornography and Child Exploitation Prevention Act, OCGA § 16-12-100.2(e). He filed a general demurrer contending that OCGA § 16-12-100.2(e) is unconstitutionally overbroad in violation of the right to free speech guaranteed under the First Amendment to the United States Constitution. The trial court denied the demurrer but granted appellant a certificate of immediate review. The Court granted the application only to review the merits of his First Amendment overbreadth challenge.

The Court stated that the first step in any overbreadth analysis is to construe the statute in question. OCGA § 16-12-100.2(e)(1) provides

that an individual “commits the offense of obscene Internet contact with a child if he or she has contact with someone he or she knows to be a child or with someone he or she believes to be a child via a computer wireless service or Internet service, including but not limited to, a local bulletin board service, Internet chat room, e-mail, or instant messaging service, and the contact involves any matter containing explicit verbal descriptions or narrative accounts of sexually explicit nudity, sexual conduct, sexual excitement, or sadomasochistic abuse that is intended to arouse or satisfy the sexual desire of either the child or the person, provided that no conviction shall be had for a violation of this subsection on the unsupported testimony of a child.”

The Court stated that following the list of content categories is the phrase “that is intended to arouse or satisfy the sexual desire of either the child or the person.” The pivotal question is what term or phrase within subsection (e) this qualifying phrase is intended to modify. Does the phrase modify only the term “sadomasochistic abuse” that immediately precedes it? Or the entire series of offending “verbal descriptions or narrative accounts” previously set forth? Or the “contact” itself? The answer to this question was deemed by the Court to be critical not only to determining the scope of conduct within the statute’s reach but also to assessing whether the scope of proscribed conduct is too broad to pass constitutional muster. After applying the rules of statutory interpretation the Court concluded that OCGA § 16-12-100.2(e)(1) should be read to prohibit only that online contact involving verbal descriptions or narrative accounts of any of the four defined categories of offending content and made with the specific intent to arouse or satisfy the sexual desires of the accused or the child victim. The crime of obscene Internet contact with a child is thus comprised of (1) the actus reus — the contact, performed under particular circumstances (with one known or believed to be age 15 or younger; via specified online means; involving verbal descriptions or narrative accounts of content falling into any of the four defined categories) and (2) the mens rea — the specific intent on the part of the accused that his contact will arouse or satisfy the sexual desire of the child or the accused.

Having construed the statute, the Court then turned to the question of whether the statute, so construed, can on its face survive First Amendment overbreadth scrutiny. The

Court noted that OCGA § 16-12-100.2(e) is one among several substantive provisions of a larger statutory enactment whose very title makes clear that its purpose is preventing the exploitation of children via electronic means. It is evident beyond the need for elaboration that government has a compelling interest in protecting the physical and psychological well-being of children. Nevertheless, the Court stated, it must ensure that, in its zeal to promote this worthy aim, our legislature has not unwittingly curtailed legitimate modes of expression in a real and substantial way.

In undertaking this assessment, the Court stated that it must determine whether a substantial number of the statute’s applications are unconstitutional, judged in relation to its plainly legitimate sweep. Within the plainly legitimate sweep of statutory prohibitions are two unprotected categories of speech relevant to this case, obscenity and child pornography. Obscenity is material “which, taken as a whole, appeal[s] to the prurient interest in sex, . . . portray[s] sexual conduct in a patently offensive way, and . . . taken as a whole, do[es] not have serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973). Child pornography encompasses visual depictions of sexual conduct involving children younger than a specified age. The Court found that though the statute certainly reaches some speech the content of which falls into one of these two categorically unprotected forms of expression, the four enumerated categories of offending content indisputably span expression that falls outside this narrow swath of unprotected speech and thus into the realm of protected expression. The question therefore was whether the mismatch is too great to pass constitutional muster.

In assessing the statute under U. S. Supreme Court precedent, the Court found that under the narrow construction it adopted above, OCGA § 16-12-100.2(e)(1) does not prohibit a real and substantial amount of constitutionally protected expression. The key to this conclusion is the statute’s mens rea element, which requires the accused, with the knowledge or belief that the victim is in fact a child younger than 16, to make contact with that victim with the specific intent to arouse or satisfy his own or the victim’s sexual desire. This specific intent requirement dramatically reduces the range of expression that is subject

to the statutory prohibition. It is also, to some degree, a proxy for elements of the *Miller v. California* obscenity standard, namely, that the material appeals to a “prurient interest in sex” and that it “lacks any literary, artistic, political, or scientific value,” see 413 U.S. at 24. Thus, the Court stated, it is difficult to envision a scenario in which an adult’s sexually explicit online communication with a child younger than 16, made with the intent to arouse or satisfy either party’s sexual desire, would ever be found to have redeeming social value. The specific intent requirement also eliminates the possibility that innocuous communications — for example, a mother’s email to her 15-year-old son admonishing him not to read *Penthouse* or a teacher’s online lecture describing Michelangelo’s *David* — might fall within the statute’s proscriptions. In addition, this requirement avoids the problem of potential overreach into the realm of adult-to-adult communications to which children might incidentally be exposed, again foreclosing unintentional encroachment into protected speech.

Accordingly, the Court concluded, OCGA § 16-12-100.2(e)(1) is not unconstitutionally overbroad under the First Amendment. In so holding, the Court noted that invalidation for overbreadth is strong medicine that is not to be casually employed. “Though creative attorneys may dream up ‘fanciful hypotheticals’ under which the statute here reaches protected expression... we are not convinced that these scenarios are sufficiently numerous or likely to warrant the statute’s wholesale invalidation.”

OCGA § 16-3-24.2; Convicted Felons

Propst v. State, S16A0275 (7/5/16)

Appellant was convicted of two counts of robbery (as lesser-included offenses of armed robbery), two counts of aggravated assault; aggravated battery; and three counts of possession of a firearm during the commission of a felony. He contended that the trial court erred in denying his demurrer to the indictment by upholding the former immunity statute, OCGA § 16-3-24.2 (2011), as constitutional. Specifically, he contended that the trial court should have reviewed his Equal Protection claims under a strict scrutiny standard because former OCGA § 16-3-24.2 infringed upon his fundamental right of

self-defense pursuant to *McDonald v. City of Chicago*, 561 U.S. 742 (130 SCt 3020, 177 LE2d 894) (2010), by precluding him, as a convicted felon, from seeking immunity from prosecution. The Court disagreed.

Initially, the Court noted that because this case was tried prior to the Legislature’s amendment of the immunity statute on July 1, 2014, the 2006 version of the statute applied. That Code section provided in pertinent part: “A person who uses threats or force in accordance with Code Section ... 16-3-21 [in defense of self or others] shall be immune from criminal prosecution therefor unless in the use of deadly force, such person utilizes a weapon the carrying or possession of which is unlawful by such person under Part 2 or 3 of Article 4 of Chapter 11 of [Title 16 of the Georgia Code].” In 2014, the immunity statute was amended as part of the Safe Carry Protection Act to delete the “or 3” from the phrase “Part 2 or 3” within the exception for unlawful carrying or possession of a weapon.

The Court stated that because the protection provided in the Equal Protection Clause of the United States Constitution is coextensive with that provided in Art. I, Sec. I, Par. II of the Georgia Constitution of 1983, it applies them as one. The Court found that *McDonald* and *District of Columbia v. Heller*, 554 U.S. 570 (128 SCt 2783, 171 LE2d 637) (2008) address an individual’s right to possess and use a firearm in self-defense inside one’s home. The extent to which Second Amendment protections apply outside the home, and whether some or all convicted felons are unprotected by the Second Amendment, are unsettled questions. But even assuming appellant had a fundamental right based on the Second Amendment to assert, that right is not implicated by the immunity statute, which merely provides a pre-trial process as a matter of legislation, not of constitutional requirement. The immunity statute did not prevent appellant from engaging in acts of alleged self-defense, and it did not prevent him from trying to argue self-defense at trial.

Further, appellant’s status as a convicted felon does not make him a member of a suspect class triggering strict scrutiny analysis. Thus, because neither a fundamental right is implicated, nor is appellant a member of a suspect class, the trial court properly applied the rational basis test. Former OCGA § 16-3-24.2 did not preclude only convicted felons

from asserting pre-trial immunity. Rather, it precluded anyone, convicted felons and non-felons alike, who unlawfully carried or possessed a weapon in violation of either Part 2 or 3 of Chapter 11 of Article 4, from asserting pre-trial immunity when an incident occurred. This included violations of OCGA §§ 16-11-127 & 130.2 (prohibiting carrying a weapon in unauthorized locations); § 16-11-132 (prohibiting possession of a handgun by a person under 18); and, § 16-11-134 (making it unlawful to discharge a firearm while under the influence). Consequentially, appellant failed to show that former OCGA § 16-3-24.2 treated members of a class — i.e., convicted felons — differently from similarly situated individuals. Accordingly, the trial court did not err in upholding the statute as constitutional and denying appellant’s motion to dismiss.

Prosecutorial Misconduct; Habeas Corpus

Washington v. Hopson, S16A0148 (7/5/16)

In 2004, Hopson was tried for rape, kidnapping, aggravated assault, aggravated sexual battery, and aggravated sodomy. Joshi was the ADA. The evidence at trial, briefly stated, showed that Hopson met the victim at a fund raiser at an outdoor venue. The victim drank from a glass of what appeared to be water given to her by Hopkins. Within minutes, the victim became dizzy, light-headed, and semi-conscious. Hopkins then dragged her to a secluded area and raped her. After the aggravated assault charge was nolle prossed, the jury found Hopson guilty of rape but acquitted him of the remaining charges. His conviction was affirmed on appeal. *Hopson v. State*, 281 Ga. App. 520 (2006) (*Hopson I*).

In 2007, Hopson filed an extraordinary motion for new trial. The evidence at the motion hearing established that sometime after Hopson’s trial, Joshi left the district attorney’s office and went into private practice. Hopson’s family subsequently consulted Joshi and another lawyer with whom Joshi shared a suite, about Hopson’s case. Hopson’s family recorded the conversation, and it was played for the court during the motion hearing. In that conversation, Joshi stated he knew at one point in the trial that the victim and her friend lied on the stand. At the motion hearing, however, Joshi explained that he had made an overstatement when he said he knew that they had lied because it was only his opinion.

He was referring to a conflict in the evidence as to whether the victim had wilfully gone with Hopson the night of the rape, or whether she was dragged to the location where the assault occurred. Joshi stated that this related only to the charge of kidnapping, not the rape charge. After the tape was played, Joshi acknowledged that he told Hopson's family that he did not believe Hopson raped the victim, but he said that his statement was "inartfully worded," and that he only meant to address the kidnapping charge. Nevertheless, Joshi told Hopson's family that for \$15,000 he could get Hopson released. He told them that his name could not be on any of the pleadings because he had an absolute conflict of interest. Joshi explained at the motion hearing that he knew that he could not be involved in any representation of Hopson, but he stated that he had discussed with the other lawyer with whom he shared a suite that the lawyer would not be prevented from basing an appeal on any mistakes Joshi made at trial. The motion was denied and affirmed on appeal. *Hopson v. State*, 307 Ga. App. 49 (2010) (*Hopson II*).

Hopson also filed a habeas petition raising the same factual arguments as his motion for new trial. The court held an evidentiary hearing, but no testimony was presented. The habeas court admitted into evidence the transcript of Hopson's trial, the pleadings and trial court orders filed in connection with his motion for new trial and extraordinary motion for new trial, and the Court of Appeals' opinion in *Hopson I*. However, neither the transcript of the extraordinary motion for new trial hearing nor the recording of Joshi's meeting with Hopson's family was admitted. The court concluded that Joshi's conduct was inappropriate in two ways, both of which justified granting habeas relief. The warden appealed.

First, the habeas court ruled that Joshi violated constitutional mandates by "knowingly present[ing] testimony that he believed to be false" at Hopson's trial and by "d[oing] nothing to stop the trial, even when he called a witness whom he knew to be lying." The court based these legal conclusions on its factual findings that Joshi "prosecuted Mr. Hopson in spite of his *knowledge* that Mr. Hopson was innocent and in spite of his knowledge that the alleged victim was lying," "suborned the victim's testimony in spite of his *knowledge* that such testimony was false," and "withheld exculpatory information involving his *knowledge* [of] the falsity of the alleged

victim's testimony." (Emphasis added.) In this way, the habeas court asserted, Joshi "let a man he knew to be innocent be convicted of rape."

However, the Court found, the evidence showed that Joshi did not *know* that the victim and her friend testified falsely at Hopson's trial; he at most *believed* that, and his opinion was based solely on information that was available to the defense and the jury. Moreover, the only basis that Joshi gave for his purported opinion that the victim and her friend had lied was inconsistent testimony about whether the victim was dragged or went voluntarily to a particular area. These inconsistencies, however, were disclosed to Hopson's trial counsel and were presented at the trial. In fact, Hopson's trial counsel relied upon the discrepancy in closing argument, and the jury acquitted Hopson of the kidnapping charge to which the testimony directly related. Hopson also failed to point to other outside evidence to support Joshi's conclusion; there was no evidence, for example, that the victim ever recanted to the prosecutor or anyone else. Thus, the habeas court's factual findings that Joshi *knew* that the victim was lying, presented testimony he *knew* to be false at trial, and failed to disclose evidence he *knew* to be exculpatory were clearly erroneous, because they were not supported by the evidence before the habeas court.

The habeas court also opined that Joshi "had a duty to stop the trial where he believe[d] that the main witness was lying" and that "Hopson's [constitutional] rights were violated where [Joshi] proceeded with his prosecution of Mr. Hopson where he did not *believe* that the main prosecuting witness was truthful in her claim." (Emphasis added.) But, the Court stated, the relevant constitutional doctrines and ethical rules are framed in terms of *knowledge and evidence*, not mere subjective belief. Prosecutors certainly have the discretion to dismiss a case when they believe it would be unjust to proceed, but there is no authority requiring a prosecutor to dismiss a case based solely on personal doubts about the credibility of a witness that arise from the same evidence available to the defense, the court, and the jury.

Moreover, the Court stated, prosecutors may not present evidence they know is false or fail to disclose materially exculpatory evidence to the defense, but they need not share their subjective concerns about the strengths or weaknesses of the State's case

and witnesses. Especially in close and serious cases, the prosecutor may allow the jury to decide if an alleged crime victim — here, an alleged rape victim — is telling the truth and thus is entitled to the justice she seeks, rather than making that determination unilaterally and preemptively. Accordingly, even if Joshi really doubted the truthfulness of the victim's testimony at the time of Hopson's trial — rather than only in retrospect or only when asserting that belief served his attempt to extract money from Hopson's family — that would not amount to a constitutional violation. Based on the same information available to Joshi, the jury believed the victim's testimony that she was raped by Hopson, and that is what counts. For these reasons, the habeas court erred in concluding that Joshi violated Hopson's constitutional rights by allowing the victim to testify.

The second reason the habeas court granted relief was Joshi's attempt to parlay his prior work for the State into getting hired to assist a man he once prosecuted, and using another attorney without an obvious conflict of interest as a front man to represent the client and assert Joshi's alleged misconduct. The Court stated that this was a blatant violation of Joshi's ethical responsibility as a lawyer and was unscrupulous. However, assuming that a conflict of interest of this sort may constitute a constitutional due process violation, Joshi's misconduct occurred long after Hopson's trial ended. Recognizing this timing issue, the habeas court explained that it was "concerned about the *possibility* that Mr. Joshi's financial motives arose during the prosecution," and then concluded that "because [Joshi's] profit motive *could* have arisen as early as during or before trial," his prosecution of Hopson constituted structural error, which requires automatic reversal of a conviction. (Emphasis added.) But, the Court found, the problem with the habeas court's reasoning is that there was no evidence in the record that Joshi was even considering leaving the district attorney's office at the time of Hopson's trial, much less that he had at that time contemplated the situation creating the conflict of interest he proposed to Hopson's family some 20 months later. Habeas relief must be supported by evidence in the record, not mere speculation. Accordingly, the Court held, the habeas court also erred in concluding that Joshi violated Hopson's constitutional

rights by unethically soliciting his business long after his conviction.

Venue; Jury Instructions

Shelton v. Lee, S16A0106 (7/5/16)

Appellant was convicted of malice murder and robbery by force. On direct appeal in 2005, the Court affirmed appellant's convictions and rejected, among other things, an evidentiary challenge to venue in Pike County, because, even though conflicting evidence was presented regarding where the injury causing death was inflicted, the body was discovered there. Thus, the evidence was sufficient to establish venue in Pike County beyond a reasonable doubt. *Shelton v. State*, 279 Ga. 161, 162-163 (4) (2005).

Thereafter, appellant filed a habeas petition alleging that the Eleventh Circuit's recent opinion in *Owens v. McLaughlin*, 733 F3d 320, 327 (III) (A) (11th Cir. 2013), finding that the jury instructions given on venue under Georgia law was burden shifting, entitled him to relief. The habeas court denied the petition.

The Court noted that the instruction given in the *Owens* case was substantially identical to the one given to Shelton's jury: where it cannot readily be determined in what county the cause of death was inflicted "it shall be considered that the cause of death was inflicted in the county in which the dead body was discovered." Because the Eleventh Circuit found that the "shall be considered" language suggests a mandatory presumption that effectively relieved the State of the burden of proof on the issue of venue, it found the instruction had violated *Owens*' constitutional rights. In arriving at this conclusion, the Eleventh Circuit found that the instruction given to *Owens*' jury on venue violated the rule in *Sandstrom v. Montana*, 442 U.S. 510 (99 SCt 2450, 61 LE2d 39) (1979), that a jury instruction violates the due process protections of the Fourteenth Amendment if it creates a presumption that shifts to the defendant the burden of proof of an element of the crime charged.

The Court stated that OCGA § 17-2-2(c) sets forth a three-step process by which a jury in a criminal homicide case may reach a factual finding about where the crime was committed. First, the jury is to determine from the facts presented at trial the county in which the cause of death was inflicted. Once that factual issue is determined, the homicide "shall be considered"

as a matter of law, "as having been committed" in that county. If that is the county in which the accused is being tried, then proper venue has been established. If, however, the jury cannot determine where the cause of death was inflicted, the statute gives further instructions: it directs the jury to determine as a matter of fact the county in which the death occurred. Once that factual issue is determined, the homicide "shall be considered," as a matter of law, as having been committed in that county. If the jury can determine neither the county in which the cause of death was inflicted nor the county in which the death occurred, then the jury is required to determine the county in which the dead body was discovered. Applying the venue statute, the homicide "shall be considered," as a matter of law, as having been committed in the county in which the body was discovered. Once the jury has determined from the facts presented, and pursuant to these substantive statutory rules, the location where the crime was committed, it can then determine whether proper venue has been established by the State.

The Court found that it correctly rejected the assertion that a jury instruction based upon the language of OCGA § 17-2-2(c) was improperly burden-shifting on the essential element of venue in *Napier v. State*, 276 Ga. 769 (2003). But, the Court acknowledged that it went astray in *Napier* when it engaged in a discussion of whether the language of the jury instructions, based upon the statute, could be interpreted as requiring the jury to make compulsory findings regarding venue. The Court stated that it is entirely proper to instruct the jury that, once certain factual findings are made — i.e., the county in which the cause of death was inflicted — the proper jurisdiction for venue purposes "shall be considered" to be established as a matter of law. To instruct a jury that it "may consider" that location to be the county in which venue is proper confers authority upon the jury that does not exist under Georgia law. Instead, since venue is a jurisdictional fact that the State must prove beyond a reasonable doubt, the jury must be instructed where venue properly lies as a matter of law in order for the jury to determine as a matter of fact whether the State has proved venue to support a conviction. The factfinder has no discretion with regard to the law of venue. For that reason, it is proper for the jury to be

instructed where venue "shall be considered," as a matter of law, once it has determined certain facts.

Nevertheless, the Eleventh Circuit focused on our Supreme Court's advice in *Napier* to trial courts in future cases that the better practice would be to instruct the jury that it "may consider whether" the cause of death was inflicted in the county in which the death occurred or in which the body was discovered. But, the Court stated, "we now disapprove of that distinction and that advice to trial courts [including *Owens v. State* to the extent it repeated that advice]. We hold, instead, that a jury instruction that follows the "shall be considered" language of OCGA § 17-2-2(c) is a proper instruction."

Contrary to the Eleventh Circuit's conclusion, the Court stated it was not persuaded that instructions such as those given in this case, viewed properly as a matter of Georgia venue law, violate the rule in *Sandstrom* by unconstitutionally shifting to the defendant the burden of proof of an element of the crime charged. The instruction given to appellant's jury, which was substantially identical to that given in the *Owens* case, did not shift the burden of proof with respect to venue. It properly instructed the jury on the rules of Georgia venue law for the jury to follow with respect to reaching a factual determination of the county in which the homicide was committed. It further properly instructed the jury that once that determination was made, Georgia law dictates that this is where venue lies for trying the defendant. Instead of relieving the State of its burden of proof with respect to venue, this instruction properly set forth the facts and circumstances the State was required to prove in order for the jury to find venue was established in Pike County and did not improperly shift that burden to appellant. Unlike the jury in *Sandstrom*, appellant's jury was not told to presume any element of the crime without factual proof beyond a reasonable doubt.

In so holding, the Court further stated that "We recognize that Georgia trial and habeas courts will be bound by our decision in this case, see Ga. Const. of 1983, Art. VI, Sec. VI. Par. VI, whereas federal habeas courts in Georgia districts remain bound by the Eleventh Circuit opinion in *Owens v. McLaughlin*. We hope the Eleventh Circuit will reconsider *Owens* in light of this decision; if not, the Supreme Court of the United States will need to resolve the conflict."