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Criminal Law Drafting Manual

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Mangan's Criminal Law Drafting Manual

Introduction

At the end of this chapter, you should be able to answer these questions:

1. Why must criminal law writing be clear and specific?
2. How do you use the statute to understand what it is that has to be proven at trial, and how does that affect how you draft documents for criminal legal issues?

Sessions v. Dimaya, 138 S. Ct. 1204, 1223–34 (2018) (Gorsuch concurrence).

Vague laws invite arbitrary power. Before the Revolution, the crime of treason in English law was so capaciously construed that the mere expression of disfavored opinions could invite transportation or death. The founders cited the crown's abuse of “pretended” crimes like this as one of their reasons for revolution. See Declaration of Independence ¶ 21. Today's vague laws may not be as invidious, but they can invite the exercise of arbitrary power all the same—by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up.

The law before us today is such a law. Before holding a lawful permanent resident alien like James Dimaya subject to removal for having committed a crime, the Immigration and Nationality Act requires a judge to determine that the ordinary case of the alien's crime of conviction involves a substantial risk that physical force may be used. But what does that mean? Just take the crime at issue in this case, California burglary, which applies to everyone from armed home intruders to door-to-door salesmen peddling shady products. How, on that vast spectrum, is anyone supposed to locate the ordinary case and say whether it includes a substantial risk of physical force? The truth is, no one knows. The law's silence leaves judges to their intuitions and the people to their fate. In my judgment, the Constitution demands more.

Consider first the doctrine's due process underpinnings. The Fifth and Fourteenth Amendments guarantee that “life, liberty, or property” may not be taken “without due process of law.” That means the government generally may not deprive a person of those rights without affording him the benefit of (at least) those “customary procedures to which freemen were entitled by the old law of England.” *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 28 (1991) (Scalia, J., concurring in judgment) (internal quotation marks omitted). Admittedly, some have suggested that the Due Process Clause does less work than this, allowing the government to deprive people of their liberty through whatever procedures (or lack of them) the government's current laws may tolerate. But in my view the weight of the historical evidence shows that the clause sought to ensure that the people's rights are never any less secure against governmental invasion than they were at common law. And many more students of the Constitution besides—from Justice Story to Justice Scalia—have agreed that this view best represents the original understanding of our own Due Process Clause.

Perhaps the most basic of due process's customary protections is the demand of fair notice. See *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); see also Note, Textualism as Fair Notice, 123 Harv. L. Rev. 542, 543 (2009) (“From the inception of Western culture, fair notice has been recognized as an essential element of the rule of law”). Criminal

indictments at common law had to provide “precise and sufficient certainty” about the charges involved. 4 W. Blackstone, Commentaries on the Laws of England 301 (1769) (Blackstone). Unless an “offence [was] set forth with clearness and certainty,” the indictment risked being held void in court. *Id.*, at 302 (emphasis deleted); 2 W. Hawkins, Pleas of the Crown, ch. 25, §§ 99, 100, pp. 244–245 (2d ed. 1726) (“[I]t seems to have been anciently the common practice, where an indictment appeared to be [in]sufficient, either for its uncertainty or the want of proper legal words, not to put the defendant to answer it”).

The requirement of fair notice applied to statutes too. Blackstone illustrated the point with a case involving a statute that made “stealing sheep, or other cattle” a felony. 1 Blackstone 88 (emphasis deleted). Because the term “cattle” embraced a good deal more than it does now (including wild animals, no less), the court held the statute failed to provide adequate notice about what it did and did not cover—and so the court treated the term “cattle” as a nullity. *Ibid.* All of which, Blackstone added, had the salutary effect of inducing the legislature to reenter the field and make itself clear by passing a new law extending the statute to “bulls, cows, oxen,” and more “by name.” *Ibid.*

This tradition of courts refusing to apply vague statutes finds parallels in early American practice as well. In *The Enterprise*, 8 F.Cas. 732 (No. 4,499) (C.C.N.Y. 1810), for example, Justice Livingston found that a statute setting the circumstances in which a ship may enter a port during an embargo was too vague to be applied, concluding that “the court had better pass” the statutory terms by “as unintelligible and useless” rather than “put on them, at great uncertainty, a very harsh signification, and one which the legislature may never have designed.” *Id.*, at 735. In *United States v. Sharp*, 27 F.Cas. 1041 (No. 16,264) (C.C.Pa.1815), Justice Washington confronted a statute which prohibited seamen from making a “revolt.” *Id.*, at 1043. But he was unable to determine the meaning of this provision “by any authority ... either in the common, admiralty, or civil law.” *Ibid.* As a result, he declined to “recommend to the jury, to find the prisoners guilty of making, or endeavouring to make a revolt, however strong the evidence may be.” *Ibid.*

Nor was the concern with vague laws confined to the most serious offenses like capital crimes. Courts refused to apply vague laws in criminal cases involving relatively modest penalties. See, e.g., *McJunkins v. State*, 10 Ind. 140, 145 (1858). They applied the doctrine in civil cases too. See, e.g., *Drake v. Drake*, 15 N.C. 110, 115 (1833); *Commonwealth v. Bank of Pennsylvania*, 3 Watts & Serg. 173, 177 (Pa.1842). As one court put it, “all laws” “ought to be expressed in such a manner as that its meaning may be unambiguous, and in such language as may be readily understood by those upon whom it is to operate.” *McConvill v. Mayor and Aldermen of Jersey City*, 39 N.J.L. 38, 42 (1876). “ ‘It is impossible ... to dissent from the doctrine of Lord Coke, that acts of parliament ought to be plainly and clearly, and not cunningly and darkly penned, especially in penal matters.’ ” *Id.*, at 42–43.

Daddario v. State, 307 Ga. 179 (2019).

Appellant Lawrence Daddario challenges his conviction and sentence of life in prison for aggravated child molestation for having sexual intercourse with his 14-year-old daughter, which resulted in a very painful and potentially life-threatening childbirth approximately nine months later. Appellant does not dispute having sexual intercourse with his daughter but claims that he committed only child molestation, not aggravated child molestation, because aggravated child molestation requires an act that “physically injures” the child, OCGA § 16-6-4 (c), and

pregnancy and childbirth usually are not considered to be physical injuries. He also claims that his aggravated child molestation conviction violates due process, because the statute is unconstitutionally vague regarding whether an act of child molestation that causes a child under the age of 16 to endure childbirth can “physically injure[]” the child.

As explained below, in every prosecution for aggravated child molestation based on physical injury to the child, the State must present evidence sufficient to enable a rational jury to find beyond a reasonable doubt that the defendant committed an act of child molestation and that the act proximately caused physical injury to the child. Appellant asks this Court to hold that evidence related to a resulting pregnancy or childbirth is *never* legally sufficient under Georgia law to support a jury finding that an act of child molestation caused physical injury to the child, while the State asks us to hold that evidence of a pregnancy or childbirth alone is *always* sufficient to support such a finding. We instead hold that whether an act of molestation proximately caused physical injury to the child victim is a question of fact to be decided by the jury based on the evidence presented at trial and is not dictated by per se rules like the ones sought by Appellant and the State, which do not appear in the text of the aggravated child molestation statute. And we hold that the evidence here – which showed that Appellant’s act of child molestation proximately caused his daughter to endure a very painful and physically traumatic childbirth nine months later – is legally sufficient to support a jury finding of the physical injury element of aggravated child molestation. We also reject Appellant’s claim that the aggravated child molestation statute violates due process because it is unconstitutionally vague as applied to his conduct with his 14-year-old daughter...Accordingly, we affirm Appellant’s conviction and sentence for aggravated child molestation.

Viewed in the light most favorable to the verdicts, the evidence presented at trial showed as follows regarding Appellant’s conviction for aggravated child molestation. Appellant’s daughter, S.D., was born in April 2000, and she lived with Appellant and her two brothers, who were around her same age.

When S.D. was in the fifth grade, an elementary school teacher saw Appellant kiss S.D. on the lips in a manner that the teacher had never seen between a parent and child and that “[f]reaked out” and “[d]isgusted” the teacher. In September 2014, at the beginning of eighth grade, Appellant pulled S.D. out of school, ostensibly for homeschooling. By then, S.D. could not remember how long her father had been having sexual intercourse with her, but she said it seemed like it had been “[e]very day” for her “whole life.” Appellant did not wear a condom when he had sexual intercourse with S.D. He told her that it was right for them to have sex with each other, that no one would think that it was “weird,” and that she should have sex with him because she was too “ugly” ever to have a boyfriend.

In early November 2014, Appellant impregnated S.D. He threatened to kill her if she told anyone that he was the father. S.D. wanted to get an abortion, but Appellant said no. In mid-January 2015, Appellant took S.D. to a faith-based pregnancy resource center that did not provide abortion services. A week later, a sonographer at the resource center performed an ultrasound on S.D. and determined that S.D. was around 12 weeks pregnant.

The resource center notified the sheriff’s office, because S.D. was only 14 years old. The ensuing investigation uncovered evidence that Appellant neglected S.D. and her brothers, and in March 2015, Appellant was arrested for second degree cruelty to children. The local Department of Family and Children Services took S.D. and her brothers into custody, and the juvenile court appointed a CASA volunteer for the children.

S.D. was put into foster care, and in mid-May 2015, she finally broke down and told her foster mother that Appellant was the baby's father. The CASA volunteer talked to S.D. several times about the disclosure, but it was very hard for S.D. to share anything about what had happened to her. In June 2015, the CASA visited Appellant at the jail to get more information from him about what happened to S.D. so that the CASA could better help S.D. During the course of the conversation, which the jail recorded, Appellant admitted to the CASA that he had sexual intercourse with S.D. more than once.

In early August 2015, S.D. started having contractions, and her foster mother took her to the hospital. After several hours, they were sent home, because S.D.'s contractions were starting and stopping too far apart for her to be admitted to the hospital. That evening, S.D. awoke in the middle of the night and told her foster mother that the baby was coming. S.D. sat down in a recliner, and the baby suddenly emerged still enclosed in the amniotic sac. S.D.'s foster mother called 911, and an ambulance soon arrived to take S.D. and the baby to the hospital. According to S.D.'s foster mother, the doctor later told her that the reason the baby emerged so quickly was because it was born inside an intact amniotic sac. S.D.'s foster mother explained: "If the sac doesn't break, they more or less just come out. The downside to that is, it tears you all apart." When asked if she saw any kind of injury to S.D., S.D.'s foster mother said, "You couldn't help but see it," because S.D.'s vaginal area was severely torn, and S.D. was bleeding profusely. S.D.'s foster mother described the scene as "traumatic," stating that she "had never seen so much blood," and she was told that if she had tried to drive S.D. to the hospital instead of calling an ambulance, S.D. "would have bled to death." S.D. was asked at trial if she had any tearing or needed any stitches after the baby was born, and she replied, "The lady at the hospital said it was like plastic surgery." She also testified that she experienced a great deal of pain for weeks after the birth. S.D.'s foster mother confirmed that S.D. had to have numerous stitches, and that S.D. "had pain for about six weeks" after the birth, for which S.D. was given prescription pain medication.

DNA samples were taken from the baby at the hospital. DNA testing later confirmed that Appellant was the baby's father.

On August 12, 2015, Appellant was indicted for aggravated child molestation, incest, statutory rape, and two counts of second degree cruelty to children. The aggravated child molestation count alleged that in early November 2014, Appellant did perform an immoral and indecent act with [S.D.], a child under the age of 16 years, in that said accused did have sex with [S.D.] with the intent to arouse and satisfy the sexual desires of said accused and said child, said act resulting in physical injury to said child in violation of O.C.G.A. § 16-6-4.

Appellant filed a combined motion to quash and special demurrer, asserting among other things that the aggravated child molestation count was defective due to a lack of specificity. The trial court held a hearing, but before the court issued a ruling, the State obtained a superseding indictment. The superseding indictment contained identical charges, except that the aggravated child molestation count specified that the "sex" was "sexual intercourse," which resulted in "physical injury to said child by impregnating her causing said child to endure childbirth." Appellant filed a second motion to quash and special demurrer. The trial court held a hearing, and Appellant argued "on statutory interpretation grounds ... that the injury element of aggravated child molestation cannot be proven through pregnancy and childbirth." He also argued that the aggravated child molestation statute was unconstitutionally vague as applied to him, because a person of ordinary intelligence who read the aggravated child molestation statute

“would not have thought at that time that childbirth or pregnancy would constitute an injury under the ... statute.” The trial court denied the motion to quash and special demurrer.

Appellant was tried from August 15 to 19, 2016. At the close of the evidence, the trial court instructed the jury on the statutory elements of child molestation and aggravated child molestation as well as the language of the aggravated child molestation charge in the indictment. The court told the jury that the State had the burden to prove “every material allegation of the criminal charges and every essential element of the crimes charged,” and that the jury must decide whether the State proved that Appellant committed the charged offenses in the manner specified in the indictment. The court also told the jury that for the offense of aggravated child molestation, the State “must prove beyond a reasonable doubt that the alleged child victim was physically injured by the act of child molestation,” and that “[t]he element of injury required for aggravated child molestation can be proven through evidence that the child experienced pain during the crime, even without corroborating medical evidence.” The court further instructed the jury that “[p]regnancy and childbirth may constitute the physical injury required as an element of aggravated child molestation *provided you, the jury, find it to be sufficient by evidence beyond a reasonable doubt to convince you that the alleged victim suffered physical injury caused by an act of child molestation.*” (Emphasis supplied.)

The jury found Appellant guilty of all charges. The trial court sentenced Appellant to serve life in prison for aggravated child molestation and a total of 20 years consecutive for the two cruelty to children convictions. The court merged the incest and statutory rape counts into the aggravated child molestation conviction.

Appellant claims that his conviction for aggravated child molestation is invalid as a matter of law, because a pregnancy or childbirth – no matter how painful, and no matter how much damage it does to the child victim’s body – is not a physical injury within the meaning of Georgia’s aggravated child molestation statute. In a related argument, he claims that the aggravated child molestation statute is unconstitutionally vague regarding whether an act of child molestation that causes a child under the age of 16 to endure childbirth can “physically injure[]” her. OCGA § 16-6-4 (c). Both claims lack merit, as they erroneously conflate a statutory element of aggravated child molestation with specific mechanisms of injury.

In Georgia, all crimes are defined by statute, see OCGA § 16-1-4, and every crime has as elements an actus reus and a mens rea, see OCGA § 16-2-1 (a) (“A ‘crime’ is a violation of a statute of this state in which there is a joint operation of an act or omission to act and intention or criminal negligence.”). See also *In re Jefferson*, 283 Ga. 216, 218 (2008) (“Like all crimes, [criminal] contempt has an act requirement (actus reus) and a mental component (mens rea).” (citation omitted)). In addition, crimes are often defined to include as elements the presence or absence of certain “attendant circumstances.” 1 Wayne R. LaFave, *Substantive Criminal Law* §§ 1.2 (c), 6.3 (b) (3d ed. Oct. 2018 update) (hereinafter “LaFave”). See *Bowman v. State*, 258 Ga. 829, 831 & n.4 (1989). For instance, “bigamy requires a previous marriage, [and] statutory rape that the girl be under age.” 1 LaFave § 1.2 (c). See OCGA §§ 16-6-3 (defining statutory rape), 16-6-20 (defining bigamy). Crimes are sometimes defined to require, as an additional element, that the conduct produce some “particular result.” 1 LaFave § 1.2 (b). The most obvious example is murder, which requires that the conduct result in death. See *id.* § 1.2 (c); *Baker v. State*, 250 Ga. 671, 672 (1983) (“[I]t is an essential element of the crime of murder to show that a death occurred”). “The totality of these various items – conduct, mental fault, plus attendant

circumstances and specified result when required by the definition of a crime – may be said to constitute the ‘elements’ of the crime.” 1 LaFave § 1.2 (c).

OCGA § 16-6-4 defines the elements of both child molestation and aggravated child molestation. OCGA § 16-6-4 (a) (1) says in relevant part: “A person commits the offense of child molestation when such person ... [d]oes any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person ...” And OCGA § 16-6-4 (c) says: “A person commits the offense of aggravated child molestation when such person commits an offense of child molestation which act physically injures the child or involves an act of sodomy.”

Thus, for both crimes, OCGA § 16-6-4 (a) (1) identifies the actus reus as “any immoral or indecent act” and the mens rea as a specific “intent to arouse or satisfy the sexual desires of either the child or the person.” See *Hill v. Williams*, 296 Ga. 753, 757 n.4 (2015) (discussing actus reus and mens rea elements of child molestation and aggravated child molestation); *McCord v. State*, 248 Ga. 765, 766 (1982) (same for child molestation). OCGA § 16-6-4 (a) (1) also specifies the presence of two attendant circumstances as required elements of both child molestation and aggravated child molestation: that the immoral or indecent act be done “to or in the presence of or with any child,” and that the child be “under the age of 16 years.” See *Hill*, 296 Ga. at 757 (describing these attendant circumstances as “essential elements” of both crimes). Appellant does not dispute that his having sexual intercourse with his daughter amounts to child molestation.

Child molestation does not require as an element that any particular result flow from the immoral or indecent act. *Aggravated* child molestation, by contrast, requires as an additional element that the immoral or indecent act produce a particular result. See OCGA § 16-6-4 (c). Specifically, the act of molestation must “physically injure[] the child.” *Id.* See also *Hill*, 296 Ga. at 757 n.4 (noting this element of aggravated child molestation). In other words, an act of child molestation becomes *aggravated* child molestation when it “physically injures the child.” OCGA § 16-6-4 (c).

Appellant argues here, as he did in the trial court, that as a matter of statutory interpretation, the physical injury element of aggravated child molestation cannot be established through proof regarding childbirth. But by its terms, OCGA § 16-6-4 (c) requires only an act of child molestation that “physically injures” the child; the statute does not specify all the possible mechanisms of injury. And the phrase “physically injures” is synonymous with the phrase “causes physical injury.” See *Hall v. Wheeling*, 282 Ga. 86, 86 (2007) (equating phrase “physically injures” in aggravated child molestation statute with phrase “causing physical injury”). See also, e.g., *Holloway v. State*, 278 Ga. App. 709, 714 (2006) (same). Thus, the only question presented here is whether the State offered evidence at trial that Appellant’s act of sexual intercourse with his 14-year-old daughter caused her to endure circumstances of childbirth so painful and traumatic to her body that a jury could conclude that she was physically injured. To answer that question, we look to the evidence the State offered to show that S.D. suffered pain and physical trauma, and we ask whether Appellant’s criminal conduct caused it.

The commission of a crime requires the joint operation of the actus reus and the mens rea, see OCGA § 16-2-1 (a), as well as the concurrence of any attendant circumstances that are defined as elements of the crime. See 1 LaFave § 6.3 (b). But the same is not true for elements that require a particular result. Where a crime is defined in terms of the outcome, there can be “a time lag between the conduct and the result.” *Id.* The connection that criminal law requires between the conduct and the result is proximate cause.

Georgia is a proximate cause state. When another meaning is not indicated by specific definition or context, the term “cause” is customarily interpreted in almost all legal contexts to mean “proximate cause” – “[t]hat which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred.”

State v. Jackson, 287 Ga. 646, 648 (2010) (citation omitted). See also 1 LaFare § 1.2 (b) (describing as one of the “basic premises which underlie the whole of the Anglo-American substantive criminal law” the proposition that “as to those crimes which require not only some forbidden conduct but also some particular result of that conduct, the conduct must be the ‘legal cause’ (often called ‘proximate cause’) of the result”). Thus, it is not necessary for a criminal statute to set out every possible way in which the prohibited conduct can cause the specified result.

Here, the indictment charged Appellant with aggravated child molestation by alleging that he had sexual intercourse with his underage daughter, which resulted in physical injury to his daughter related to the delivery of her child. The evidence the State offered at trial was sufficient to support a finding beyond a reasonable doubt of the physical injury element of the charge. Specifically, the State presented evidence that Appellant’s act of sexual intercourse with his 14-year-old daughter proximately caused her physical injury by showing that S.D. suffered severe tearing of her vaginal area and life-threatening blood loss during childbirth, that S.D. required so many stitches afterward that it looked like “plastic surgery,” and that S.D. suffered a great deal of pain not only during the delivery itself, but for the next six weeks, for which she was given prescription pain medication. See *Dixon v. State*, 278 Ga. 4, 8 (2004) (explaining that under OCGA § 16-6-4 (c), evidence of pain is sufficient to support a jury finding that an act of child molestation physically injured the victim); *Massey v. State*, 346 Ga. App. 233, 235 (2018) (holding same).

Appellant’s act of unprotected sexual intercourse with his 14-year-old daughter S.D., “in a natural and continuous sequence, unbroken by any efficient intervening cause, produce[d] injury” to S.D. in the form of a childbirth with severe tearing and potentially life-threatening blood loss, as well as pain during the delivery and for the next six weeks that was serious enough to warrant treatment with prescription pain medication, none of which would have occurred but for Appellant’s immoral and indecent act of molestation. *Jackson*, 287 Ga. at 646 (citation and punctuation omitted). Accordingly, Appellant’s claim that his conviction and sentence for aggravated child molestation are invalid as a matter of statutory interpretation fails. See *id.* at 654 (“Proximate causation imposes liability for the reasonably foreseeable results of criminal (or, in the civil context, tortious) conduct if there is no sufficient, independent, and unforeseen intervening cause.”).

Appellant also claims that his conviction for aggravated child molestation violates due process, because OCGA § 16-6-4 (c) is unconstitutionally vague regarding whether an act of child molestation that causes a child under the age of 16 to endure childbirth can “physically injure[]” her. We disagree.

The constitutional guarantee of due process prohibits the government from “taking away someone’s life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.” *Johnson v. United States*, 578 U.S. (2015).

As explained above, it is a basic premise of American criminal law that when a criminal statute defines a particular result as an element of a crime, the connection required between the

prohibited conduct and the specified result is proximate cause. Thus, the statute need not set out every step in the chain of causation between the conduct and the result. Moreover, a person of common intelligence would understand that an act of child molestation that results in the pregnancy of a 14-year-old girl could, at the least, cause her to sustain physical injury in the event of a painful and traumatic childbirth such as the one discussed above in Division 2 (a), as contemplated by the physical injury requirement of the aggravated child molestation statute. Accordingly, Appellant's claim that his aggravated child molestation conviction violates due process because OCGA § 16-6-4 (c) is void for vagueness as applied to him also fails.

Entry of Appearance

At the end of this chapter, you should be able to answer these questions:

1. What is an Entry of Appearance?
2. What must go in it?
3. What is the signature block?
4. What must go in it?
5. What happens if you do not file an Entry of Appearance?
6. In what time frame should you file an Entry of Appearance?

Ga. R. Unif. Super. Ct. Rule 4.2

No attorney shall appear in that capacity before a superior court until the attorney has entered an appearance by filing a signed entry of appearance form or by filing a signed pleading in a pending action. An entry of appearance and all pleadings shall state:

- (1) the style and number of the case;
- (2) the identity of the party for whom the appearance is made; and
- (3) the name, assigned state bar number, current office address, telephone number, fax number, and e-mail address of the attorney (the attorney's e-mail address shall be the e-mail address registered with the State Bar of Georgia).

The filing of any pleading shall contain the information required by this paragraph and shall constitute an appearance by the person(s) signing such pleading, unless otherwise specified by the court. The filing of a signed entry of appearance alone shall not be a substitute for the filing of an answer or any other required pleading. The filing of an indictment or accusation shall constitute an entry of appearance by the district attorney.

Any attorney who has been admitted to practice in this state but who fails to maintain active membership in good standing in the State Bar of Georgia and who makes or files any appearance or pleading in a superior court of this state while not in good standing shall be subject to the contempt powers of the court.

Within forty-eight hours after being retained, an attorney shall mail to the court and opposing counsel or file with the court the entry of his appearance in the pending matter. Failure to timely file shall not prohibit the appearance and representation by said counsel.

Weeks v. State, 260 Ga. App. 129 (2003).

Kevin Weeks appeals the denial of his motion to withdraw his plea of guilty to armed robbery and aggravated assault, arguing that the plea was not valid because... his

attorney...lacked the authority to represent him because he never formally entered an appearance. Finding that ... Weeks was legitimately represented by competent counsel, we affirm. After sentence is pronounced, whether to allow the withdrawal of a guilty plea lies within the trial court's sound discretion, and we review the trial court's decision for manifest abuse of that discretion.

Weeks pled guilty to two counts of a four-count indictment and received concurrent ten-year sentences. In exchange for pleading guilty, the State nolle prossed the other charges. Shortly after the court imposed sentence, Weeks moved pro se to withdraw his plea...Weeks also argued that, based on procedural irregularities in the appointment of his counsel, he was technically unrepresented. At the hearing, the trial court ruled against Weeks.

Weeks argues that because (attorney) never filed a written entry of appearance, (attorney) lacked the authority to represent him and, therefore, Weeks was not actually represented by counsel during his guilty plea, rendering it invalid. This contention is wholly without merit. USCR 4.2 states that no attorney can represent his client in court until he “has entered an appearance by filing a signed entry of appearance form *or* by filing a signed pleading in a pending action.” (Emphasis supplied.) As (attorney) filed several signed, pre-trial motions on behalf of Weeks, he satisfied the requirements of USCR 4.2. A formal written entry of appearance was unnecessary. The trial court did not err in its ruling on this issue.

Certificate of Service

At the end of this chapter, you should be able to answer these questions:

1. What is a certificate of service?
2. When do you have to use one?
3. What information should be provided in a certificate of service?
4. In what ways does a certificate of service help you as an attorney?
5. When you sign a certificate of service, what are you representing you have done?

OCGA § 17-1-1

(a) Unless otherwise provided by law or by order of the court, every pleading subsequent to the entry of the initial indictment or accusation upon which the defendant is to be tried; every order not entered in open court; every written motion, unless it is one as to which a hearing ex parte is authorized; and every written notice, demand, and similar paper shall be served upon each party.

(b)

(1) Where service is required to be made, the service shall be made upon the party's attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court.

(2) As used in this subsection, delivering a copy means:

- (A) Handing it to the attorney or to the party;
- (B) Leaving it at his office with his clerk or other person in charge thereof; or

(C) If the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

(3) Service by mail shall be deemed complete upon mailing.

(c) All original papers, copies of which are required to be served upon parties, shall be filed with the court either before service or immediately thereafter.

(d) The filing of pleadings and other papers with the court shall be made by filing them with the clerk of the court unless the judge permits the papers to be filed with him, in which event he shall note thereon the filing date and transmit them to the office of the clerk.

(e)

(1) Proof of service may be made by certificate of an attorney or of his employee, written admission, affidavit, or other proof satisfactory to the court. Failure to make proof of service shall not affect the validity of service.

(2) When an attorney executes a certificate, which shall be attached to the original of the paper to be served, certifying as to the service thereof, the certificate shall be taken as prima-facie proof of such service.

(3) The certificate of service provided for in this subsection shall read substantially as follows:

--Certificate of Service--

I do certify that (copy) (copies) hereof have been furnished to (here insert name or names) by (delivery) (mail) this _____ day of _____, _____.

Attorney

Hudson v. State, 311 Ga. App. 206 (2011).

A Fulton County grand jury indicted David Hudson for two counts of aggravated sodomy (OCGA § 16-6-2(a)(2)), one count of sexual battery (OCGA § 16-6-22.1(b)), one count of battery (OCGA § 16-5-23.1(a)), and one count of reckless conduct (OCGA § 16-5-60). Hudson appeals from the trial court's denial of his motion for discharge and acquittal, arguing that the trial court erroneously found that his speedy trial demand did not satisfy the statutory pleading requirements of OCGA § 17-7-170. We agree and conclude that Hudson's demand for speedy trial was properly pled as a separate, distinct, and individual document. Accordingly, we reverse the trial court's order and remand this case for further proceedings.

This appeal presents a question of law, which we review de novo. *Snow v. State*, 229 Ga.App. 532 (1997).

The record shows that on June 23, 2009, Hudson was indicted in the Superior Court of Fulton County. On August 6, 2009, Hudson filed his demand for a speedy trial, together with ten other pleadings and motions upon a single form certificate of service. On September 17, 2009, the trial court granted the State's motion to dismiss Hudson's demand for failure to comply with the pleading requirements of OCGA § 17-7-170. Thereafter, on December 30, 2009, Hudson filed a motion for discharge and acquittal for failure to be tried within the time frame set forth in OCGA § 17-7-170. The trial court denied Hudson's motion on April 16, 2010, finding that it was meritless in light of the prior dismissal of Hudson's speedy trial demand. The instant appeal followed.

Hudson challenges the trial court's denial of his motion for discharge and acquittal, as well as the underlying dismissal of his speedy trial demand, arguing that his demand satisfied the

pleading requirements of OCGA § 17-7-170(a) and that the trial court's prior ruling to the contrary was error. We agree.

OCGA § 17-7-170(a) pertinently sets forth the required form of a statutory speedy trial demand:

...A demand for speedy trial filed pursuant to this Code section shall be filed as a separate, distinct, and individual document and shall not be a part of any other pleading or document. Such demand shall clearly be titled "Demand for Speedy Trial"; reference this Code section within the pleading; and identify the indictment number or accusation number for which such demand is being made....

As noted above, the record reflects that Hudson filed 11 different documents on August 6, 2009, all of which were listed upon a single certificate of service. One of the eleven documents filed included Hudson's statutory demand for a speedy trial. Notwithstanding the absence of a separate certificate of service attached directly to Hudson's speedy trial demand filing, *see generally* OCGA § 17-1-1(e)(2), Hudson's demand was otherwise its own separate, distinct, and individual document that was not a part of any of the ten additional documents filed on August 6, 2009. *See* OCGA § 17-7-170(a). *Compare Jones v. State*, 304 Ga.App. 445, 449(2)(b) (2010) (concluding defendant's speedy trial demand was not a separate, distinct, and individual document where it was contained within the defendant's motion to dismiss).

Moreover, Hudson's speedy trial demand complied with the additional pleading requirements of OCGA § 17-7-170(a) insofar as the self-contained document clearly bears the title "DEMAND FOR SPEEDY JURY TRIAL," references OCGA § 17-7-170(a), and identifies the indictment number for which such demand is being made.

We therefore conclude that, contrary to the trial court's ruling otherwise, Hudson's speedy trial demand complied with the pleading requirements as contemplated by OCGA § 17-7-170(a). Consequently, the trial court erred in dismissing Hudson's speedy trial demand. In light of this error, we hereby reverse the trial court's order denying Hudson's motion for discharge and acquittal and remand this case for further proceedings to determine whether Hudson's statutory speedy trial demand satisfied all the remaining requirements of OCGA § 17-7-170.

Matter of Moore, 300 Ga. 407 (2016).

This disciplinary matter is before the Court on the Review Panel's report, recommending that Alvis Melvin Moore (State Bar No. 518375) be suspended for six months, with conditions on reinstatement.

This matter stems from a grievance filed by a superior court judge after discovering that Moore, who was representing a criminal defendant in her court, had failed to serve the District Attorney with defensive pleadings, had falsely stated in certificates of service that the District Attorney had been served, and had misrepresented his communications with the District Attorney. After an investigation, the State Bar filed a Formal Complaint, alleging that Moore, who was admitted to the Bar in 1994, violated Bar Rules 3.3 (a) (1), 4.1, and 8.4 (a) (4) of the Georgia Rules of Professional Conduct found in Bar Rule 4-102 (d). The Formal Complaint did not set forth a recommendation of discipline, but asked that Moore be "appropriately disciplined." Moore filed an answer and denied that he had failed to serve the District Attorney. Instead, he explained his belief that he was entitled to rely on the word of the Clerk of Court that a copy of his filings would be hand delivered to the District Attorney by the clerk's office, and thus his certificates of service were accurate. Moore also denied making any misrepresentation to the trial court.

Following an evidentiary hearing at which Moore was the only witness, Moore filed a petition for voluntary discipline in which he admitted the facts he had previously denied. However, the special master, Shelby Outlaw, rejected the petition for voluntary discipline, which sought only a reprimand by either the Investigative Panel or the Review Panel. Instead, the special master issued her report and recommendation, finding the following facts: Moore was retained to represent a defendant in a felony drug case in Hall County Superior Court. During his representation, Moore filed an entry of appearance and several motions, but failed to serve the District Attorney's office. On one of his motions he failed to attach a certificate of service and on the others he attached certificates of service that falsely represented that he had served the District Attorney. Even after the trial court judge admonished Moore at a hearing that his filings were not proper because he failed to serve the District Attorney, Moore filed another pleading with a certificate of service falsely stating that he had served the District Attorney by hand. Additionally, Moore informed the trial court at a hearing that the District Attorney's office had told him that a confidential informant would not be made available, despite the fact that Moore had no communications with the District Attorney's office about the informant's availability. The special master found that Moore's actions were detrimental to his client's interests, that Moore adamantly and unreasonably maintained throughout the hearing that he had done nothing wrong, and that he never expressed remorse or accepted any responsibility for the consequences of his actions. The special master recommended an indefinite suspension and that, as a condition of reinstatement, Moore undergo a physical and mental evaluation and be certified as fit to practice law.

Moore sought review by the Review Panel, but the Review Panel adopted the special master's factual findings and conclusions that Moore violated Rules 3.3, 4.1, and 8.4 (a) (4), and recommended a six-month suspension with reinstatement conditioned on Moore's participation in the Bar's law practice management program and on his providing a detailed psychological evaluation showing that he is competent to practice law.

Moore has filed exceptions to the Review Panel's report and continues to assert that he made no false statements regarding service on the District Attorney, but that he reasonably relied on the clerk to place a service copy in the District Attorney's box and argues that he did not knowingly violate any rules.

We agree with the Review Panel that Moore's refusal to express remorse or acknowledge the wrongful nature of his conduct is an aggravating factor, but also note that Moore's conduct does not appear to be reflective of a pattern of disregard for the legal system. Compare *In the Matter of Nicholson*, 299 Ga. 737 (2016). Rather, we find that his lack of any prior disciplinary history is a mitigating factor.

Having carefully considered the record and prior case law, we do not believe that a six-month suspension is the appropriate sanction. Instead, we believe that a one-year suspension is warranted. See *In the Matter of Nowell*, 297 Ga. 785 (2015) (two-month suspension where lawyer intentionally, and with dishonest motive, gave false testimony in two depositions, but self-reported misconduct and corrected false testimony); *In the Matter of Lang*, 292 Ga. 894 (2013) (one-year suspension for misuse of trust account and for prolonged effort to deceive client and opposing counsel, but where substantial mitigating circumstances were present); *In the Matter of Wright*, 291 Ga. 841 (2012) (public reprimand and six-month suspension where attorney made false statements to two tribunals and refused to admit wrongdoing).

Accordingly, we hereby direct that Alvis Melvin Moore be suspended from the practice of law in the State of Georgia for one year, effective as of the date of this opinion. Moore's

reinstatement shall be conditioned upon his providing a detailed, written evaluation by a licensed psychologist or psychiatrist certifying that he is mentally competent to practice law. Additionally, he must arrange for an evaluation by the State Bar's Law Practice Management Program, and, within six months of reinstatement, implement its recommendations. Moore is reminded of his duties under Rule 4-219 (c).

At the conclusion of the suspension imposed in this matter, if Moore wishes to seek reinstatement, he must submit a petition for reinstatement to the Review Panel showing compliance with the conditions for reinstatement imposed in connection with the one-year suspension. Upon receipt of the petition for reinstatement, the Review Panel will review it and any objections by the State Bar's Office of General Counsel, and make a recommendation to the Supreme Court, and this Court will issue an order granting or denying reinstatement.

One-year suspension with conditions.

Williams v. State, 201 Ga. App. 384 (1991).

Defendant Michael W. Williams appeals his conviction for selling cocaine. This case arises from the alleged sale of cocaine to an undercover Chatham County police officer. The officer to whom the drugs were allegedly sold testified that on the night of July 5, 1989, he was working undercover when he was waved down by Bobby V. Weathers, who was originally a co-defendant, who asked him what he needed. When the officer responded that he was looking for a 20, referring to \$20.00 worth of cocaine, Weathers told him to pull over. The officer parked his automobile almost directly across from a red Chevrolet, in which the defendant was seated. Weathers talked to the defendant and returned to the officer and asked "are you the man," that is, are you a police officer, which the officer denied. The defendant was then waved over to the officer's car by Weathers, and the defendant looked at the officer and said "[t]hat's the man," at which point he backed away from the officer's car. The officer again assured Weathers that he was not "the man." Weathers obtained an object from the defendant. After further deliberations, Weathers told the officer he would lay the object on the curb and the officer could put his money down beside it. The officer testified he laid down a \$20 bill, the serial number of which had been recorded for later identification, and took the object, which was later determined to be cocaine. The officer left the scene and the "take down" team moved into the area and arrested the defendant and Weathers. The officer who arrested the defendant testified the defendant had \$1,100 in his left front pocket, including the \$20 bill the first officer had left in exchange for the cocaine.

Defendant contends the trial court erred by refusing to grant the defendant's motion for a continuance based upon the failure of the State to comply with the mandate of OCGA § 17-7-211 and supply him with a copy of scientific reports identifying the substance defendant was charged with selling.

The question remains whether the trial court committed reversible error by denying the defendant's motion for continuance and by allowing the crime lab report and testimony relating thereto to be admitted at trial. Error must be shown to be harmful before it will be deemed to be reversible error. *Rutledge v. State*, 152 Ga.App. 755(1)(a) (1979). Defendant filed a motion seeking a copy of all scientific tests on December 10, 1989. On February 9, 1990, a certificate of service was filed by the State in which the State certifies that a copy of the indictment, the crime lab reports in question, and all *Brady* material were mailed to defendant on that same day. The

trial of this case began on August 29, 1990. Defense counsel stated that he did not receive a copy of the crime lab reports until the day trial began.

OCGA § 17-7-211 provides in pertinent part: “(b) In all criminal trials, felony and misdemeanor, the defendant shall be entitled to have a complete copy of any written scientific reports in the possession of the prosecution which will be introduced in whole or in part against the defendant by the prosecution in its case-in-chief or in rebuttal.... If the scientific report is in the possession of or available to the prosecuting attorney, he must comply with this Code section at least ten days prior to the trial of the case. (c) Failure by the prosecution to furnish the defendant with a copy of any written scientific report, when a proper and timely written demand has been made by the defendant, shall result in such report being excluded and suppressed from evidence in the prosecution's case-in-chief or in rebuttal.” (Indentions omitted.)

In *Rodriguez v. State*, 180 Ga.App. 272(2) (1986), this court had an opportunity to rule upon a case involving a factual situation similar to the one presented by this case. In that case the defendant contended that the trial court had erred in allowing testimony concerning a crime lab report because that report had not been provided to defendant as required by OCGA § 17-7-211. The record in that case contained a certificate of service by the assistant district attorney indicating that service of the report had been made on defendant's counsel on October 8, 1984. The trial in that case commenced on December 3, 1984. *Id.* at 272(2). We held that “[p]roof of service may be made by certificate of service of an attorney or other proof satisfactory to the court, and when an attorney executes a certificate of service, it shall be prima facie proof of such service. OCGA § 17-1-1(e)(1) and (2). In this case, as in *Rodriguez*, the assistant district attorney's certificate of service establishes prima facie proof that a scientific report was furnished. Furthermore, because defense counsel stated that he had seen the crime lab reports when he was invited to review the State's file in this case, there was no resulting surprise or prejudice to defendant from the introduction of this evidence. Hence, the trial court did not commit reversible error by denying defendant's motion for a continuance and allowing the crime reports and testimony concerning those reports to be admitted at trial.

Ferguson v. Freeman, 282 Ga. 180 (2007).

Charles E. Ferguson filed a petition for a writ of habeas corpus to contest his pre-trial confinement. The habeas corpus court denied relief in an order entered August 9, 2006. The record contains a notice of appeal from that order with a certificate of service dated August 25, 2006, but the notice was marked filed on September 25, 2006. The notice of appeal from the August 9 order had been returned to Ferguson by the habeas corpus court clerk with an undated form stating that the notice of appeal was not filed because it lacked a designation of the appellate court to which the appeal was directed and did not indicate whether there would be transcripts filed with the record. Ferguson returned that notice of appeal to the habeas corpus court clerk with a cover letter dated September 7, 2006, pointing out that the notice of appeal he had originally sent was adequate. The habeas corpus court clerk filed the returned notice of appeal on September 25, 2006.

If the notice of appeal marked filed on September 25, 2006, were to be considered as filed on that date, it would be untimely since it would have been filed outside the 30-day period prescribed by OCGA § 5-6-37, and the appeal from the August 9 order denying habeas corpus relief would have to be dismissed because a proper and timely-filed notice of appeal is an absolute requirement to confer jurisdiction upon an appellate court. *Gulledge v. State*, 276 Ga. 740, 741 (2003). However, the peculiar circumstances of this case lead us to the conclusion that

the notice of appeal must be considered timely filed. We first note that the habeas corpus court clerk's action in returning the notice of appeal unfiled violated this Court's holding in *Hughes v. Sikes*, 273 Ga. 804(1) (2001), that a habeas corpus court clerk's duty to file a notice of appeal is ministerial in nature, and it is beyond the clerk's duty or power to be concerned with the legal viability of a notice presented for filing. Notwithstanding the habeas corpus court clerk's unauthorized action, the "mailbox rule" enunciated by this Court in *Massaline v. Williams*, 274 Ga. 552 (2001), prevents the unfiled notice of appeal from being rendered untimely. We held in *Massaline* that when a prisoner who is proceeding pro se appeals from a decision on his habeas corpus petition, his notice of appeal will be deemed filed on the date he delivers it to prison authorities for forwarding to the clerk of the superior court, and the date on the certificate of service will give rise to a rebuttable presumption that the prisoner handed his filing to the prison officials on that date. *Id.* at 555. In the present case, the certificate of service attached to Ferguson's notice of appeal shows a date of August 25, and there is nothing in the record to rebut the presumption that he delivered it on that date to the authorities in whose custody he was. Accordingly, pursuant to our holding in *Massaline v. Williams*, *supra*, we will consider Ferguson's notice of appeal dated August 25 to have been filed on that date. That being so, the notice of appeal was timely and invoked this Court's appellate jurisdiction.

Bond Motion

At the end of this chapter, you should be able to answer these questions:

1. What is the purpose of a bond motion?
2. What factors do judges consider when giving or denying bond?
3. Who has the initial burden?
4. What is the initial burden?
5. When does the burden shift?
6. What does the burden shift to and to who does it shift?
7. What are the different types of bond?
8. When does a judge have to give a bond?
9. What is the timing on when a bond should be considered for a defendant?
10. What do the roles of specific facts about a defendant play in bond setting?
11. What is the standard of review for denying bond?
12. What types of conditions can be set on bond?
13. When can a bond be revoked?

Ga R Unif Super Ct Rule 26.1

Immediately following any arrest but not later than 48 hours if the arrest was without a warrant, or 72 hours following an arrest with a warrant, unless the accused has made bond in the meantime, the arresting officer or the law officer having custody of the accused shall present the accused in person before a magistrate or other judicial officer for first appearance.

At the first appearance, the judicial officer shall:

- (A) Inform the accused of the charges;
- (B) Inform the accused of the right to remain silent, that any statement made may be used against the accused, and of the right to the presence and advice of an attorney, either retained or appointed;

- (C) Determine whether or not the accused desires and is in need of an appointed attorney and, if appropriate, advise the accused of the necessity for filing a written application;
- (D) Inform the accused of his or her right to a later pre-indictment commitment hearing, unless the first appearance covers the commitment hearing issues, and inform the accused that giving a bond shall be a waiver of the right to a commitment hearing;
- (E) In the case of warrantless arrest, make a fair and reliable determination of the probable cause for the arrest unless a warrant has been issued before the first appearance;
- (F) Inform the accused of the right to grand jury indictment in felony cases and the right to trial by jury, and when the next grand jury will convene;
- (G) Inform the accused that if he or she desires to waive these rights and plead guilty, then the accused shall so notify the judge or the law officer having custody, who shall in turn notify the judge.
- (H) Set the amount of bail if the offense is not one bailable only by a superior court judge, or so inform the accused if it is.

Ga R Unif. Mag. Court Rule 23.3

The court may set bail which may be secured by:

- (1) Cash - by a deposit with the sheriff of an amount equal to the required cash bail; or
- (2) Property - by real estate located within the State of Georgia with unencumbered equity, not exempted, owned by the accused or surety, valued at double the amount of bail set in the bond; or
- (3) Recognizance - in the discretion of the court;
- (4) Professional - by a professional bail bondsman authorized by the sheriff and in compliance with the rules and regulations for execution of a surety bail bond.

Bail may be conditioned upon such other specified and reasonable conditions as the court may consider just and proper. The court may restrict the type of security permitted for the bond although the sheriff shall determine what sureties are acceptable when surety bond is permitted.

OCGA § 17-6-1

(a) The following offenses are bailable only before a judge of the superior court:

- (1) Treason;
- (2) Murder;
- (3) Rape;
- (4) Aggravated sodomy;
- (5) Armed robbery;
- (5.1) Home invasion in the first degree;
- (6) Aircraft hijacking and hijacking a motor vehicle in the first degree;
- (7) Aggravated child molestation;
- (8) Aggravated sexual battery;
- (9) Manufacturing, distributing, delivering, dispensing, administering, or selling any controlled substance classified under Code Section 16-13-25 as Schedule I or under Code Section 16-13-26 as Schedule II;
- (10) Violating Code Section 16-13-31 or Code Section 16-13-31.1;
- (11) Kidnapping, arson, aggravated assault, or burglary in any degree if the person, at the time of the alleged kidnapping, arson, aggravated assault, or burglary in any degree, had

previously been convicted of, was on probation or parole with respect to, or was on bail for kidnapping, arson, aggravated assault, burglary in any degree, or one or more of the offenses listed in paragraphs (1) through (10) of this subsection;

(12) Aggravated stalking; and

(13) Violations of Chapter 15 of Title 16.

(b)(1) All offenses not included in subsection (a) of this Code section, inclusive of offenses that are violations of local ordinances, are bailable by a court of inquiry. Except as provided in subsection (g) of this Code section, at no time, either before a court of inquiry, when indicted or accused, after a motion for new trial is made, or while an appeal is pending, shall any person charged with a misdemeanor be refused bail. When determining bail for a person charged with a misdemeanor, courts shall not impose excessive bail and shall impose only the conditions reasonably necessary to ensure such person attends court appearances and to protect the safety of any person or the public given the circumstances of the alleged offense and the totality of circumstances.

(2) Except as otherwise provided in this chapter:

(A) A person charged with violating Code Section 40-6-391 whose alcohol concentration at the time of arrest, as determined by any method authorized by law, violates that provided in paragraph (5) of subsection (a) of Code Section 40-6-391 may be detained for a period of time up to six hours after booking and prior to being released on bail or on recognizance; and

(B) When an arrest is made by a law enforcement officer without a warrant upon an act of family violence or a violation of a criminal family violence order pursuant to Code Section 17-4-20, the person charged with the offense shall not be eligible for bail prior to the arresting officer or some other law enforcement officer taking the arrested person before a judicial officer pursuant to Code Section 17-4-21.

(3)(A) Notwithstanding any other provision of law, a judge of a court of inquiry may, as a condition of bail or other pretrial release of a person who is charged with violating Code Section 16-5-90 or 16-5-91, prohibit the defendant from entering or remaining present at the victim's school, place of employment, or other specified places at times when the victim is present or intentionally following such person.

(B) If the evidence shows that the defendant has previously violated the conditions of pretrial release or probation or parole which arose out of a violation of Code Section 16-5-90 or 16-5-91, the judge of a court of inquiry may impose such restrictions on the defendant which may be necessary to deter further stalking of the victim, including but not limited to denying bail or pretrial release.

(c)(1) In the event a person is detained in a facility other than a municipal jail for an offense which is bailable only before a judge of the superior court, as provided in subsection (a) of this Code section, and a hearing is held pursuant to Code Section 17-4-26 or 17-4-62, the presiding judicial officer shall notify the superior court in writing within 48 hours that the arrested person is being held without bail. If the detained person has not already petitioned for bail as provided in subsection (d) of this Code section, the superior court shall notify the district attorney and shall set a date for a hearing on the issue of bail within 30 days after receipt of such notice.

(2) In the event a person is detained in a municipal jail for an offense which is bailable only before a judge of the superior court as provided in subsection (a) of this Code section for a period of 30 days, the municipal court shall notify the superior court in writing within 48 hours

that the arrested person has been held for such time without bail. If the detained person has not already petitioned for bail as provided in subsection (d) of this Code section, the superior court shall notify the district attorney and set a date for a hearing on the issue of bail within 30 days after receipt of such notice.

(3) Notice sent to the superior court pursuant to paragraph (1) or (2) of this subsection shall include any incident reports and criminal history reports relevant to the detention of such person.

(d) A person charged with any offense which is bailable only before a judge of the superior court as provided in subsection (a) of this Code section may petition the superior court requesting that such person be released on bail. The court shall notify the district attorney and set a date for a hearing within ten days after receipt of such petition.

(e)(1) A court shall be authorized to release a person on bail if the court finds that the person:

- (A) Poses no significant risk of fleeing from the jurisdiction of the court or failing to appear in court when required;
- (B) Poses no significant threat or danger to any person, to the community, or to any property in the community;
- (C) Poses no significant risk of committing any felony pending trial; and
- (D) Poses no significant risk of intimidating witnesses or otherwise obstructing the administration of justice.

(2) When determining bail, as soon as possible, the court shall consider:

- (A) The accused's financial resources and other assets, including whether any such assets are jointly controlled;
- (B) The accused's earnings and other income;
- (C) The accused's financial obligations, including obligations to dependents;
- (D) The purpose of bail; and
- (E) Any other factor the court deems appropriate.

(3) If the person is charged with a serious violent felony and has already been convicted of a serious violent felony, or of an offense under the laws of any other state or of the United States which offense if committed in this state would be a serious violent felony, there shall be a rebuttable presumption that no condition or combination of conditions will reasonably assure the appearance of the person as required or assure the safety of any other person or the community. As used in this subsection, the term "serious violent felony" means a serious violent felony as defined in Code Section 17-10-6.1.

(4) Any bond issued by an elected judge or judge sitting by designation that purports a dollar amount shall be executed in the full-face amount of such bond through secured means as provided for in Code Section 17-6-4 or 17-6-50 or shall be executed by use of property as approved by the sheriff in the county where the offense was committed.

(5) Notwithstanding any other provision of law, nothing in this Code section shall prohibit a duly sworn sheriff from releasing an inmate from custody in cases of medical emergency with the consent of the judge in the county in which he or she presides.

(f)(1) Except as provided in subsection (a) of this Code section or as otherwise provided in this subsection, the judge of any court of inquiry may by written order establish a schedule of bails and unless otherwise ordered by the judge of any court, an accused shall be released from custody upon posting bail as fixed in the schedule.

(2) For offenses involving an act of family violence, as defined in Code Section 19-13-1, bail or other release from custody shall be set by a judge on an individual basis and a schedule of

bails provided for in paragraph (1) of this subsection shall not be utilized; provided, however, that the judge shall include a listing of specific conditions which shall include, but not be limited to, having no contact of any kind or character with the victim or any member of the victim's family or household, not physically abusing or threatening to physically abuse the victim, the immediate enrollment in and participation in domestic violence counseling, substance abuse therapy, or other therapeutic requirements.

(3) For offenses involving an act of family violence, the judge shall determine whether one or more specific conditions shall be used, except that any offense involving an act of family violence and serious injury to the victim shall be bailable only before a judge when the judge or the arresting officer is of the opinion that the danger of further violence to or harassment or intimidation of the victim is such as to make it desirable that the consideration of the imposition of additional conditions as authorized in this Code section should be made. Upon setting bail in any case involving family violence, the judge shall give particular consideration to the exigencies of the case at hand and shall impose any specific conditions as he or she may deem necessary. As used in this Code section, the term "serious injury" means bodily harm capable of being perceived by a person other than the victim and may include, but is not limited to, substantially blackened eyes, substantially swollen lips or other facial or body parts, substantial bruises to body parts, fractured bones, or permanent disfigurements and wounds inflicted by deadly weapons or any other objects which, when used offensively against a person, are capable of causing serious bodily injury.

(4) For violations of Code Section 16-15-4, the court shall require increased bail and shall include as a condition of bail or pretrial release that the accused shall not have contact of any kind or character with any other member or associate of a criminal street gang and, in cases involving an alleged victim, that the accused shall not have contact of any kind or character with any such victim or any member of any such victim's family or household.

(5) For offenses involving violations of Code Section 40-6-393, bail or other release from custody shall be set by a judge on an individual basis and not a schedule of bails pursuant to this Code section.

(g) No appeal bond shall be granted to any person who has been convicted of murder, rape, aggravated sodomy, armed robbery, home invasion in any degree, aggravated child molestation, child molestation, kidnapping, trafficking in cocaine or marijuana, aggravated stalking, or aircraft hijacking and who has been sentenced to serve a period of incarceration of five years or more. The granting of an appeal bond to a person who has been convicted of any other felony offense or of any misdemeanor offense involving an act of family violence as defined in Code Section 19-13-1, or of any offense delineated as a high and aggravated misdemeanor or of any offense set forth in Code Section 40-6-391, shall be in the discretion of the convicting court. Appeal bonds shall terminate when the right of appeal terminates, and such bonds shall not be effective as to any petition or application for writ of certiorari unless the court in which the petition or application is filed so specifies.

(h) Except in cases in which life imprisonment or the death penalty may be imposed, a judge of the superior court by written order may delegate the authority provided for in this Code section to any judge of any court of inquiry within such superior court judge's circuit. However, such authority may not be exercised outside the county in which said judge of the court of inquiry was appointed or elected. The written order delegating such authority shall be valid for a period of one year, but may be revoked by the superior court judge issuing such order at any time prior to the end of that one-year period.

(i) As used in this Code section, the term “bail” shall include the release of a person on an unsecured judicial release, except as limited by Code Section 17-6-12.

(j) For all persons who have been authorized by law or the court to be released on bail, sheriffs and constables shall accept such bail; provided, however, that the sureties tendered and offered on the bond are approved by the sheriff of the county in which the offense was committed.

OCGA § 17-6-2

(b) In all other misdemeanor cases, sheriffs and constables shall accept bail in such reasonable amount as may be just and fair for any person or persons charged with a misdemeanor, provided that the sureties tendered and offered on the bond are approved by the sheriff in the county where the offense was committed.

OCGA § 17-6-12

(a) As used in this Code section, the term:

(1) “Bail restricted offense” means the person is charged with:

(A) An offense of:

(i) Murder or felony murder, as defined in Code Section 16-5-1;

(ii) Armed robbery, as defined in Code Section 16-8-41;

(iii) Kidnapping, as defined in Code Section 16-5-40;

(iv) Rape, as defined in Code Section 16-6-1;

(v) Aggravated child molestation, as defined in subsection (c) of Code Section 16-6-4, unless subject to the provisions of paragraph (2) of subsection (d) of Code Section 16-6-4;

(vi) Aggravated sodomy, as defined in Code Section 16-6-2; or

(vii) Aggravated sexual battery, as defined in Code Section 16-6-22.2; or

(B) A felony offense of:

(i) Aggravated assault;

(ii) Aggravated battery;

(iii) Hijacking a motor vehicle in the first degree;

(iv) Aggravated stalking;

(v) Child molestation;

(vi) Enticing a child for indecent purposes;

(vii) Pimping;

(viii) Robbery;

(ix) Bail jumping;

(x) Escape;

(xi) Possession of a firearm or knife during the commission of or attempt to commit certain crimes;

(xii) Possession of firearms by convicted felons and first offender probationers;

(xiii) Trafficking in cocaine, illegal drugs, marijuana, or methamphetamine;

(xiv) Participating in criminal street gang activity;

(xv) Habitual violator; or

(xvi) Driving under the influence of alcohol, drugs, or other intoxicating substances.

(2) “Unsecured judicial release” means any release on a person's own recognizance that does not purport a dollar amount through secured means as provided for in Code Section 17-6-4

or 17-6-50 or property as approved by the sheriff in the county where the offense was committed.

(b) An elected judge or judge sitting by designation as provided for in subsection (c) or (d) of this Code section may issue an unsecured judicial release if:

(1) Such unsecured judicial release is noted on the release order; and

(2) Except as provided for in subsection (c) of this Code section, the person is not charged with a bail restricted offense.

(c) A person charged with a bail restricted offense shall not be released on bail on an unsecured judicial release for the purpose of entering a pretrial release program, a pretrial release and diversion program as provided for in Article 4 of Chapter 3 of Title 42, or a pretrial intervention and diversion program as provided for in Article 4 of Chapter 18 of Title 15, or pursuant to Uniform Superior Court Rule 27.

(d) Except as provided in subsection (c) of this Code section and in addition to other laws regarding the release of an accused person, the judge of any court having jurisdiction over a person charged with committing an offense against the criminal laws of this state shall have authority, in his or her sound discretion and in appropriate cases, to authorize the release of the person on an unsecured judicial release only.

(e) Upon the failure of a person released on an unsecured judicial release to appear for trial, if the release is not otherwise conditioned by the court, absent a finding of sufficient excuse to appear, the court shall summarily issue an order for his or her arrest which shall be enforced as in cases of forfeited bonds.

OCGA § 17-7-50

Any person who is arrested for a crime and who is refused bail shall, within 90 days after the date of confinement, be entitled to have the charge against him or her heard by a grand jury having jurisdiction over the accused person; provided, however, that if the person is arrested for a crime for which the death penalty is being sought, the superior court may, upon motion of the district attorney for an extension and after a hearing and good cause shown, grant one extension to the 90 day period not to exceed 90 additional days; and, provided, further, that if such extension is granted by the court, the person shall not be entitled to have the charge against him or her heard by the grand jury until the expiration of such extended period. In the event no grand jury considers the charges against the accused person within the 90 day period of confinement or within the extended period of confinement where such an extension is granted by the court, the accused shall have bail set upon application to the court.

Ayala v. State, 262 Ga. 704 (1993).

This court granted the application for interlocutory appeal to consider whether the state must prove that a person charged with murder who seeks a pretrial bond has not met the conditions for release in OCGA § 17-6-1(e). We hold that the defendant has the burden of producing evidence on community ties, but the state has the burden of persuading by a preponderance of the evidence that a defendant is not entitled to release on bail. We vacate the trial court's order denying bail and remand for further proceedings.

Jesus Ayala is charged with the murder and aggravated assault of his sister's husband, possession of a firearm during the commission of a felony, and obstruction of a law enforcement officer.

The state is not seeking the death penalty. Ayala, a Mexican citizen, presented testimony at his bond hearing that he has resided in Hall County for three years and in the United States for 12

years; he has 20 to 30 relatives living in Hall County; and he would have a job in Hall County if released on bond. The state objected to bond because of the nature of the charges. The trial court found that the defendant met his burden of proving that he posed no danger to the community, risk of committing any felony, or risk of intimidating witnesses. The court denied bond because “the defendant has not carried his burden of proving that he is not a risk to flee the jurisdiction of this Court if released on bond.”

1. A person charged with the offense of murder may obtain bail only before a superior court judge. OCGA § 17-6-1(a)(2). The purpose of a pretrial bond is to prevent punishment before a conviction and to secure the appearance of the person in court for trial. *Roberts v. State*, 32 Ga.App. 339, 340-41 (1924). The standards for determining whether to grant release prior to trial are based on the 1968 American Bar Association pretrial release standards. *Lane v. State*, 247 Ga. 387, 388, n. 2 (1981). The trial court may release a person on bail if the court finds the person:

- (1) Poses no significant risk of fleeing from the jurisdiction of the court or failing to appear in court when required;
- (2) Poses no significant threat or danger to any person, to the community, or to any property in the community;
- (3) Poses no significant risk of committing any felony pending trial; and
- (4) Poses no significant risk of intimidating witnesses or otherwise obstructing the administration of justice.

OCGA § 17-6-1(e). The trial court must explain its reasons for denying bond to assist appellate review. *Lane*, 247 Ga. at 389, 276 S.E.2d 644. The granting or denial of bail will not be set aside unless there is a manifest and flagrant abuse of discretion. *Jernagin v. State*, 118 Ga. 307, 308 (1903).

This court has not addressed whether the state or the defendant has the burden of proof in pretrial bond hearings before a superior court. Neither the *Lane* opinion nor the law codifying the ABA standards specifies which party has the burden of proof or the evidentiary standard to be applied. See 1982 Ga.Laws 910, § 1.

Because of the phrasing of the statutory language, we conclude that the defendant has the burden of coming forward initially with evidence to show that he or she poses no significant risk of fleeing, threatening the community, committing another crime, or intimidating a witness. This burden of production means that a person charged with murder must present evidence at the bond hearing on factors that indicate roots in the community. These factors include the defendant's length and character of residence in the community, employment status and history, past history of responding to legal process, and prior criminal record. See *Lane*, 247 Ga. at 388, n. 2. Once the defendant meets the burden of production, the state may present evidence to rebut it. Placing the burden of production on the defendant is fair because the accused is the best source of information on his or her community ties.

In this state, unlike many other states, the presumption of innocence has always remained with the person accused of a capital offense, even during the trial. *Vanderford v. Brand*, 126 Ga. 67, 70 (1906). “The most fundamental premise of our criminal justice system is that a person ought not to be punished for a criminal offense until the state demonstrates guilt beyond a reasonable doubt.” 2 ABA, Standards for Criminal Justice 10-1.1 comment (1980). “Unless [the] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.” *Stack v. Boyle*, 342 U.S. 1 (1951).

To protect this presumption of innocence, we hold that the state has the burden of persuasion in convincing the superior court that a defendant is not entitled to pretrial release. This requirement means the state has the burden of proving by a preponderance of the evidence that the trial court should deny bail either to secure the defendant's appearance in court or to protect the community. Depending on the quality of the defendant's evidence, the state may not need to present any evidence to carry its burden of persuasion. Other states and the Federal Bail Reform Act, 18 U.S.C. §§ 3146-3152, place a similar burden of proof on the government.

The state argues that the burden of proof should be placed on accused persons in pretrial bond hearings because convicted defendants have the burden of proof on appeal bonds. See *Moore v. State*, 151 Ga.App. 413, 414 (1979). The release of defendants after their conviction for murder, however, is based on different standards than the pretrial release of persons accused of murder. See OCGA § 17-6-1(g) (denying appeal bonds to certain convicted felons). We have held, for example, that the ABA Standards on release pending appeal do not apply in capital felony cases and that a trial court need not give any reasons for denying an appeal bond to a convicted murderer. *Hardin v. State*, 251 Ga. 533, 534 (1983). The defendant's conviction rebuts the prior presumption of innocence and justifies requiring the defendant to bear the burden of convincing the court to grant an appeal bond. See *Vanderford*, 126 Ga. at 70.

In contrast, the law favoring release of persons prior to trial supports placing the burden of persuasion on the state in hearings on pretrial release in superior court. Because the trial court placed the burden of proof on Ayala, rather than the state, we vacate the order denying bail and remand for reconsideration in light of this opinion.

Myers v. St. Lawrence, 289 Ga. 240 (2011).

Pro se appellant James K. Myers appeals the denial of his pre-trial petition for a writ of habeas corpus. For the reasons that follow, we affirm.

Myers was indicted on charges of aggravated assault, obstruction of a law enforcement officer, criminal damage to property, and simple battery against a pregnant person. The trial court denied a pre-trial bond, finding that Myers posed: a significant flight risk; a significant threat to persons, the community, or property; a significant risk for committing a felony pending trial; and a significant risk for intimidating witnesses. The court also noted that Myers had a lengthy history of felonies and had previously been a fugitive from justice. While awaiting trial, Myers filed a petition for a writ of habeas corpus, contending that his detention without bail was illegal, and that his counsel was ineffective. After a hearing, the habeas court denied the petition.

Myers has been charged with felonies and, thus, he is not entitled to bail as a matter of right. *Constantino v. Warren*, 285 Ga. 851, 853(1). Rather, whether he should have been released on bail is governed by OCGA § 17-6-1(e), which provides as follows:

A court shall be authorized to release a person on bail if the court finds that the person:

- (1) Poses no significant risk of fleeing from the jurisdiction of the court or failing to appear in court when required;
- (2) Poses no significant threat or danger to any person, to the community, or to any property in the community;
- (3) Poses no significant risk of committing any felony pending trial; and
- (4) Poses no significant risk of intimidating witnesses or otherwise obstructing the administration of justice.

The conjunctive “and” indicates that the trial court may grant bail only if it finds that none of the four risks exists. *Id.* at 853–854(2).

In his habeas petition, Myers contended that the denial of bail constituted excessive bail, prohibited by the Eighth Amendment to the United States Constitution, and Art. I, Sec. I, Par. XVII of the Georgia Constitution. “[T]he foremost consideration when fixing bail is the probability that the accused, if freed, will appear at trial; and ... the amount of bail assessed is within the sole discretion of the trial court and will not be overturned absent a clear abuse of discretion.” *Pullin v. Dorsey*, 271 Ga. 882, 882–883 (2000). Myers did not provide the habeas court with a transcript of his bail hearing. Thus, there is no such transcript before this Court on his appeal from the habeas court's ruling, and we presume that the evidence presented in the trial court justifies that court's decision. See *Blue v. Blue*, 279 Ga. 550(1) (2005); *Kegler v. State*, 267 Ga. 147, 148(3) (1996). But, the trial court specifically concluded that he was a flight risk, and the habeas court noted that under recidivist treatment, Myers faced incarceration for a significant period of time. Nothing in the record suggests that the trial court abused its discretion in denying bail, and it was thus not error for the habeas court to deny Myers's petition. See *Constantino*, *supra* at 855(3).

Constantino v. Warren, 285 Ga. 851 (2009).

Frank Constantino appeals from the habeas court's denial of his petition for habeas corpus relief, in which he sought release from pre-trial detention following the trial court's denial of his request for bail. For the reasons that follow, we affirm.

On February 19, 2009, Constantino was indicted by a Cobb County grand jury for violating the Georgia RICO Act, securities fraud, and theft by taking. The indictment alleges that Constantino took more than \$2 million from an elderly woman and invested it in business ventures in Belize. On February 20, 2009, Constantino was arrested, and on February 24, 2009, he filed a motion for pre-trial bail. On March 5, 2009, the trial court held a hearing on the motion. At the hearing, Constantino's wife, Sandra Newhouse, testified that she and Constantino have lived in her Cobb County home since 1992; that they married in 1993; that she purchased the house in 1998; and that she was willing to put the home up for bail. She added that Constantino, who is 65 years old, has high blood pressure; that he had surgery for prostate cancer in October 2008 and has received radiation treatments; and that they have numerous friends in the community. She also stated that she had given Constantino's passport to his attorney and that Constantino was willing to surrender it to the Court. Newhouse and Constantino moved to Atlanta from West Virginia, and several of Constantino's relatives from West Virginia were in the courtroom but did not testify.

On cross-examination, Newhouse testified that the house in which she and Constantino live is in her name; that Constantino has no assets in the United States; that she has no assets except for the house; and that Constantino owns property in Belize and Nicaragua and has traveled to Belize ten to twelve times in the past few years. Newhouse also testified she purchased her house in 1998 for \$450,000, but she now owes \$700,000 on the property and does not know how much the house is worth.

The trial court denied Constantino's motion for bond, stating, in an oral ruling, that he had no real ties to Cobb County and was a “great risk to flee” given his property and connections in Belize and Nicaragua.

On March 13, 2009, Constantino filed a habeas petition contending that the trial court's denial of bail was unconstitutional, that the Georgia and United States Constitutions forbid

excessive bail, and that he is entitled to bail as a matter of right. On March 27, 2009, the habeas court held a hearing on Constantino's habeas petition. The parties agreed that the court could consider the testimony of Constantino's wife at the bond hearing, and Constantino offered additional testimony from seven witnesses who testified about their relationships with him.

For example, Rudy Weber testified he has lived in Georgia for forty-five years and has known Constantino for three years. He met Constantino when he helped Constantino refinance his home for \$900,000 at a time when the home was worth \$1.2 million. Since the refinancing, Weber has remained in "good contact" with Constantino and has been to Constantino's home a few times. Weber acknowledged that Constantino's home had been refinanced at the height of the real estate market and that the value of the home had likely dropped some since that time.

Marjorie Crouch testified she has been friends with Constantino and his wife for about 15 years and has been to their house numerous times. Crouch added that she has invested money with Constantino and does not believe he is a flight risk. David Kim, a service consultant for Audi, testified he has known Constantino for about six years and has been to different "Audi-related outings" with him. Kim added he did not believe Constantino was a risk to flee. Paul Miller, who has known Constantino from church for about four years, testified he did not believe Constantino would flee. In addition, Craig Stephens testified that he has known Constantino for about 17 years, that they met when they were both in the insurance business, that he has a business and social relationship with Constantino, and that he does not believe Constantino would flee. On cross-examination, the witnesses acknowledged that they did not know whether Constantino owned either the house in which he lived or any other property in this country, and several of the witnesses had short-term, mostly business relationships with Constantino (three of the witnesses had businesses that serviced the cars he drove).

At the hearing, Constantino contended that, based on the testimony of his wife and the other seven witnesses, there was no evidence he was a risk to flee, and he was entitled to bail. The sheriff, on the other hand, contended that Constantino was a significant risk to flee because, among other things, he did not own any assets in this country, he owned assets in Belize and Nicaragua, and he traveled to Belize on a regular basis. On May 27, 2009, the habeas court denied Constantino's habeas petition, concluding that the trial court's denial of bail "was a reasonable exercise of that court's discretion." Constantino then filed this appeal.

Constantino contends that, because he is not indicted for one of the offenses specified in OCGA § 17-6-1(a), the bail provisions of OCGA § 17-6-1(e) do not apply to his case, and he is entitled to bail as a matter of right. He is wrong. OCGA § 17-6-1(a) merely specifies that certain crimes are bailable only before a superior court; it does not provide that persons who commit other crimes are entitled to bail as a matter of right.

OCGA § 17-6-1 is now the statute that governs bail, however, and it does not provide for bail as a matter of right except in misdemeanor cases. OCGA § 17-6-1(b)(1).

For the foregoing reasons, Constantino was not entitled to bail as a matter of right. Instead, whether he should have been released on bail is governed by OCGA § 17-6-1(e), which provides as follows:

- A court shall be authorized to release a person on bail if the court finds that the person:
- (1) Poses no significant risk of fleeing from the jurisdiction of the court or failing to appear in court when required;
 - (2) Poses no significant threat or danger to any person, to the community, or to any property in the community;

- (3) Poses no significant risk of committing any felony pending trial; and
- (4) Poses no significant risk of intimidating witnesses or otherwise obstructing the administration of justice.

The conjunctive “and” indicates that the trial court may grant bail only if it finds that none of the four risks exists.

“The trial court must explain its reasons for denying bond to assist appellate review. The granting or denial of bail will not be set aside unless there is a manifest and flagrant abuse of discretion.” *Ayala v. State*, 262 Ga. 704, 705 (1993). Constantino bore the burden of producing evidence that he posed “no significant risk of fleeing, threatening the community, committing another crime, or intimidating a witness.” *Id.* “To meet this burden, the defendant must first present evidence showing his roots in the community.” *Dunn v. Edwards*, 275 Ga. 458, 458 (2002). The State, however, always retains the burden of persuasion that the defendant is not entitled to pretrial release. *Id.*

In the present case, Constantino offered some evidence of ties to his community and argued that he did not flee the country either during his ongoing civil litigation with the woman who is the victim in his criminal case or during the criminal investigation of his conduct. He also offered evidence of health problems, and his attorney and wife stated he was willing to surrender his passport. On the other hand, Constantino has now been indicted on 16 counts of criminal activity that may result in significant incarceration if he is convicted. The court also heard evidence that Constantino does not own the home in which he lives, has no assets in the United States, has assets in Belize and Nicaragua, has allegedly funneled significant amounts of money to investments in Belize, and has traveled extensively to Belize. There was evidence that his wife has no assets other than her home, that she was uncertain how much equity she has in the house, and that, due to the downturn in the real estate market, the house is worth less than it was several years ago. Based on this evidence, we conclude the habeas court did not err in ruling that the trial court acted within its broad discretion in finding that Constantino posed a significant risk to flee and in denying bail on that ground.

Constantino contends that the denial of bail violated the Excessive Bail Clauses of both the Georgia and United States Constitutions. See Ga. Const.1983, Art. I, Sec. I, Par. XVII and the Eighth Amendment to the United States Constitution (both providing that “[e]xcessive bail shall not be required”). Based on the evidence discussed above, however, we conclude that the trial court did not abuse its discretion in determining that the denial of bail was “necessary to ensure [Constantino's] presence at trial,” *Salerno*, 481 U.S. at 753, and that the habeas court did not err in denying relief. See *Pullin v. Dorsey*, 271 Ga. 882, 882–883 (2000) (holding that excessive bail is bail not “reasonably calculated to insure the presence of the defendant”); *Mullinax v. State*, 271 Ga. 112, 112–113, 515 S.E.2d 839 (1999) (same).

Mullinax v. State, 271 Ga. 112 (1999).

This is an appeal by Charles Mullinax from the denial of his motion to reduce bond and from the denial of his pre-conviction petition for a writ of habeas corpus. For the reasons which follow we dismiss the appeal from the order denying his motion to reduce bond and affirm the denial of his petition for a writ of habeas corpus.

In April 1998 Lindsey Strickland, Mullinax's girlfriend, was discovered dead by strangulation in Thomas County. Police found a curtain sash from the nearby residence once owned by Mullinax's mother alongside Strickland's body and Strickland's missing earring was found inside the residence. Mullinax was arrested and charged with murder shortly after the

discovery of the body. On May 14, 1998 Mullinax petitioned the trial court to set bond. Because of the likelihood that Mullinax would interfere with the administration of justice the trial court denied bond. On July 30, 1998, Mullinax, who had not been indicted because of delays in processing the physical evidence at the State Crime Lab, petitioned for bail arguing that he was entitled to bond because he had been detained for more than 90 days without being indicted. See OCGA § 17-7-50. Following a hearing on October 5, 1998 the court set bond in the amount of \$250,000 and denied a subsequent motion to reduce the amount of that bond. A pre-trial petition for writ of habeas corpus challenging the amount of bond on grounds of excessiveness was denied on December 10, 1998. Because the refusal to reduce the amount of bond did not amount to an abuse of discretion on the part of the trial court, we affirm.

The sole issue raised in Mullinax's appeal from the denial of his petition for writ of habeas corpus is whether the bond set by the Superior Court of Thomas County is so excessive as to amount to a refusal to grant bail. Excessive bail is prohibited by the Georgia Constitution (Ga. Const.1983, Art. I, Sec. I, Par. XVII) and the Eighth Amendment to the U.S. Constitution. For purposes of the Eighth Amendment, excessive bail is defined as bail set at an amount higher than an amount reasonably calculated to insure the presence of the defendant. *Stack v. Boyle*, 342 U.S. 1, 5 (1951). When fixing bail in Georgia, a trial judge's foremost consideration is the probability that the accused, if freed, will appear at trial and to a lesser extent "the accused's ability to pay, the seriousness of the offense, and the accused's character and reputation. [Cit.]" *Spence v. State*, 252 Ga. 338, 341(2)(b) (1984). See generally OCGA § 17-6-1(e). A defendant who seeks release on bail has the burden of showing "roots in the community, that the defendant does not pose a significant risk of fleeing, threatening the community, committing another crime, or intimidating a witness. [Cits.]" *Cowards v. State*, 266 Ga. 191, 193(2) (1996). However, in all cases the amount of bail assessed is within the sole discretion of the trial court and will not be overturned absent a clear abuse of discretion. *Jones v. Grimes*, 219 Ga. 585(2) (1964).

The State adduced evidence that Mullinax, who is a teenager and a high school drop-out, had little contact with his family and no means of support. Mullinax did not reside with either parent and had no apparent supervision from any other relative or adult. He had been arrested previously for possession of marijuana, shoplifting, and simple battery. With regard to the crime charged, a GBI agent testified that Mullinax had been in contact with potential witnesses to coach them about the information they were to supply to law enforcement officers investigating the case.

Under the circumstances, based upon the seriousness of the offense charged and the likelihood that Mullinax would not appear at trial, we discern no clear abuse of discretion by the trial court in holding that the bail amount originally set was not excessive. *Taylor v. Chitwood*, 266 Ga. 793(2), 471 S.E.2d 511 (1996); *Jones v. Grimes*, supra, 219 Ga. at 587(2), 134 S.E.2d 790.

Dunn v. Edwards, 275 Ga. 458 (2002).

Torrance Dunn was arrested and charged with malice murder and felony obstruction of justice. The trial court denied his request for bond and Dunn brought this habeas action challenging that decision. Because Dunn failed to offer evidence indicating roots in the community, the habeas court did not err in denying relief. Therefore, we affirm.

In *Ayala v. State*, this Court addressed the burden of proof required in a pretrial bond hearing. Initially, the defendant bears the burden of producing evidence that he does not pose a

significant risk to flee, threaten the community, commit another crime, or intimidate witnesses. To meet this burden, the defendant must first present evidence showing his roots in the community. The Court stated in *Ayala* that evidence demonstrating ties to the community would include “the length and character of residence in the community, employment status and history, past history of responding to legal process, and prior criminal record.” Once the defendant has satisfied this burden, the burden of production shifts to the State. If the defendant fails to produce sufficient evidence, the State may not be required to produce any evidence. However, the State always retains the burden of persuasion that the defendant is not entitled to pretrial release.

The defendant in this case failed to satisfy his initial burden. The only testimony presented at the bond hearing on the issue of the defendant's ties to the community came from the investigating officer. When questioned about whether Dunn was from Athens and whether he lived there, the officer answered affirmatively. There was no evidence that Dunn had continuously lived in Athens for a significant period of time, that he had significant involvement with family, friends or institutions in the community, that he had a stable job history, or that he had a reputation for reliability. The record contains defense counsel's introduction of a cousin and reference to an aunt who had previously been in the courtroom. The record also contains the statement that “other family members identified themselves.” The presence of family members in the courtroom, however, is not evidence. Because Dunn failed to meet his burden, the trial court properly denied bond and the habeas court did not err in denying relief.

Dunn contends that the trial court's order denying bond is insufficient as a matter of law because it did not make findings of fact. We agree, that as a general matter, trial courts should render findings of fact in denying bond because they will help provide an adequate basis for appellate review. However, in this case, Dunn presented virtually no evidence on the relevant issue of community ties and therefore, we cannot conclude that the trial court erred in failing to be more specific in its order denying bond.

Prigmore v. State, 327 Ga. App. 368 (2014).

Spencer Prigmore was arrested on charges of vehicular homicide (OCGA § 40–6–393), reckless driving (OCGA § 40–6–390), leaving the scene of an accident (OCGA § 40–6–270), and driving under the influence of drugs (OCGA § 40–6–391). We granted Prigmore's application for interlocutory appeal to consider whether the trial court erred in denying his motion for pre-trial bond. For the reasons that follow, we affirm.

In determining whether the trial court erred in denying bond, we apply a “flagrant abuse” standard. (Citation omitted.) *Hardy v. State*, 192 Ga.App. 860, 860(2) (1989). In other words, the trial court's discretion will not be disturbed “unless it was manifestly or flagrantly abused.” (Citation omitted.) *Id.*

The transcript from the bond hearing shows the following facts. Prigmore was driving his vehicle along Lawrenceville Highway at about 6:45 p.m. when he crossed a lane of traffic and left the roadway, traveled for some distance on the sidewalk, and struck and killed a woman and her six-year-old daughter. After striking the pedestrians, Prigmore returned to the roadway and continued driving for approximately a quarter-mile before turning into a parking lot and parking his vehicle in the drive-thru of a business. Witnesses to the accident had followed Prigmore and informed police of his location. When the police approached Prigmore in his vehicle, he appeared very upset, and he stated “[O]h, my God, just tell me, did I kill them[?]” After Prigmore was taken into custody for further investigation, police officers described Prigmore as being so intoxicated that they could not get any statement from him. Prigmore was read the

implied consent law, but he refused to submit to a state-administered test. Consequently, the police sought and obtained a search warrant for a blood draw. While being held in jail on these charges, Prigmore was placed on suicide watch due to his despondency over the incident.

Although Prigmore did not testify at the bond hearing, he presented witnesses to testify regarding his ties to the community. In response, the State elicited testimony that Prigmore had multiple convictions for driving under the influence. The State then proffered evidence that Prigmore has three previous DUI convictions, the most recent in 1999. In addition, he entered a plea as a first offender to a charge of possession of a controlled substance in 1998, followed by a battery conviction in 2006, a charge of furnishing alcohol to a minor in 2009, and a shoplifting conviction in 2012. The State also argued that Prigmore may flee if released, pointing to evidence that he left the scene after running over the pedestrians and that he stopped when his vehicle became inoperable a quarter-mile down the road.

Under Georgia law, a trial court may release a defendant on bail if it finds that the defendant:

- (1) [p]oses no significant risk of fleeing from the jurisdiction of the court or failing to appear in court when required;
- (2) [p]oses no significant threat or danger to any person, to the community, or to any property in the community;
- (3) [p]oses no significant risk of committing any felony pending trial; and
- (4) [p]oses no significant risk of intimidating witnesses or otherwise obstructing the administration of justice.

OCCA § 17-6-1(e).

In announcing its ruling at the conclusion of the bond hearing, the trial court expressed concern about Prigmore's well-being and that Prigmore may pose a danger to himself and to the community if released. The trial court also acknowledged that there was evidence that officers believed that Prigmore may have been under the influence at the time of the accident, and it expressed concern about Prigmore's history with alcohol and driving under the influence. The trial court further stated that it was concerned about the possibility that Prigmore may flee. In its written order, the trial court stated that Prigmore “poses a significant risk of committing further felonies pending trial of this matter and poses a significant risk to persons in the community, including himself.”

Given the facts presented to the trial court, we cannot say that it flagrantly abused its discretion in reaching its conclusions. “Whether we agree with [the trial court's] findings and conclusions is not controlling.” (Citations omitted.) *Hardy*, supra at 361(2). As there is some evidence to support at least part of the underlying basis for the trial court's conclusions, the trial court did not err in denying bond. *Id.*

Hardy v. State, 192 Ga. App. 860 (1989).

Following the issuance of two warrants charging appellant with trafficking in cocaine and selling cocaine, appellant was arrested and incarcerated. Thereupon, appellant moved for the setting of bond and, with the consent of the district attorney's office, bond was set at \$40,000. Upon his release, appellant was arrested again and charged with trafficking in cocaine on two other occasions. These charges pertained to incidents which occurred before appellant's arrest. Appellant again moved for the setting of bond. This time, the motion was opposed by the district attorney's office and bond was denied, the superior court ruling that there was a substantial likelihood appellant would commit additional crimes (i.e., sell cocaine) if he was released. This appeal followed. *Held:*

In determining whether bond was denied properly in cases of this kind, we apply a “flagrant abuse” standard. *Reed v. State*, 134 Ga.App. 47, 48. In other words, the superior court's discretion will not be controlled unless it was manifestly or flagrantly abused. *Id.* The considerations to be employed by the superior court in granting or denying pre-trial bonds are the same as the considerations to be employed in granting or denying appeal bonds. One such consideration is whether the person incarcerated is likely to commit a serious crime, i.e., a felony, upon being released. *Birge v. State*, 238 Ga. 88, 90. Release is authorized if the superior court finds the person incarcerated “[p]oses no significant risk of committing any felony pending trial.” OCGA § 17-6-1(e)(3).

In the case sub judice, the superior court concluded that there was a substantial likelihood appellant would commit a serious crime. Given the additional serious crimes with which appellant was charged following his initial release, we cannot say the superior court flagrantly abused its discretion in reaching this conclusion. “Whether we agree with these findings and conclusions is not controlling. There is some evidence to support at least part of the underlying basis for the [superior] court's conclusion. Consequently, we do not find a flagrant abuse of the [superior] court's discretion in denying bail.”

Womack v. State, 223 Ga. App. 82 (1996).

Hajj Womack is charged in a 93 count indictment alleging armed robbery, aggravated assault, possession of a firearm during the commission of a crime, kidnapping, carrying a concealed weapon and participation in criminal gang activity. We granted Womack's application for interlocutory appeal to consider whether the trial court erred in denying his petition for pre-trial bond. For reasons which follow, we affirm.

Womack asserts eight enumerations of error, all of which stem from the initial bond hearing. All eight enumerations rely upon the evidence heard by the trial court in the initial bond hearing. However, for reasons not disclosed by the record, the bond hearing was not recorded. In an order denying Womack's petition for reconsideration, the trial judge indicated that the judge acted properly in the initial hearing and there was “no basis to alter the previous order denying the request for a bond.”

“In determining whether bond was denied properly in cases of this kind, we apply a ‘flagrant abuse’ standard. [Cit.] In other words, the superior court's discretion will not be controlled unless it was manifestly or flagrantly abused. [Cit.]” (Indention omitted.) *Hardy v. State*, 192 Ga.App. 860(2) (1989).

“In *Birge v. State*, 238 Ga. 88 (1976), we set out standards for determining whether or not to grant bond pending appeal. We find that similar considerations are relevant when a trial court is considering a motion for bond prior to trial. The defendant may be detained pending trial if the facts support a finding that the defendant is likely to commit a serious crime, intimidate witnesses or otherwise interfere with the administration of justice or will flee if released.” (Citation and punctuation omitted.) *Lane v. State*, 247 Ga. 387, 388 (1981).

In this case, the trial court “found there was reason to believe that there was a threat of additional crimes being committed if [Womack] was released from custody.” Thus, the trial court stated one of the findings enunciated in *Lane*, thereby supporting the denial of bond. “Whether we agree with these findings and conclusions is not controlling.” *Hardy*, supra. Accordingly, we affirm the decision of the trial court.

Rooney v. State, 217 Ga. App. 850 (1995).

We granted John Thomas Rooney's application for interlocutory appeal to consider whether a superior court judge erred in reconsidering, and subsequently revoking, the pretrial bond set by another judge, who was presiding in the superior court judge's place by designation. Under the facts of this particular case, we conclude that no error occurred because the designated judge should not have granted bond to Rooney after expressly finding that he was likely to intimidate witnesses or otherwise interfere with the administration of justice.

The Gwinnett County police arrested Rooney, and a magistrate formally charged him with rape, aggravated sodomy, aggravated sexual battery, burglary and battery. The magistrate set bond in the amount of \$25,000 on each of the charges of aggravated sexual battery, burglary and battery. The magistrate did not, however, set bond on the rape and aggravated sodomy charges because only a superior court judge has the authority to do so. See OCGA § 17-6-1(a)(3), (4).

On October 6, 1994, Rooney filed a petition for bond in the Superior Court of Gwinnett County. The matter was assigned to Judge James Oxendine, and a hearing was scheduled for October 20, 1994. On the day of the hearing, Judge Oxendine was out of town. Rooney admits, however, that Judge Oxendine had delegated authority to hear the matter to Gwinnett County Recorder's Court Judge Michael Greene pursuant to OCGA § 17-6-1(h). Neither party disputes that Judge Greene's designation was appropriate, nor does either party contend that his designation was made pursuant to OCGA § 15-1-9.1(e). Thus we reject the dissent's assertion that a copy of the actual order designating Judge Greene must be obtained before a decision can be reached in this case.

During the bond hearing, Judge Greene heard testimony from Rooney and two witnesses for the State. The State's first witness was Investigator Lorraine Jackson. She testified that her investigation showed that Rooney had forced his way into a woman's home. When the woman resisted Rooney's aggressions, Rooney became enraged. Rooney took the woman into the bathroom and forced her to perform oral sodomy on him. He then sodomized her with a tube of toothpaste. Thereafter, Rooney took the woman into her bedroom where he allegedly beat her with a belt and raped her. The woman later identified Rooney as her attacker in a photographic lineup.

The State's second witness, Billy Davis, testified that he was in a holding cell with Rooney. According to Davis, Rooney approached him about having the woman that accused him of rape "done in" during a carjacking. Davis said Rooney told him the woman's name. He also testified that Rooney later told him that Rooney might try to pay the woman off.

After the bond hearing, Judge Greene issued a written order, dated October 21, 1994, wherein he specifically found that there was a substantial risk that Rooney would intimidate witnesses or otherwise interfere with the administration of justice. Nonetheless, Judge Greene set bond in the amount of \$50,000 on each of the rape and aggravated sodomy charges. Additionally, he ordered that the rape bond be "cash only." Judge Greene did not disturb the bonds previously set by the magistrate.

On November 7, 1994, the State filed a motion for reconsideration. Judge Oxendine held a hearing on the State's motion on November 14, 1994. During this hearing, Rooney presented no evidence, and the State only recalled Davis, who in essence gave the same testimony that he previously had given. At the hearing's conclusion, after considering Davis's testimony, the transcript of the hearing before Judge Greene and argument from both sides, Judge Oxendine granted the State's motion. By order dated November 14, 1994, he revoked the rape and

aggravated sodomy bonds. Judge Oxendine specifically stated in his order that there was evidence that Rooney raped and sodomized the victim and that there was a risk that Rooney would intimidate witnesses if released on bond. It is undisputed that Rooney had not made bond prior to the time the State filed its motion for reconsideration.

In his sole enumeration, Rooney contends that Judge Oxendine lacked the authority to reconsider Judge Greene's order and that Judge Oxendine erred when he vacated the order and denied bond on the rape and aggravated sodomy charges. We disagree.

Contrary to Rooney's assertion otherwise, this is not a case where one superior court judge has reconsidered and vacated another superior court judge's order. In this case, Judge Greene merely was presiding over a matter pending before Judge Oxendine's court. Moreover, any authority Judge Greene had was given to him by Judge Oxendine. Consequently, any order Judge Greene issued must be viewed as coming from Judge Oxendine's court. Having said this, we hold that the authority to reconsider and subsequently vacate any such order was within Judge Oxendine's sound legal discretion.

Edvalson v. State, 339 Ga. App. 348 (2016).

Thomas Scot Edvalson appeals from an order of the Gwinnett County Superior Court denying his motion to dismiss and plea of former jeopardy. Edvalson asserts that his prosecution is barred by double jeopardy because certain amended bond conditions imposed upon him by the trial court were punitive in nature. Edvalson further contends that because these bond conditions punished him for the indicted crimes, the Double Jeopardy Clause prevents the State from punishing him further, and therefore the State cannot try him for those crimes. Finding that Edvalson has no cognizable double jeopardy claim, we affirm the order of the trial court.

On an appeal from the grant or denial of a double jeopardy plea in bar, we generally review the trial court's oral and written rulings as a whole to determine whether any factual findings contained therein support the trial court's ruling as to whether the defendant was entitled to a plea in bar. But in those cases where the relevant facts are undisputed and no question regarding the credibility of witnesses is presented, we review de novo the trial court's application of the law to undisputed facts.

Honester v. State, 336 Ga.App. 166, 167 (2016) (citations and punctuation omitted). Here, the relevant facts are undisputed and show that Edvalson was arrested in September 2012 on charges of possession of child pornography, and he was subsequently indicted on four counts of sexual exploitation of children, in violation of OCGA § 16–12–100 (b) (8). In November 2012, the trial court granted Edvalson a bail bond which allowed Edvalson to remain free from incarceration while awaiting trial. The trial court's bond order contained two special conditions, with the first condition prohibiting Edvalson from having a computer, smart phone, or other Internet-enabled device in his house. The second condition prohibited Edvalson from having unsupervised contact with any child under the age of 16. On November 5, 2014, the State filed an emergency motion seeking to revoke Edvalson's bond on the grounds that he had violated the first special condition. Two days later, the trial court held a hearing on that motion, at which both Edvalson and his lawyer were present. During that hearing, the State presented the testimony of Detective Jeff Madson, who was a certified forensic computer examiner. Madson's testimony established that since his release on bond, Edvalson had been online; had submitted images of child erotica to at least one website; had been banned from a website for posting child pornography; and had posted a number of comments regarding child pornography, “including sarcastic comments about

certain child pornography laws posted 29 days before the revocation hearing.” *Edvalson v. State*, 298 Ga. 626, 627 (2016).

However, on cross-examination, the detective acknowledged that he had not been inside Edvalson's house or applied for a search warrant for it; that he had no evidence that Edvalson had a computer, smartphone, or internet-enabled [device] in his house; and that he was not alleging that Edvalson had unsupervised contact with anyone under the age of 16 since he posted bond.

Id. at 627.

At the close of the evidence,

[t]he superior court stated that it accepted that Edvalson was the author of the internet posts in question but despite the disturbing nature of the circumstances and the court's concern, it was going to deny the motion to revoke bond because there was no evidence that Edvalson used, or possessed in his home, any of the devices prohibited in the bond or that he violated the terms and conditions as set forth in the bond order. However, the superior court detailed additional conditions of the bond which would then be in force, and stated that the special conditions of the original bond order would also remain in effect.

Id. at 627, 783 S.E.2d 603.

The trial court set forth on the record the additional bond conditions it intended to impose and told Edvalson, “I want it to be very clear, sir, that I don't intend for you to be on the internet at all or using any computer or electronic devices...” Following the hearing, the trial court entered an order adding the following special conditions to Edvalson's bond:

1. [Edvalson] shall not use or otherwise access the internet by any means nor shall he access any online service of any nature.
2. [Edvalson] shall not possess, either directly or indirectly, images in any form depicting a child under 18 years of age.
3. [Edvalson] shall not use or possess a computer, tablet, smart phone, or any other device capable of accessing the internet.

After the trial court denied his motion for reconsideration of the order amending his bond conditions, Edvalson filed a petition for a writ of habeas corpus, “alleging that the additional bond conditions were overbroad, unduly restrictive, and imposed in violation of due process.” *Edvalson*, 298 Ga. at 628. Following a hearing, the trial court denied the petition, and in a decision issued on March 7, 2016, the Supreme Court of Georgia affirmed the trial court. *Id.* at 629. In rejecting Edvalson's claim that the imposition of the amended bond conditions violated his due process rights, the Supreme Court noted that “the superior court had the authority to impose additional reasonable restrictions on Edvalson's behavior as conditions of his pretrial release on bond”; “Edvalson's bond was not revoked and he was not deprived of his freedom by incarceration”; “he had a full and fair opportunity to be heard before his bond was modified”; and the amended bond conditions were neither overbroad nor punitive in nature. *Id.*

While Edvalson's appeal on the writ of habeas corpus was pending, the State re-indicted Edvalson, with the new indictment charging Edvalson with 22 counts of sexual exploitation of a minor. Several months after the new indictment was handed down, Edvalson filed a motion to dismiss and plea of former jeopardy, arguing that the amended bond conditions were punitive, rather than remedial; that the Double Jeopardy Clause bars him from being punished twice for the same crimes; and that because the State could not punish him further for the indicted crimes,

the charges against him should be dismissed. The trial court held a hearing on that motion, and thereafter denied the same. Edvalson now appeals from that order.

The Fifth Amendment's Double Jeopardy Clause “protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense.” *Moser v. Richmond County Bd. of Commissioners*, 263 Ga. 63 (1) (1993). In their respective briefs, both Edvalson and the State focus on the Double Jeopardy Clause's prohibition against multiple punishments, but in doing so, neither party acknowledges the “fundamental principle that an accused must suffer jeopardy before he can suffer double jeopardy.” *Serfass v. U.S.*, 420 U.S. 377, 393 (IV) (1975). Thus, neither party addresses the threshold question presented by this appeal, which is whether jeopardy attached as a result of Edvalson's pretrial bond revocation proceeding. See *Haynes v. State*, 245 Ga. 817, 818 (1980) (“[t]he threshold question to be addressed in any case involving double jeopardy is whether jeopardy has attached to defendant during the proceedings which he contends preclude further prosecution”).

“In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn. In a non-jury trial, jeopardy attaches when the court begins to hear evidence.” *Serfass*, 420 U.S. at 388 (III) (citations omitted). See also *Hoke v. State*, 326 Ga.App. 71, 74 (1) (2014) (although jury had been selected, it had not been sworn, and therefore jeopardy had not attached at the time the court dismissed the jury). Thus, “jeopardy does not attach, and the constitutional prohibition [against double jeopardy] can have no application, until a defendant is put to trial before the trier of facts, whether the trier be a jury or a judge.” *Serfass*, 420 U.S. at 388 (III) (citations and punctuation omitted). Accordingly, jeopardy does not attach at any pretrial proceeding, including a bond revocation hearing. See *Wells v. Stynchcombe*, 231 Ga. 199, 201 (1973) (a pretrial hearing that does not involve a determination as to the guilt or innocence of the accused does not trigger jeopardy); See *Strickland v. State*, 300 Ga.App. 898, 901 (2009) (a hearing on the State's motion to modify the defendant's bond conditions was not a “prosecution[] for the purposes of double jeopardy” and did not cause jeopardy to attach); *Smith v. State*, 171 Ga.App. 279, 282 (1984) (“jeopardy [does] not attach to a preliminary hearing”). Given that Edvalson has not yet suffered jeopardy, he has no basis for asserting a claim of double jeopardy. Moreover, because jeopardy does not attach until the defendant is put to trial, the Double Jeopardy Clause's prohibition on multiple punishments forbids only the imposition of multiple punishments following the defendant's conviction upon one or more of the indicted crimes. See *Whalen v. United States*, 445 U.S. 684, 688 (I) (1980) (a claim that a defendant's sentence violates the double jeopardy clause's prohibition on multiple punishments presents “the question whether punishments imposed by a court *after a defendant's conviction* upon criminal charges are unconstitutionally multiple”) (citations omitted; emphasis supplied). See also *State v. Marlowe*, 277 Ga. 383–384 (1) (2003) (discussing whether the Double Jeopardy Clause requires the merger of the defendant's convictions on multiple crimes, so as to avoid the prohibition on multiple punishments). As Edvalson's petition for habeas corpus implicitly recognized, it is the Fifth Amendment's Due Process Clause, not its Double Jeopardy Clause, that protects a defendant from pretrial punishment. See *Bell v. Wolfish*, 441 U.S. 520, 535–536 (II) (B) (1979) (“under the Due Process Clause, a [defendant] may not be punished prior to an adjudication of guilt in accordance with due process of law”). Thus, the appropriate remedy for pretrial punishment (including bond conditions that are punitive, rather than remedial) is to bring a petition for habeas corpus or other proceeding under the Due Process Clause. See *Edvalson*, 298 Ga. at 628 (noting Edvalson's contention that the amended bond conditions violated his due

process rights because, inter alia, they were “punitive [rather than remedial] in nature”). See also *Jones v. Grimes*, 219 Ga. 585, 587 (1) (b) (1964) (the appropriate remedy for excessive bail is a petition for a writ of habeas corpus).

As the foregoing demonstrates, Edvalson has not suffered jeopardy and therefore he cannot assert a claim of double jeopardy. In reaching this conclusion, we note that three relatively recent decisions from this Court have analyzed a defendant's challenge to the denial of his motion to dismiss and plea of former jeopardy that, like Edvalson's plea in bar, was based on the argument that pretrial bond conditions constituted punishment within the meaning of the Double Jeopardy Clause. See *Alden*, 314 Ga.App. at 440, n. 10 (analyzing defendant's claim that allegedly punitive bond conditions entitled him to a plea in bar and noting that because the defendant had not been tried, and therefore had been neither convicted nor acquitted of the indicted crimes, only the Double Jeopardy Clause's protection against multiple punishments could arguably apply to that claim); *Bozzuto v. State*, 276 Ga.App. 614, 616 (1) (2005) (analyzing defendant's claim that the trial court's imposition of allegedly punitive bond conditions and subsequent revocation of his bond for violating those conditions “subjected him to multiple punishments in violation of ... double jeopardy”). To the extent that either *Alden* or *Bozzuto* can be read as affording a defendant a right to assert a plea of former jeopardy based on any pretrial punishment, including any allegedly punitive conditions imposed on a defendant's pretrial bail bond, those holdings are disapproved. For the reasons set forth above, we affirm the order of the trial court denying Edvalson's motion to dismiss and plea of former jeopardy.

Patel v. State, 283 Ga. App. 181 (2006).

Following his nolo contendere plea to a charge of family violence battery, Viren Patel (represented by counsel) moved to withdraw his plea, which motion the court denied. He appeals pro se, contending that the court erred in...imposing a special condition on his pre-trial bond that precluded him from contacting the victim, revoking his bond for contacting the victim, [and] denying his motion to set aside this revocation....Discerning no error, we affirm.

The undisputed evidence shows that Patel was arrested and charged with one count of family violence battery and two counts of simple battery arising out of an alleged violent encounter with his wife. He was released from jail on a cash bond with the special condition that he “stay away absolutely, directly or indirectly, by person, telephone, messenger or any other means of communication from [his wife].” He acknowledged that “upon a violation of any of these special conditions, my bond may be revoked.”

Alleging that Patel violated this special condition by accompanying his wife to court to have her dismiss a separate temporary protective order against him, the State moved the court to revoke the bond. Following an evidentiary hearing at which Patel was represented by counsel, the court revoked the bond. Two weeks later, Patel (with advice of counsel) negotiated with the State and decided to plead nolo contendere to the family violence battery charge; he was sentenced to thirty days imprisonment plus eleven months probation. Conditions of probation included 20 days of community service plus no violent contact with his wife.

Obtaining a new attorney, Patel timely moved to withdraw his nolo plea, claiming that he was coerced into making the plea and that his sentence was greater than that negotiated. Following another evidentiary hearing, the court denied this motion and later denied a motion to reconsider this ruling. The court further denied Patel's motion to transfer venue and his motion to set aside the order revoking bond. Filing an affidavit of indigence, Patel moved the court to

appoint appellate counsel for him. Based on evidence presented at a third hearing, the court found Patel's testimony of indigence incredible and denied the appointment of appellate counsel. Patel appeals pro se.

Patel's...enumeration claims that the trial court lacked the authority to impose the special bond condition that Patel have no contact with his wife. For offenses involving an act of family violence, OCGA § 17-6-1(f)(2) expressly authorizes special bond conditions that the accused “hav[e] no contact of any kind or character with the victim.” Even without this express statutory authorization, the trial court has inherent authority to impose such conditions when the defendant is charged with a violent crime against a specific victim. This enumeration must fail.

Patel's [next] enumeration charges that the trial court erred in revoking his pre-trial bond. However, since Patel subsequently entered a nolo plea and is now free on supersedeas bond, this issue is moot, particularly since we affirm in Division 4 below the court's judgment denying the withdrawal of that plea.

Moreover, even if the issue were not moot, Patel's argument that no evidence supported the court's order revoking the bond fails. The bond's special condition mandated that Patel “stay away absolutely, directly or indirectly, by person, telephone, messenger or any other means of communication from [his wife].” At the hearing on the bond revocation, one witness testified that Patel admitted (i) he had been communicating with his wife through a mutual friend and (ii) he met with his wife at the courthouse to have her withdraw a temporary protective order against him. Another witness testified that she saw Patel in the clerk's office with his wife and that he sat directly behind her in the courtroom. Thus, some evidence supported the trial court's finding that Patel had violated the special bond condition, which justified the revocation of the bond.

Patel complains that the trial court admitted certain hearsay testimony during the bond revocation hearing. However, even assuming that such evidence was inadmissible hearsay, we note that in hearings where the trial judge is the finder of fact, “there is a presumption, in the absence of a strong showing to the contrary, that the trial judge sifts the wheat from the chaff, ignoring illegal evidence and considering only legal evidence.” (Punctuation omitted.) *Allen v. State*. As no showing to the contrary was made here, we must affirm. See *King v. State*. In his argument on this enumeration, Patel also alleges that the trial court erred in denying his pro se motion to continue the bond revocation hearing. However, this ruling was not enumerated as error in any of Patel's enumerations of error. Therefore, “the arguments in his brief that a [continuance] should have been granted are not before us.

Because the issue is moot and because in any case the court did not err in revoking the bond, Patel's ...enumeration of error fails.

Clarke v. State, 228 Ga. App. 219 (1997).

This is a case of first impression for this Court. Max Clarke challenges the trial court's authority to place conditions on his bail bond and the trial court's authority to revoke bail when he violated those conditions.

Clarke was arrested for committing battery and simple battery on November 18, 1996, on a woman acquaintance. Bail was set on November 22, 1996, in the amount of \$2,500; bail was conditioned upon the following provision: that Clarke “not intimidate, threaten, harass, verbally or physically abuse or harm [the victim]. [Clarke] is to have no contact with [the victim], either ... personal contact or at her place of residence or her place of employment. Do not telephone or

write letters to [the victim]. Do not engage in any type of following or surveillance behavior as described in OCGA § 16-5-90.”

On December 23, 1996, the State filed a motion to revoke the bail bond, asserting that Clarke violated the conditions. Clarke made an oral motion to dismiss the State's motion, asserting that defendants charged with a misdemeanor cannot be denied bail. Following a motion hearing, the trial court denied Clarke's motion to dismiss. Recognizing that this was a case of first impression in Georgia, the trial court granted a Certificate of Immediate Review. This appeal follows.

Clarke first challenges the trial court's power to place conditions on bail in misdemeanor cases absent statutory authority. In support of this enumeration, Clarke asserts that placing such conditions on bail is the same thing as refusing to set bail, and that the Code forbids the trial court from denying bail in a misdemeanor case. OCGA § 17-6-1(b)(1). We find no merit in Clarke's analysis. OCGA § 17-6-1(b)(1) does not require the court to set *unconditional* bail, nor does it invade the judge's discretion as to how much bail may be set. In this case, Clarke was not denied bail; he was, in fact, released on a bail bond prior to his violation of the conditions thereon.

Further, we find that the trial court had inherent authority to place such conditions, which will be upheld by this Court absent an abuse of discretion. The trial court has inherent discretion to release a misdemeanor defendant on his own recognizance pending trial or to require payment of a bail bond. OCGA § 17-6-1(b)(1). However, in lieu of setting a higher bail, which may preclude a defendant from being released at all prior to trial, a trial court may choose to impose reasonable restrictions on a defendant's behavior. When a defendant is charged with a violent crime against a specific victim, it is within the trial court's inherent powers to require that the defendant avoid any contact with the victim as a condition of remaining free pending trial. Such condition is not arbitrary or capricious; it is a reasonable response to the trial court's function of balancing the defendant's rights with the public's safety interests, while avoiding the intimidation of prosecuting witnesses. *Birge v. State*, 238 Ga. 88, 90, 230 S.E.2d 895 (1976). This rule bridges the gap between two seemingly inconsistent statutory provisions: (1) the absolute requirement of bail for committing misdemeanor offenses under OCGA § 17-6-1(b)(1), and (2) the trial court's limited authorization “to release a person on bail if the court finds that the person ... [p]oses no significant threat or danger to any person, to the community, or to any property in the community,” under OCGA § 17-6-1(e)(2).

In actual practice, the monetary bond ensures the defendant's presence at trial, while the conditions protect the victim/witness' safety. Although the Georgia legislature specifically has allowed bond conditions in cases of family violence, stalking, or driving while intoxicated, OCGA § 17-6-1(b)(2)(A), (B); (b)(3); (f)(2), the absence of such statutory authority does not *preclude* such conditions when the trial court, in its discretion, believes the conditions are appropriate and necessary under the facts of the case.

In this case, Clarke was charged with battery against a specific female victim. It was not unreasonable to forbid him from threatening, harassing, stalking, or abusing her as conditions of his release pending trial. There was no abuse of discretion in setting such conditions of bail. Clarke also asserts that the trial court has no authority to revoke his bond following his violation of the bail conditions. However, the trial court has express authority under OCGA § 15-1-3(3) to “compel obedience to its judgments, orders, and process and to the orders of a judge out of court in an action or proceeding therein.” Inherent in such provision is the power to address

wilful violations of court mandates; without such authority, bail bond conditions would be rendered meaningless.

In *Hood v. Carsten*, 267 Ga. 579, 580–581, 481 S.E.2d 525 (1997), the Supreme Court of Georgia stated that they were “unaware of and the parties have not presented any specific guidelines under Georgia law pertaining to a trial court's power to revoke a bond. It is clear that trial courts have such power ...,” as long as the trial courts provide at least minimal due process protection prior to the revocation. (Footnote omitted.) “[C]ourts must be vested with authority to act promptly to protect the victim and enforce the bond conditions imposed.” *Id.* at 582, 481 S.E.2d 525. Notably, *Hood* involved a defendant who was charged with stalking, and there is a specific statutory provision allowing the trial court to impose bond conditions or, if necessary, to deny bail in order to protect the victim. OCGA § 17–6–1(b)(3). However, in Division 1, *supra*, we found that the trial court has the inherent authority to place reasonable conditions on a defendant's bond. Therefore, under *Hood*, it is clear that the trial court also has the authority to revoke the bond if, following a hearing, the trial court determines that the defendant violated those conditions. See also *Fernandez v. United States*, 81 S.Ct. 642, 644, 5 L.Ed.2d 683, 686 (1961) (holding that, even in the presence of an absolute right to bail, “on principle, [trial courts] have authority, as an incident of their inherent powers to manage the conduct of proceedings before them, to revoke bail during the course of a criminal trial, when such action is appropriate to the orderly progress of the trial and the fair administration of justice”).

Further, even absent specific bail bond conditions prohibiting contact with a victim, a trial court's authority to revoke a defendant's bond may be found under OCGA § 17–17–7, which states that the State may move a trial court to revoke a defendant's bond upon a victim's assertion of “acts or threats of physical violence or intimidation by the accused...”¹ Such language clearly indicates a legislative intent to allow bond revocation when necessary to protect the victim from further violence.

In this case, Clarke was charged with battery, and bail was issued with the condition that he stay away from the victim. However, the State asserts that Clarke went to the victim's place of employment and made threatening statements toward third persons regarding the victim; Clarke was arrested after he refused to leave the premises.

On remand, the trial court must conduct a hearing to determine if Clarke's actions constituted a violation of the conditions of his bail bond. If such violation is found, the trial court is authorized to decide whether to revoke Clarke's bail bond, raise the amount of bail, set more restrictive conditions on the bail, or hold Clarke in criminal contempt of court.

Charging Documents

At the end of this chapter, you should be able to answer these questions:

1. How do you pick what kind of charging document?
 - a. Accusation
 - b. Indictment
 - c. Citation
2. What is a general demurrer?
3. What is a special demurrer?
4. What is the benefit of tracking statutory language when drafting charging documents and when does tracking the statutory language create an issue?
5. Referencing specific part of the statute can matter; why?

6. When do dates matter?
7. When do names of victims matter?
8. What crimes can be accused, and what do they have in common?
9. Why is venue important?
10. When do you have to allege prior convictions?

O.C.G.A. § 17-7-50

Any person who is arrested for a crime and who is refused bail shall, within 90 days after the date of confinement, be entitled to have the charge against him or her heard by a grand jury having jurisdiction over the accused person; provided, however, that if the person is arrested for a crime for which the death penalty is being sought, the superior court may, upon motion of the district attorney for an extension and after a hearing and good cause shown, grant one extension to the 90 day period not to exceed 90 additional days; and, provided, further, that if such extension is granted by the court, the person shall not be entitled to have the charge against him or her heard by the grand jury until the expiration of such extended period. In the event no grand jury considers the charges against the accused person within the 90 day period of confinement or within the extended period of confinement where such an extension is granted by the court, the accused shall have bail set upon application to the court.

O.C.G.A. § 17-7-51

All special presentments by the grand jury charging defendants with violations of the penal laws shall be treated as indictments. It shall not be necessary for the clerk of the court to enter the special presentments in full upon the minutes, but only the statement of the case and finding of the grand jury as in cases of indictments. It shall not be necessary for the district attorney to frame bills of indictment on the special presentments, but he may arraign defendants upon the special presentments and put them on trial in like manner as if the presentments were bills of indictment.

O.C.G.A. § 17-7-54

(a) Every indictment of the grand jury which states the offense in the terms and language of this Code or so plainly that the nature of the offense charged may easily be understood by the jury shall be deemed sufficiently technical and correct. The form of every indictment shall be substantially as follows:

Georgia, _____ County.

The grand jurors selected, chosen, and sworn for the County of _____, to wit: _____, in the name and behalf of the citizens of Georgia, charge and accuse (name of the accused) of the county and state aforesaid with the offense of _____; for that the said (name of the accused) (state with sufficient certainty the offense and the time and place of committing the same), contrary to the laws of said state, the good order, peace, and dignity thereof.

(b) If there should be more than one count, each additional count shall state:

And the jurors aforesaid, in the name and behalf of the citizens of Georgia, further charge and accuse (name of the accused) with having committed the offense of _____; for that the said (name of the accused) (state with sufficient certainty the offense and the time and place of

committing the same) contrary to the laws of said state, the good order, peace, and dignity thereof.

O.C.G.A. § 17-7-70

(a) In all felony cases, other than cases involving capital felonies, in which defendants have been bound over to the superior court, are confined in jail or released on bond pending a commitment hearing, or are in jail having waived a commitment hearing, the district attorney shall have authority to prefer accusations, and such defendants shall be tried on such accusations, provided that defendants going to trial under such accusations shall, in writing, waive indictment by a grand jury.

(b) Judges of the superior court may open their courts at any time without the presence of either a grand jury or a trial jury to receive and act upon pleas of guilty in misdemeanor cases and in felony cases, except those punishable by death or life imprisonment, when the judge and the defendant consent thereto. The judge may try the issues in such cases without a jury upon an accusation filed by the district attorney where the defendant has waived indictment and consented thereto in writing and counsel is present in court representing the defendant either by virtue of his employment or by appointment by the court.

O.C.G.A. § 17-7-70.1

(a)

(1) In felony cases involving violations of the following:

(A) Code Sections 16-8-2, 16-8-14, 16-8-18, 16-9-1, 16-9-20, 16-9-31, 16-9-33, 16-9-37, 16-10-52, and 40-5-58;

(B) Article 1 of Chapter 8 of Title 16, relating to theft;

(C) Chapter 9 of Title 16, relating to forgery and fraudulent practices;

(D) Article 3 of Chapter 10 of Title 16, relating to escape and other offenses related to confinement; or

(E) Code Section 16-11-131, relating to possession of a firearm by a convicted felon or first offender probationer,

in which defendants have either been bound over to the superior court based on a finding of probable cause pursuant to a commitment hearing under Article 2 of this chapter or have expressly or by operation of law waived a commitment hearing, the district attorney shall have authority to prefer accusations, and the defendants shall be tried on such accusations according to the same rules of substantive and procedural laws relating to defendants who have been indicted by a grand jury.

(2) All laws relating to rights and responsibilities attendant to indicted cases shall be applicable to cases brought by accusations signed by the district attorney.

(3) The accusation need not be supported by an affidavit except in those cases in which the defendant has not been previously arrested in conjunction with the transaction charged in the accusation.

(a.1) The provisions of subsection (a) of this Code section shall apply to violations of Code Section 16-13-30 whenever there has been a finding of probable cause pursuant to a commitment hearing under Article 2 of this chapter or the accused has waived either expressly or by operation of law the right to this hearing.

(b) Judges of the superior court may open their courts at any time without the presence of either a grand jury or a trial jury to receive and act upon pleas of guilty or nolo contendere in felony and

misdemeanor cases. The judge of the superior court may try the issues in such cases without a jury upon an indictment or upon an accusation filed by the district attorney where the defendant has waived trial by jury.

(c) An accusation substantially complying with the form provided in subsections (d) and (e) of Code Section 17-7-71 shall in all cases be sufficient.

(d) The district attorney may not bring an accusation pursuant to this Code section in those cases where the grand jury has heard evidence or conducted an investigation or in which a no bill has been returned.

(e) Notwithstanding subsections (a) through (d) of this Code section, nothing in this Code section shall affect the rights of public officials to appear before a grand jury as provided in Code Sections 45-11-4 and 45-15-11 or peace officers to appear before a grand jury as provided in Code Section 17-7-52.

O.C.G.A. § 17-7-71

(a) In all misdemeanor cases, the defendant may be tried upon an accusation framed and signed by the prosecuting attorney of the court. The accusation need not be supported by an affidavit except in those cases where the defendant has not been previously arrested in conjunction with the transaction charged in the accusation and where the accusation is to be used as the basis for the issuance of a warrant for the arrest of the defendant.

(b)

(1) In all misdemeanor cases arising out of violations of the laws of this state, relating to
(A) the operation and licensing of motor vehicles and operators;
(B) the width, height, and length of vehicles and loads;
(C) motor common carriers and motor contract carriers; or
(D) road taxes on motor carriers as provided in Article 2 of Chapter 9 of Title 48, the defendant may be tried upon the uniform traffic citation and complaint provided for in Article 1 of Chapter 13 of Title 40.

(2) In all misdemeanor cases arising out of violations of the laws of this state relating to game, fish, or boating, the defendant may be tried upon the summons provided for in Code Section 27-1-35.

(c) Every accusation which states the offense in the terms and language of the law or so plainly that the nature of the offense charged may be easily understood by the jury shall be deemed sufficiently technical and correct.

(d) An accusation substantially complying with the following form shall in all cases be sufficient:

IN THE _____ COURT OF _____ COUNTY STATE OF GEORGIA

On behalf of the people of the State of Georgia, the undersigned, as prosecuting attorney for the county and state aforesaid, does hereby charge and accuse (name of accused) with the offense of _____; for that the said (name of accused) (state with sufficient certainty the offense and the time and place it occurred) contrary to the laws of this state, the good order, peace, and dignity thereof.

/s/

(District attorney)

(Solicitor-general)

(e) If there should be more than one count, each additional count shall state:

The undersigned, as prosecuting attorney, does further charge and accuse the said (name of accused) with the offense of _____ (the offense as before); for that the said (name of accused) (state with sufficient certainty the offense and the time and place it occurred), contrary to the laws of this state, the good order, peace, and dignity thereof.

(f) Prior to trial, the prosecuting attorney may amend the accusation, summons, or any citation to allege or to change the allegations regarding any offense arising out of the same conduct of the defendant which gave rise to any offense alleged or attempted to be alleged in the original accusation, summons, or citation. A copy of any such amendment shall be served upon the defendant or his or her counsel and the original filed with the clerk of the court. On motion, the court shall grant the defendant a continuance which is reasonably necessitated by an amendment. If any additional charges against the defendant are made the judge shall advise the defendant that he or she has an automatic right to a continuance.

O.C.G.A. § 17-7-72

In probate courts which have jurisdiction over misdemeanor possession of marijuana in accordance with Code Sections 16-13-2 and 16-13-30 and certain misdemeanor violations of Code Section 3-3-23 pursuant to Code Section 15-9-30.6, the following offenses may be tried upon a summons or citation without an accusation:

(1) Possession of one ounce or less of marijuana, in accordance with Code Sections 16-13-2 and 16-13-30; and

(2) Any violation of paragraph (2) of subsection (a) of Code Section 3-3-23 which is punishable as a misdemeanor, but not violations punishable as high and aggravated misdemeanors.

Rules for Use of Uniform Misdemeanor Citation, Accusation & Summons

https://www.gasupreme.us/wp-content/uploads/2019/02/Uniform_Misdemeanor_Citation_Rules_FINAL_REVIS ED_07-01-2019.pdf

City of Peachtree City v. Shaver, 276 Ga. 298 (2003).

This Court granted certiorari to the Court of Appeals in *Shaver v. City of Peachtree City*, 253 Ga.App. 212 (2002), to determine whether the Court of Appeals correctly held that a uniform traffic citation, see OCGA § 40-13-1 and the Rules of Department of Public Safety, Rule 570-19-.01, cannot be used as a charging instrument for the non-traffic offense of underage possession of alcohol. See OCGA § 3-3-23(a)(2). The Court of Appeals was incorrect in holding that the uniform traffic citation in this case could not be so used. Accordingly, we reverse.

On September 16, 1999, Eric Shaver (“Shaver”) was arrested for underage possession of alcohol and issued a uniform traffic citation. The uniform traffic citation stated the offense and referred to the Code section alleged to have been violated, OCGA § 3-3-23. According to a stipulation in lieu of a transcript, prior to trial in the municipal court, Shaver objected to the use of the uniform traffic citation, arguing that it was not a valid charging instrument for non-traffic offenses.

The Municipal Court of Peachtree City denied the objection, and Shaver was convicted

and sentenced to pay a fine and serve a period of time on probation. On certiorari, the superior court affirmed the conviction. Shaver sought a discretionary appeal in the Court of Appeals, which granted review. See OCGA § 5–6–35(a)(1). The Court of Appeals reversed the superior court, holding that a uniform traffic citation cannot be used to prosecute the non-traffic offense of underage possession of alcohol, and that consequently the municipal court lacked jurisdiction to try Shaver for the offense of underage possession of alcohol.

Municipal courts, such as the Municipal Court of Peachtree City, are granted jurisdiction “to try and dispose of first offense violations” of possession of alcoholic beverages by a person under 21 years of age. OCGA § 36–32–10(a). And the General Assembly has specifically provided that one charged with the offense of possession of alcoholic beverages by a person under the age of 21 may be arrested upon a citation which shall enumerate the specific charges against the person and either the date upon which the person is to appear and answer the charges or a notation that the person will be later notified of the date upon which the person is to appear and answer the charges. If the person charged shall fail to appear as required, the judge having jurisdiction of the offense may issue a warrant or other order directing the apprehension of such person and commanding that such person be brought before the court to answer the charges contained within the citation and the charge of his or her failure to appear as required. OCGA § 3–3–23.1(d).

Clearly, under OCGA § 3–3–23.1(d), no formal accusation is contemplated, and the defendant may be prosecuted on the citation. Thus, a citation is a proper charging instrument for this offense in municipal court. The only question then, is whether the uniform traffic citation can serve as that charging instrument. OCGA § 3–3–23.1(d) sets forth certain requirements that the instrument must meet, and the uniform traffic citation at issue here met those requirements. The uniform traffic citation named the offense and specifically provided that it was OCGA § 3–3–23 that was alleged to have been violated. The uniform traffic citation also informed Shaver that he was to appear at 8:30 a.m. on October 6, 1999 in the Municipal Court of Peachtree City to respond to the charge, and provided the court's street address. Nothing else is required by OCGA § 3–3–23.1(d).3

Shaver argues that, nonetheless, the uniform traffic citation cannot serve as a citation for this offense because OCGA § 17–7–71(b)(1) limits the offenses for which the uniform traffic citation can be used as a charging instrument, and underage possession of alcohol is not one of them. Shaver particularly points to *State v. Rustin*, 208 Ga.App. 431, 435 (1993), which addressed OCGA § 17–7–71 and stated that “[t]he import of these statutory and regulatory provisions is that a uniform traffic citation and complaint may serve as an accusation *only for traffic offenses*” and is not available to be used as a charging instrument for other, non-traffic offenses. (Emphasis supplied.). However, this reliance is misplaced. *Rustin* addressed OCGA § 17–7–71, which by its own terms does not apply to a municipal court, but only to “superior, state, or county courts.” OCGA § 17–7–71(a). And OCGA § 17–7–71 deals with accusations, not citations, and is silent as to whether the uniform traffic citation can serve as a citation in a non-traffic offense; the uniform traffic citation is only mentioned therein as an exception to the accusation procedure. *Rustin* was also specifically concerned with the amendment of an accusation under OCGA § 17–7–71(f), and no such question is presented here; not only is this prosecution not under an accusation, but there has been no attempt to amend the citation. Thus, *Rustin* is irrelevant as regards any consideration of the use of a uniform traffic citation as a *citation* for a non-traffic offense, and *Rustin's* statement that “a uniform traffic citation and complaint may serve as an *accusation* only for traffic offenses,” does not apply. (Emphasis

supplied.) *Rustin*, supra at 435, 430 S.E.2d 765.

Nor does there appear to be any other impediment to allowing a uniform traffic citation to serve as a citation under OCGA § 3–3–23.1(d). Although the uniform traffic citation was established to create a standard charging instrument for traffic offenses throughout the State, the uniform traffic citation is simply a printed form, promulgated by the Department of Public Safety. Neither the statute authorizing it nor the administrative rule establishing it restrict it to traffic offenses. See OCGA § 40–13–1; Rules of Department of Public Safety, Rule 570–19–.01. The administrative rule simply requires that it “shall be used by all law enforcement officers who are empowered to enforce the traffic laws and ordinances in effect in this State.” Rules of Department of Public Safety, Rule 570–19–.01. And OCGA § 40–13–1 contemplates the uniform traffic citation to be a versatile document, stating that the “form shall serve as the citation, summons, accusation, or other instrument of prosecution of the offense or offenses for which the accused is charged, and as the record of the disposition of the matter by the court before which the accused is brought...” But for the appearance of the words “Uniform Traffic” at the top of the form, the propriety of using the document as a citation under OCGA § 3–3–23.1(d) would not even be an issue. Thus, the appearance of those words does not render it improper as a charging instrument under OCGA § 3–3–23.1(d).

Further, even if the Court of Appeals had been correct in reading *Rustin* as preventing the uniform traffic citation from serving as a charging instrument against Shaver, it applied an incorrect analysis. The Court of Appeals held: “Peachtree City lacked a valid charging instrument. Accordingly, we agree that the municipal court lacked jurisdiction to try Shaver for such offense.” (Citation omitted.) *Shaver*, supra at 213. In no way does the failure to have “a valid charging instrument” equate to a failure of jurisdiction over the case, and the Court of Appeals' reliance on *Weatherbed v. State*, 271 Ga. 736 (1999), for that proposition is misplaced. *Weatherbed* did not deal with a charging instrument that failed for reasons of *form*, but with a prosecution that proceeded on an accusation, when an instrument of entirely different *character*-an indictment-was required. Here there is a charging instrument of the proper character-a citation-and the only possible failing is one of form.

A defendant is entitled to a charging instrument that is perfect in form as well as substance, and the proper method to challenge the form of such instrument is a special demurrer. *State v. Eubanks*, 239 Ga. 483, 485 (1977); *Dennard v. State*, 243 Ga.App. 868, 877(2) (2000). But the standard of review occasioned by the trial court's denial of a special demurrer is harmless error; the question then becomes whether the defense was prejudiced by the incorrect form. *Davis v. State*, 272 Ga. 818, 819–820(1) (2000); *Blackwelder v. State*, 256 Ga. 283, 284(4) (1986). And in no manner did the inclusion of the words “Uniform Traffic” on the citation prejudice Shaver's ability to defend the charge. Thus, even had the Court of Appeals been correct in determining that the charging instrument here was invalid, the conviction still should not have been reversed.

Sexton-Johnson v. State, 354 Ga. App. 646 (2020), *reconsideration denied* (Mar. 19, 2020), *cert. granted* (Dec. 7, 2020).

Count 3 of the indictment charged Sexton-Johnson

with the offense of POSSESSION OF OPEN CONTAINER OF ALCOHOLIC BEVERAGE WHILE OPERATING A VEHICLE (O.C.G.A. 40-6-253) for the said accused ... did possess an open container of an alcoholic beverage ... while operating a

vehicle ... said container was not in the possession of a passenger and was not located in a locked glove compartment, locked trunk, or other locked non-passenger area of the vehicle. ...

Sexton-Johnson contends that “[o]peration of a vehicle contemporaneous with possession of the open container is *not* an essential element of the crime.” She intimates that in order for the State to have charged her sufficiently with an open container violation under OCGA § 40-6-253, the State needed to allege that she possessed the open alcoholic beverage containers in the passenger area of the motor vehicle on the “*roadway or shoulder of [a] public highway.*” OCGA § 40-6-253 (b) (1) (B) provides that “[a] person shall not ... [p]ossess any open alcoholic beverage container in the passenger area of any motor vehicle which is on the roadway or shoulder of any public highway.” We agree.

A general demurrer challenges the validity of an indictment by asserting that the substance of the indictment is legally insufficient to charge any crime. In other words, a general demurrer is essentially a claim that the indictment is fatally defective and, therefore, void, because it fails to allege facts that constitute the charged crime or any other crime, including a lesser included offense of the charged crime.

(Citation and punctuation omitted.) *Everhart*, 337 Ga. App. at 353-354 (3) (a). See also *Coleman v. State*, 318 Ga. App. 478, 479 (1) (2012). A general demurrer “should be granted only when an indictment is absolutely void in that it fails to charge the accused with any act made a crime by the law.” (Citation and punctuation omitted.) *Poole v. State*, 326 Ga. App. 243, 247 (2) (a) (2014).

The Sixth Amendment to the United States Constitution states that criminal defendants shall “be informed of the nature and cause of the accusation against them.” It is established in Georgia that satisfaction of this fundamental principle requires that a criminal indictment which does not recite language from the Code must allege every essential element of the crime charged. (Citation and punctuation omitted.) *Everhart*, 337 Ga. App. at 354-355 (3) (a). As we reiterated in *Everhart*, “there can be no conviction for the commission of a crime an essential element of which is not charged in the indictment. If an accused individual can admit to all of the allegations in an indictment and still be not guilty of a crime, then the indictment generally is insufficient and must be declared void.” (Punctuation omitted.) *Id.* at 355 (3) (a), 786 S.E.2d 866.

Here, Sexton-Johnson could have admitted all the allegations in Count 3 and still not be guilty of a crime. Indeed, it might be possible for one to possess an open container of alcoholic beverage while operating a motor vehicle in a parking lot or driveway and not be guilty of violating OCGA § 40-6-253. Had trial counsel filed a motion to quash the open container charge, asserting that it was subject to a general demurrer, the trial court would have been required to dismiss the charge. “Accordingly, [Sexton-Johnson's] trial counsel's failure to challenge this count constitutes deficient performance, contributed to [her] conviction on a void count, and therefore harmed [her] and prejudiced [her] case.” *Everhart*, 337 Ga. App. at 355 (3) (a). Sexton-Johnson's conviction on Count 3 is therefore reversed.

State v. Delaby, 298 Ga. App. 723 (2009).

The State of Georgia appeals from the trial court's partial grant of Ronald Charles Delaby's special demurrer to an indictment charging him with two counts of influencing a witness pursuant to OCGA § 16-10-93.

This case arises out of the separate criminal prosecution of David Daniel for child molestation. Delaby was employed as a private investigator to assist in Daniel's defense, and in

March 2006, he conducted a recorded interview with the victim, D.K. Daniel's defense team provided the prosecution a tape and transcript of that interview through discovery procedures, and Delaby was subsequently arrested based upon that recording. A Forsyth County grand jury indicted Delaby on April 18, 2008, and he filed his special demurrer on May 7, 2008.

“By [filing a] special demurrer[,] an accused claims, not that the charge in an indictment ... is fatally defective and incapable of supporting a conviction (as would be asserted by general demurrer), but rather that the charge is imperfect as to form or that the accused is entitled to more information.” (Footnote omitted.) *State v. Jones*, 251 Ga.App. 192, 193 (2001). See also *State v. Gamblin*, 251 Ga.App. 283(1) (2001).

The Georgia courts apply a stricter analysis to indictments like Delaby's, to which a special demurrer has been filed before trial, than to special demurrers considered after trial:

Because we are reviewing [an] indictment before any trial, we do not conduct a harmless error analysis to determine if he has actually been prejudiced by the alleged deficiencies in the indictment; rather, we must apply the rule that a defendant who has timely filed a special demurrer is entitled to an indictment perfect in form and substance.

(Footnote omitted.) *Blackmon v. State*, 272 Ga.App. 854 (2005). Under Georgia law, an indictment that “states the offense in the terms and language of [the applicable Code section] or so plainly that the nature of the offense charged may easily be understood by the jury shall be deemed sufficiently technical and correct.” OCGA § 17–7–54(a). The real test, therefore, is not whether the indictment could have been clearer, but whether it states the elements of the offense and “sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.” (Citations and punctuation omitted.) *State v. English*, 276 Ga. 343, 346(2)(a) (2003). Thus, “[i]t is useful to remember that the purpose of the indictment is to allow defendant to prepare his defense intelligently and to protect him from double jeopardy.” (Citations and punctuation omitted.) *Id.*

The applicable statute in this case provides:

It shall be unlawful for any person *knowingly to use intimidation*, physical force, or threats; to persuade another person by means of corruption or to attempt to do so; or to engage in misleading conduct toward another person with intent to ... [i]nfluence, delay, or prevent *the testimony of any person in an official proceeding*.

(Emphasis supplied.) OCGA § 16–10–93(b)(1)(A).

The trial court granted the demurrer as to Count 1 of the indictment, which alleged that on March 31, 2006, Delaby “did knowingly use intimidation with the intent to influence the testimony of [D.K.], in an official proceeding....” The trial court acknowledged that Count 1 tracked the language of the statute and that an indictment tracking statutory language is generally deemed sufficient. See *State v. Austin*, 297 Ga.App. 478 (2009) (“By tracking the statute, the state presented a technically correct allegation.”) (footnote omitted); *Stewart v. State*, 246 Ga. 70, 72(2) (1980). But the trial court also found that “[w]here the statutory definition of an offense includes generic terms, the indictment must state the species of acts charged; it must descend to particulars.” (Citations, punctuation and emphasis omitted.) *Lee v. State*, 117 Ga.App. 765, 766 (1968). The court found that in this context the word “‘intimidation’ must be alleged with greater clearness,” and as alleged, the indictment did not “sufficiently apprise” Delaby of “what he must be prepared to meet at trial.”

The State argues that the trial court erred in granting the demurrer as to Count 1 because the word “intimidation” has been defined by Georgia courts in the context of robbery by

intimidation. But the definition of “intimidation” in that context does not resolve the issue of whether the language of Delaby's indictment was sufficient to apprise him of what he must defend at his trial for influencing a witness. Moreover, the cases upholding indictments for robbery by force or intimidation cited by the State are inapposite. One of the cases considered the validity of an indictment after the defendant had already been convicted. *Ramsey v. State*, 212 Ga. 381(1) (1956). That indictment, therefore, would be subject to a less stringent analysis. Additionally, each of the indictments in those cases provided at least some factual detail to support the crime charged, as each alleged that the defendant took a specific amount of money from the victim violently and by force.

No similarly specific facts appear in the language of Count 1 in this case.

An indictment must sufficiently apprise the defendant of what he must be prepared to meet. “The defendant is entitled to know the particular facts constituting the alleged offense to enable him to prepare for trial.” (Citations omitted.) *State v. Black*, 149 Ga.App. 389, 390–391(3) (1979). Applying this principle in *Military Circle Pet Center No. 94 v. State*, 181 Ga.App. 657 (1987), this Court reversed the denial of a special demurrer, holding that the use of the term “neglect” in an accusation alleging cruelty to animals was generic even though it tracked the statutory language. The Court found that the accusation was required to assert the manner in which the defendants were negligent in order to withstand a special demurrer:

Appellants ... were charged only with causing unjustifiable physical pain, suffering, or death by “neglect,” without specifying the manner in which they were negligent. Since their negligence could have taken many forms, such as failure to provide adequate food and water, physical abuse, failure to treat a disease, etc., the failure to charge the manner in which the crime was committed subjected the accusations to a special demurrer.

Id. at 658(1)(a)

Similarly in this case, the intimidation of a witness could come in a number of ways, none of which is alleged in the indictment. Therefore, we agree with the trial court that the use of the statutory language in Count 1 of the indictment was generic and did not adequately inform Delaby of the facts constituting the offense alleged against him. Because Delaby filed a timely special demurrer, he was entitled to an indictment that was perfect in form and substance. Count 1 of Delaby's indictment failed to meet that standard, and we affirm the trial court's grant of the special demurrer to that count.

Kimbrough v. State, 300 Ga. 878 (2017).

Heather Leigh Kimbrough and Melissa Ann Mayfield were charged by indictment with a violation of the Georgia Racketeer Influenced and Corrupt Organizations (RICO) Act. The indictment alleges that Kimbrough and Mayfield, being associated with an enterprise, violated the Act by participating in the affairs of the enterprise through a pattern of racketeering activity, see OCGA § 16-14-4 (b), and it identifies the alleged enterprise and pattern of racketeering activity. But other than the allegation that Kimbrough and Mayfield participated in the enterprise “through” a pattern of racketeering activity, the indictment says nothing at all about the alleged connection between the enterprise and the racketeering. Seeking more detail about that alleged connection, Kimbrough and Mayfield filed special demurrers. The trial court, however, denied the special demurrers, and Kimbrough and Mayfield appealed.

In *Kimbrough v. State*, 336 Ga.App. 381, 384-386 (2) (b) (i) (2016), the Court of Appeals held that the indictment contains enough detail about the connection between the enterprise and

the racketeering activity to survive a special demurrer, and it affirmed the denial of Kimbrough and Mayfield's special demurrers. We issued a writ of certiorari to review that decision, and for the reasons that follow, we reverse.

In July 2013, a Gwinnett County grand jury returned a 50-count indictment against Kimbrough, Mayfield, Jason Dennis Doerr, and Samantha Shay Downard. Count 1 charges all of the defendants with a violation of the RICO Act, alleging that they, "being associated with an enterprise[,] to wit: Executive Wellness and Rehabilitation, did participate in, directly and indirectly, such enterprise through a pattern of racketeering activity." Count 1 further alleges that the pattern of racketeering activity consists of multiple violations of the Georgia Controlled Substances Act. More specifically, Count 1 alleges that the racketeering activity involved the defendants unlawfully obtaining Oxycodone (a Schedule II controlled substance) by "withholding information from various [medical] practitioners ... that [the defendants] had obtained a controlled substance of a similar therapeutic use in a concurrent time period from another practitioner." See OCGA § 16-13-43 (a) (6). Count 1 says that the pattern of racketeering activity is "more particularly described" in subsequent counts of the indictment, and indeed, nineteen other counts charge various defendants with unlawfully obtaining Oxycodone by withholding information from a medical practitioner. The remaining 30 counts charge various other violations of the Controlled Substances Act. Altogether, the indictment identifies Executive Wellness and Rehabilitation as the enterprise at the bottom of the RICO charge, alleges that the defendants were associated with the enterprise and participated in it "through" a pattern of racketeering activity, and specifies nineteen predicate acts of racketeering that form the alleged pattern of racketeering activity. The indictment says nothing more, however, about the nature of the alleged connection between the enterprise and the pattern of racketeering activity. By their special demurrers, Kimbrough and Mayfield insisted upon greater detail about that connection.

An indictment may be challenged by general or special demurrer. A general demurrer "challenges the sufficiency of the *substance* of the indictment." Green v. State, 292 Ga. 451, 452 (2013) (citation omitted; emphasis supplied). If the accused could admit each and every fact alleged in the indictment and still be innocent of any crime, the indictment is subject to a general demurrer. See Lowe v. State, 276 Ga. 538, 539 (2) (2003). If, however, the admission of the facts alleged would lead necessarily to the conclusion that the accused is guilty of a crime, the indictment is sufficient to withstand a general demurrer. See *id.* A special demurrer, on the other hand, "challenges the sufficiency of the *form* of the indictment." Green, 292 Ga. at 452 (citation and punctuation omitted; emphasis supplied). By filing a special demurrer, the accused claims "not that the charge in an indictment is fatally defective and incapable of supporting a conviction (as would be asserted by general demurrer), but rather that the charge is imperfect as to form or that the accused is entitled to more information." State v. Delaby, 298 Ga.App. 723, 724, 645 (2009)(punctuation and citation omitted).

"Where a defendant challenges the sufficiency of an indictment by the filing of a special demurrer before going to trial, [s]he is entitled to an indictment perfect in form." State v. Grube, 293 Ga. 257, 259 (2) (2013). Even so, an indictment does not have to contain "every detail of the crime" to withstand a special demurrer. State v. English, 276 Ga. at 346 (2) (a) (2003). According to OCGA § 17-7-54 (a), an indictment "shall be deemed sufficiently technical and correct" if it "states the offense in the terms and language of this Code or so plainly that the nature of the offense charged may easily be understood by the jury." Subsection 17-7-54 (a) also requires, however, that an indictment state the offense "with sufficient certainty." Consistent with these statutory directives, we have held that an indictment not only must state the essential

elements of the offense charged, see Henderson v. Hames, 287 Ga. 534, 538 (3) (2010), but it also must allege the underlying facts with enough detail to “sufficiently apprise[] the defendant of what he must be prepared to meet.” State v. English, 276 Ga. 343, 346 (2) (a) (2003) (citation and punctuation omitted). As we have explained, when a court considers whether an indictment is sufficient to withstand a special demurrer, “[i]t is useful to remember that [a] purpose of the indictment is to allow [a] defendant to prepare [her] defense intelligently.” English, 276 Ga. at 346 (2) (a) (citation and punctuation omitted).

Turning to the indictment in this case, Count 1 charges Kimbrough and Mayfield with a violation of OCGA § 16-14-4 (b), which provides that “[i]t shall be unlawful for any person employed by or associated with any enterprise to conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering activity.” An essential element of this offense is a connection or nexus between the enterprise and the racketeering activity. See Dorsey v. State, 279 Ga. 534, 540 (2) (b) (2005) (holding that evidence was sufficient to sustain RICO conviction because there was “a clear connection between the enterprise ... and the predicate acts”). Although Count 1 identifies the enterprise with which the defendants allegedly were associated (Executive Wellness and Rehabilitation) and specifies the alleged racketeering activity through which they participated in the enterprise (unlawfully obtaining Oxycodone by withholding information from medical practitioners), the indictment fails to set forth any facts that show a connection between the enterprise and the racketeering activity, and the nature of that connection is not apparent from the identification of the enterprise, the general description of the racketeering activity in Count 1, or the subsequent counts charging more particularly the predicate acts of racketeering.

To be sure, the indictment alleges that Kimbrough and Mayfield were “associated with” the enterprise and “participated” in it “through” the pattern of racketeering activity. But not knowing whether the enterprise is alleged to be a licit or illicit one, how the defendants allegedly were “associated with” it, or how the alleged racketeering activity relates in any way to the business or affairs of the enterprise, Kimbrough and Mayfield cannot possibly ascertain from the indictment what they must be prepared to meet with respect to proof of the requisite connection between the enterprise and the alleged pattern of racketeering activity. The indictment does not disclose whether the State intends to prove the connection with evidence that, for instance:

- The defendants were clients of Executive Wellness and Rehabilitation and obtained Oxycodone for their own use by unlawfully obtaining prescriptions from medical practitioners employed by the enterprise;
- The defendants were clients of Executive Wellness and Rehabilitation and obtained Oxycodone for shared use at the facilities of the enterprise;
- The defendants unlawfully obtained prescriptions for Oxycodone and filled those prescriptions at Executive Wellness and Rehabilitation;
- The defendants worked for Executive Wellness and Rehabilitation and unlawfully obtained Oxycodone to supply to clients of the enterprise;
- The defendants were vendors or suppliers of Executive Wellness and Rehabilitation and unlawfully obtained Oxycodone for resale to the enterprise;
- The defendants unlawfully obtained Oxycodone, sold it, and used the proceeds to finance other activities of Executive Wellness and Rehabilitation; or
- Executive Wellness and Rehabilitation is an illicit association in fact that exists for the purpose of unlawfully obtaining, possessing, and using controlled substances.

As written, the indictment simply does not give Kimbrough and Mayfield enough information

about the RICO charge to “prepare [their] defense intelligently.” *English*, 276 Ga. at 346.

To be clear, we do not mean to suggest that a RICO indictment must contain pages and pages of extensive detail about the connection between the enterprise and the pattern of racketeering activity. We hold only that the sparse allegations of this indictment—which says *nothing at all* about the nature of the connection—are insufficient to enable the defendants to prepare for trial. Accordingly, the special demurrers ought to have been sustained, and the Court of Appeals erred when it affirmed the denial of the special demurrers. In that respect, the judgment of the Court of Appeals is reversed.

Jackson v. State, 301 Ga. 137 (2017).

In 2004, appellant Prentiss Ashon Jackson entered a negotiated guilty plea to one count of statutory rape, registered with the sexual offender registry, and listed an address in Houston County. He was made aware of the requirement to update his registration information within 72 hours prior to any change of address. Nevertheless, in 2011, he moved to Bibb County without registering his new address within the required period of time. He was indicted, and the caption of the one-count indictment read: “Failure to register as a sex offender.” The body of the count read as follows:

for that the said accused, in the State of Georgia and County of Houston, on or about September 15, 2011, did fail to register his change of address with the Houston County Sheriff’s Office within 72 hours of the change as required under OCGA § 42-1-12, contrary to the laws of said State, the good order, peace and dignity thereof.

During trial, Jackson made an oral general demurrer to the indictment, which the trial court denied. Jackson was convicted by a jury and sentenced to 30 years, serving six years in prison without the possibility of parole and serving the remaining 24 years on probation. Jackson appealed and challenged, among other things, the sufficiency of the indictment against him. The Court of Appeals held the indictment was not fatally defective and affirmed his conviction. See *Jackson v. State*, 335 Ga.App. 597, 598-599 (1) (2016). This Court granted Jackson’s petition for certiorari to examine whether the Court of Appeals erred in finding that the indictment was not fatally defective.

...[I]f the allegation that a statute has been violated were the only essential element required to be set forth in an indictment, and the only test to be applied for judging whether the indictment is fatally defective were whether an accused could admit violation of the statute and yet be not guilty of the alleged offense, all that would be required of an indictment is that it accuse the defendant of being in violation of the referenced statute. But this is not enough.

[S]uch an indictment would not provide the accused with due process of law in that it would not notify the accused of what factual allegations he must defend in court. Nor would it establish what facts the grand jury considered when it determined probable cause existed to charge the accused with a crime. “Unless every essential element of a crime is stated in an indictment, it is impossible to ensure that the grand jury found probable cause to indict.” *Smith v. Hardrick*, 266 Ga. 54, 55 (1) (1995). An indictment that alleges the accused violated a certain statute, without more, would simply state a legal conclusion regarding guilt, and not an allegation of facts from which the grand jury determined probable cause of guilt was shown. Likewise, it would not allege sufficient facts from which a trial jury could determine guilt if those facts are shown at trial. A valid indictment “[uses] the language of the statute, includ[ing]

the essential elements of the offense, and [is] sufficiently definite to advise [the accused] of what he must be prepared to confront.” *Davis v. State*, 272 Ga. 818, 819 (1) (2000).

In sum, to withstand a general demurrer, an indictment must: (1) recite the language of the statute that sets out all the elements of the offense charged, or (2) allege the facts necessary to establish violation of a criminal statute. If either of these requisites is met, then the accused cannot admit the allegations of the indictment and yet be not guilty of the crime charged. In this case, however, neither of these methods for creating a legally sufficient indictment was followed.

The indictment in this case is based upon several assumptions of fact not set forth in the indictment. The caption of the indictment seems to imply that appellant is a convicted sexual offender who was required to register his address. Nevertheless, while the indictment does reference a change of address and that defendant was required to register it with the Houston County sheriff’s office, it does not assert that appellant previously was registered there as a sexual offender and has now established a new address within Houston County, or that appellant has moved from Houston County to an address in another county, or that he has moved to Houston County from an address in another county where he was previously registered. In other words, the indictment does not inform the accused of what alleged action or inaction would constitute a violation of even subsection (f) (5) of the Code section, which subsection was not even referenced in the indictment. Nor does it inform the parties what facts the grand jury considered in arriving at its conclusion that probable cause was shown that the accused committed a specific crime.

Moreover, the offense denominated in the indictment is “failure to register as a sex offender” and the Court of Appeals concluded appellant could not admit he violated the referenced Code section “and still be innocent of the charged offense.” But this simply illustrates the problem with the indictment in this case, since failure to register is not the offense for which appellant was tried. The record reflects that appellant properly registered his original address after his guilty plea conviction; he did not fail to register as required by OCGA § 42-1-12. The evidence presented at trial related to appellant’s *failure to update* his required registration information with a change of address, not an initial failure to register as a sexual offender. Although the indictment in this case cited the statute appellant was accused of violating (OCGA § 42-1-12), and it referenced some of the language of that statute, it did not recite a sufficient portion of the statute to set out all the elements of the offense for which he was tried and convicted. Likewise, the indictment did not allege all the facts necessary to establish a violation of OCGA § 42-1-12 (f)(5).

The case of *Relaford v. State* provides a good example of a legally adequate indictment in a case in which the appellant, a registered sexual offender, was accused and convicted of failing to report an address change when he relocated his residence within the same county in which he initially registered, an offense also covered by OCGA § 42-1-12 (f) (5). One of the counts of the indictment against the accused in *Relaford* read as follows:

[O]n or about April 4, 2007, the exact date being unknown to the grand jurors, after having previously been convicted of Rape ... on November 14, 2000, which conviction required [him] to register as a sexual offender in the county in which he resided, [the accused] did change his Chatham County residence from [stated address], Savannah, Chatham County, Georgia and did fail to notify the Sheriff of Chatham County of such change within 72 hours following such change in violation of Code Section 42-1-12.

Supra, 306 Ga.App. at 550. By contrast, the indictment in this case did not allege appellant was a convicted sexual offender; that he was required as a sexual offender to register his address with

the sheriff of the county in which he resides; that he had previously resided in Houston County and had registered his address with the sheriff of that county; or that he changed his address from one in Houston County to one in another county. It simply alleged that appellant failed to register his change of address with the Houston County sheriff's office within 72 hours as required by law. Only if additional factual allegations had been asserted in the indictment would it be clear what acts or omissions the grand jury had found probable cause to believe the appellant had committed, and what acts or omissions the trial jury would be required to find, beyond a reasonable doubt, that appellant had committed in order to find him guilty as charged.

We conclude the indictment in this case was not sufficient to withstand a general demurrer and was deficient and void. Consequently, appellant's conviction is reversed.

State v. Layman, 279 Ga. 340 (2005).

The appellant, the State of Georgia, appeals from the trial court's order quashing seven counts of an indictment against the appellee, Josh Layman. On appeal, the State contends that the trial court erred by quashing those counts of the indictment on the ground that the indictment did not allege the date of the alleged crimes with enough specificity. For the reasons that follow, we affirm.

On November 10, 2003, Layman was indicted for eight crimes stemming from the death of Cameron Green. Counts 1–7 of the indictment were for the crimes of felony murder, malice murder, armed robbery, hijacking a motor vehicle, aggravated assault, concealing the death of another, and theft by taking of a motor vehicle. All seven of these counts alleged that the crimes occurred between June 30, 2003, and July 19, 2003. Count 8 of the indictment was for the crime of making a false statement, and the indictment alleged that the crime occurred on July 24, 2003. Layman filed a special demurrer to Counts 1–7 of the indictment, contending that the indictment failed to identify the date of the crimes with sufficient particularity. At a hearing on the special demurrer, Agent David King of the Georgia Bureau of Investigation testified that on July 19, 2003, the body of Cameron Green was found in Dawson County, and that he investigated Green's death. Agent King testified that several witnesses had seen Green alive on July 4, and that they had seen Green with Layman on that day. In addition, Agent King testified that Green's father stated that he had talked to his son about 11:00 a.m. on July 4. Moreover, Agent King testified that the remains found were skeletal, and that, based on his experience, Green had been dead about a week when his remains were found. He also added, however, that he was not trained in estimating the time of death; that he could not form an expert opinion as to the time of death; that the autopsy report did not list an estimated time of death; and that no medical examiner had related an estimated time of death to him. The agent also added that Green's black Mercedes automobile was found abandoned on July 8, 2003.

The trial court sustained Layman's demurrer to the indictment, stating that the State could narrow the range of dates on which the crimes allegedly occurred. The State has now appealed.

“Generally, an indictment which fails to allege a specific date on which the crime was committed is not perfect in form and is subject to a timely special demurrer.” However, where the State can show that the evidence does not permit it to allege a specific date on which the offense occurred, the State is permitted to allege that the crime occurred between two particular dates. Layman contended below, and the trial court agreed, that where the State was reasonably capable of narrowing the range of dates alleged in the indictment, it must do so. Although we can find no case exactly on point, we agree with the trial court's conclusion. First, the conclusion is consistent with the general rule that an indictment must be perfect in form and must allege a

specific date on which the crime was committed. Moreover, it is consistent with OCGA § 17-7-54, which provides that the indictment must state with “sufficient certainty” the date of the offense. In addition, if the State alleges a certain range of dates in an indictment, and, at trial, proves that the crimes occurred outside that range of dates, the State generally is not harmed. In this regard, the State is not restricted at trial to proving that an offense occurred on the date alleged in the indictment when the indictment does not specifically allege that the date of the offense is material. And, if there is a variation between the date alleged and the date proved at trial, the variance does not entitle a defendant to a new trial unless it prejudiced the defense.

Accordingly, we conclude that, if an indictment alleges that a crime occurred between two particular dates, and if evidence presented to the trial court shows that the State can reasonably narrow the range of dates during which the crime is alleged to have occurred, the indictment is subject to a special demurrer.

Applying this rule in the present case, we conclude that the evidence at the hearing on the demurrer showed that the State reasonably could narrow the range of dates during which the indictment alleged the crimes were committed. In this regard, the evidence showed that several witnesses, including the victim's father, stated that the victim was alive on July 4. Moreover, as for the crimes involving the victim's car, the evidence showed that the car was found abandoned on July 8, 2003. Thus, it is reasonable to assume that the crimes concerning the car occurred on or before that date. Moreover, as for the July 19, 2003, end date alleged in the indictment, the evidence at the hearing established that Green had been dead for some significant period of days before his body was discovered.

For these reasons, we conclude that the trial court properly granted Layman's special demurrer to the indictment.

State v. Grube, 293 Ga. 257 (2013).

In October 2009, a Catoosa County Sheriff's deputy pretending to be a 14-year-old girl named Tiffany posted a listing on an Internet website indicating she was looking for something fun to do over an upcoming holiday weekend. Appellant Timothy Grube, then a 27-year-old male, responded to the post and subsequently exchanged numerous e-mail communications with undercover officers who were posing as Tiffany. Grube ultimately arranged to meet Tiffany, whom he believed to be a 14-year-old girl, for the purpose of engaging in sexual relations. He was arrested by police when he arrived at the agreed upon meeting place.

Grube was indicted on charges of computer pornography, attempted aggravated child molestation and attempted child molestation. See OCGA § 16-6-4(a) and (c); OCGA § 16-12-100.2(d). The trial court determined all three counts of the indictment were deficient because each failed to identify the victim of the alleged crimes. The State filed a second indictment charging Grube with the same crimes but amended the language used so as to identify the victim as “ ‘Tiffany,’ a person believed by the accused to be a child” and “ ‘Tiffany,’ a person he believed to be a 14-year-old girl.” Grube filed a special demurrer to the second indictment, again asserting the indictment failed to sufficiently identify the victim. The trial court agreed, and the indictment was dismissed.

After the Court of Appeals affirmed, *State v. Grube*, 315 Ga.App. 885 (2012), we granted the State's petition for certiorari to determine whether the Court of Appeals erred by finding the second indictment insufficient to withstand a special demurrer. We now reverse the judgment of the Court of Appeals.

The test of the constitutional sufficiency of an indictment

is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

State v. English, 276 Ga. 343, 346 (2003), quoting *Snider v. State*, 238 Ga.App. 55, 58 (1999).

Where a defendant challenges the sufficiency of an indictment by the filing of a special demurrer before going to trial, he is entitled to an indictment perfect in form. *South v. State*, 268 Ga.App. 110, 110–11 (2004). See OCGA § 17–7–54.

Count one of the indictment charges Grube with the crime of computer pornography under OCGA § 16–12–100.2(d)1 in that

between the 9th day of October, 2009, and the 25th day of October, 2009, Grube did intentionally utilize a computer Internet service to attempt to lure and entice “Tiffany,” a person believed by the accused to be a child, to commit child molestation and aggravated child molestation.

In count two, Grube is charged with attempted aggravated child molestation in the following manner:

on the 25th day of October, 2009, Grube did attempt to commit the crime of aggravated child molestation ... in that he did knowingly and intentionally perform acts which constituted a substantial step toward the commission of said crime in that he did engage in explicit communications with “Tiffany,” a person he believed to be a 14–year–old girl, describing his desire to engage in oral sodomy with said 14–year–old girl, arrange a meeting with her, and arrived at said meeting place.

Count three alleges Grube committed the crime of attempted child molestation when

on the 25th day of October, 2009, Grube ... did knowingly and intentionally perform acts which constituted a substantial step toward the commission of said crime in that he did engage in explicit communications with “Tiffany,” a person he believed to be a 14–year–old girl, describing his desire to engage in sexual intercourse with her, arrange a meeting with her, and arrived at said meeting place with condoms.

All three counts follow in large part the language of the statutes Grube is charged with violating, set forth the dates of the alleged crimes, and set forth with particularity the acts constituting the offenses so that Grube may prepare a defense. The only deficiency Grube alleges is that each of the counts fails to more precisely identify the victim. In response, the State concedes that as a general rule an indictment for offenses against a particular person should identify the victim by providing the victim's name but argues that identification of the victim as Tiffany, the only name by which Grube knew the victim and by which he could identify a specific set of communications, is sufficient under the facts of this case....

The requirement that an indictment identify the victim of a crime against a person serves these same purposes and does so best when it provides the full and correct name of the victim. *Irwin v. State*, 117 Ga. 722 (1903) (indictment should name victim by correct name, if known, or some name by which the victim is generally called). Because this cannot be accomplished in every circumstance, however, our cases allow for identification of the victim by the name by which he or she is generally known, always keeping in mind that the constitutional purpose for identifying the victim is to apprise the defendant of the charges against him. See *Irwin*, supra,

117 Ga. 722.

Application of these criteria is not altered, but is informed, by the fact that a defendant's criminal conduct is revealed through the use of an Internet “sting” operated by law enforcement. In such cases, the undercover officer may be the person against whom a defendant's conduct is directed, but the defendant knows the officer only by the fictitious persona, alias, or on-line moniker created for purposes of the investigation. A requirement that the officer's true identity be included in the indictment would do nothing to further the goal of apprising the defendant of what he must be prepared to meet at trial. Rather, meaningful notice of the specific conduct forming the basis of the criminal charges in such cases is provided if the victim is identified by the alias or name by which he or she is known to the defendant.

This conclusion is consistent with our holdings in other cases challenging the manner in which an indictment identifies the victim or defendant. Addressing similar due process concerns, courts in cases involving an alleged variance between the indictment and proof at trial or misnomer in the indictment consistently have concluded that the notice provided by use of an alias or other name by which a victim or defendant is generally known is constitutionally sufficient. *Allen v. State*, 231 Ga. 17(1) (1973) (where accused is known by different names, indictment may identify accused by all such names as alias dictus); *Andrews v. State*, 196 Ga. 84(9) (1943) (indictment may identify defendant by alias or other name by which he is generally known); *Cockrell v. State*, 248 Ga.App. 359, 361(2) (2001) (defendant apprised of charges against him where victim identified in indictment by fictitious name); *Bland v. State*, 182 Ga.App. 626, 627 (1987) (defendant definitely informed as to charges where indictment identified victim by use of nickname); *Bennett v. State*, 107 Ga.App. 284(1) (1963) (grand jury may indict an accused using alias). We see no legal reason to distinguish these cases with regard to notice under the Due Process clause and hold that identification of a victim by use of an alias or other name by which the victim is generally known sufficiently informs a defendant of the victim's identity and apprises the defendant of the nature of evidence he or she must be prepared to meet. This is especially true when identification of the victim is accompanied by language which highlights or explains the use of the alias or alternative name.

Here, the indictment identifies the victim as “Tiffany, a person believed by the accused to be a child.” Because Tiffany is an alias used by undercover officers engaged in a sting operation, the State properly relied upon the partial name by which she was known to Grube to identify her and the set of communications on which the charges are based. The State supplemented this description with language indicating that Tiffany was not an actual child/person, information which explains the absence of a full name and allows Grube to prepare his defense at trial. While the better practice may have been for the indictment to include both the alias by which Grube knew the victim and the fact that Tiffany was an alias or a fictitious persona created by undercover officers, the indictment as drafted apprises Grube of the essential elements of the charges against him, identifies the victim by the only name by which the victim is generally known to him, and informs him that Tiffany is not a 14-year-old girl. That the victim may also have been a fictitious persona created by an undercover officer is a fact to be proved at trial, and its absence from the indictment is not a material defect.

The second criteria of a valid indictment, protecting a defendant from double jeopardy in a possible future proceeding, is similarly met by the instant indictment. Because the indictment not only informs Grube that the charges arise out of conduct directed toward Tiffany but also sets out the dates on which the alleged conduct took place and with respect to Counts 2 and 3, informs him with some precision of the content of the alleged communications, it cannot

reasonably be argued that he is not protected from the dangers of double jeopardy. This is especially true because Grube will be free to use other parts of the record in this case to distinguish charges brought against him in a potential future proceeding.

State v. Wyatt, 295 Ga. 257 (2014).

Appellee John Randall Wyatt was indicted in Gwinnett County on seven charges related to the death of two-year-old Andrea Marginean. After the trial court granted his special demurrers on four of the counts, the State filed this interlocutory appeal. We reverse.

On the morning of April 11, 2009, Wyatt, who was then 29 years old, was babysitting Andrea and her two brothers, aged four and six. He had been babysitting the three children regularly for the past several months. When their mother, Nicole Marginean, got home around 1:00 p.m. that day, Andrea was essentially unresponsive, and Ms. Marginean took her to a local hospital. Andrea died three days later.

After taking Andrea to the hospital, Ms. Marginean called Wyatt and told him the police were looking for him....At first Wyatt told the officers the following: When he awoke around 9:00 a.m. that morning, he checked on Andrea, discovered that her diaper was overflowing with feces, and took her to the bathroom to clean her off and change her diaper. She did not like taking baths and began screaming on the way to the bathroom. In the bathroom, Wyatt laid Andrea down on the tile floor, reasoning that the tile would be easier to clean, but she would not remain still and began banging her head on the underside of the toilet. He grabbed her to hold her down but then had difficulty reaching the water. This continued for some time, with Wyatt trying to clean and calm Andrea and her banging her head on the floor, the toilet, and the tub. Once she was clean, Andrea stood up on her own, Wyatt helped her put on her pants, and he then carried her back to her bedroom where she fell asleep. Later, he checked on her and discovered that her breathing was labored. He began CPR in an attempt to remove the phlegm he believed was obstructing her breathing. Ms. Marginean returned home at that point and took Andrea to the hospital.

After the officers told Wyatt that his story was inconsistent with the injuries the doctors had found on Andrea, Wyatt changed his account, saying that before the diaper incident Andrea had been disobeying him and sliding down the stairs on her back. After she slid down the stairs twice, he grabbed her and took her to the bathroom, and it was then that she defecated on herself and him. He first maintained that everything else he had said was true, but he then admitted that while he was trying to calm Andrea down in the bathroom, he hit her on the head once or twice with an open hand.

On August 19, 2013, the trial court held a hearing, at which the State introduced, without objection, reports from the hospitals where the victim was treated and from the medical examiner. The hospital reports showed that the doctor at the local hospital to which Andrea was first taken noticed extensive bruising on several parts of her body and ordered a head CT scan, which showed a large subdural hematoma. Andrea was then flown to a hospital in Atlanta, where doctors performed emergency surgery, which proved to be unsuccessful; Andrea was pronounced dead three days later. The medical examiner's report concluded that the cause of death was "closed head trauma with subdural hematoma, delayed effects" and that the manner of death was homicide. The report also said that "surgical intervention, producing associated hemorrhage within the scalp, confounds the assessment of the presence or absence of an impact site."

At the demurrer hearing, the State argued that the indictment was sufficiently specific and that it was permitted to allege in Count 5 that the object with which Wyatt assaulted Andrea was unknown because her head could have been hit by “the toilet or the tub or by the defendant’s own hand.” On August 23, 2013, the trial court summarily granted Wyatt’s special demurrers to Counts 1, 2, 4, and 5. The State requested a certificate of immediate review, which the trial court granted, and then filed an application for interlocutory appeal, which this Court granted to consider whether those four counts as indicted were sufficient to put Wyatt on notice as to what he must defend against at trial.

Wyatt’s special demurrers are based on his contention that the aggravated assault accusation, which states that the object used to assault the victim is unknown and is silent as to how the object was used, and the aggravated battery accusation, which is silent as to the way in which the battery was committed, do not allow him to prepare for trial on those charges and their corresponding felony murder charges. We will consider each felony murder count and its underlying felony count together, and examine whether the entirety of the indictment provides sufficient detail about the crimes Wyatt is accused of committing. See *Hester v. State*, 283 Ga. 367, 368 (2008) (“[The rule that] each count must be wholly complete within itself applies only to the essential elements of the crime, and not to the form of the indictment or to factual details alleged therein. The indictment must be read as a whole.” (citations omitted)).

(a) *Aggravated Assault*

Count 5 charges Wyatt with aggravated assault, alleging that on April 11, 2009, he “unlawfully ma[d]e an assault [on Andrea] with an object the exact nature of which is unknown to the members of the Grand Jury, which when used offensively against another person is likely to result in serious bodily injury.” Count 2, charging felony murder based on aggravated assault, adds that the assault “cause[d] bleeding to and damage to [Andrea’s] brain.” Wyatt argues that the lack of detail about the dangerous object he allegedly used and the manner in which he used it leaves him without adequate notice of what he must defend against at trial. The State argues in response that the indictment is as specific as it can be because the nature of Andrea’s head wounds and the surgery performed in the attempt to save her life make it impossible to determine the exact nature of the object that inflicted her injuries. We conclude that there is no basis under our precedent to grant a special demurrer on Counts 2 and 5.

Wyatt is charged with aggravated assault under OCGA § 16–5–21(a)(2), which is defined as an assault “[w]ith a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury.” An indictment charging aggravated assault must allege the element that aggravates the crime above a simple assault, in this case the use of a deadly weapon or dangerous object. See *Simpson v. State*, 277 Ga. 356, 358 (2003) (“[A]n indictment for aggravated assault should ... allege the aggravating aspect of the simple assault.”). See also *Lizana v. State*, 287 Ga. 184, 185–186 (2010).

This Court has held, however, that an indictment under OCGA § 16–5–21(a)(2) “need not ... specify the manner in which the defendant committed the simple assault, when that is a lesser included offense within the greater offense of aggravated assault.” *Simpson*, 277 Ga. at 358. See also *Chase v. State*, 277 Ga. 636, 638 (2004) (“It is not necessary that an indictment charging a defendant with aggravated assault specify the manner in which the simple assault was committed, but it must set forth the aggravating aspect.”). Likewise, the indictment need not say how the defendant used the weapon or object that aggravated the assault. See, e.g., *Arthur v.*

State, 275 Ga. 790, 791 (2002) (affirming the denial of a special demurrer because, “by alleging [the defendant’s] general use of a gun, the State apprised him that he would have to defend against all of the possible ways of committing the assault that he himself had admitted in his statement”); *Watson v. State*, 178 Ga.App. 778, 780 (1986) (concluding that an indictment charging that the defendant assaulted the victim “with a metal pipe,” without specifying how the pipe was used, was sufficient).

Furthermore, while an indictment under OCGA § 16–5–21(a)(2) must allege that the assault was committed with a deadly weapon or an object that was likely to or actually did result in serious bodily injury, the indictment is not required to identify the exact weapon or object used if the circumstances of the case do not allow such specificity. We have held that alleging that the object used to commit the aggravated assault is unknown can be “sufficiently definite to advise [the defendant] of what he must be prepared to confront.” *Johnson v. State*, 286 Ga. 432, 433–434 (2010) (involving an indictment alleging that the defendant assaulted the victim with “hands and an object, the description of which being unknown”). That holding is consistent with cases involving indictments for malice murder, where we have explained that “[a]n indictment failing to specify the cause of death is sufficient when the circumstances of the case will not admit of greater certainty in stating the means of death.” *Hinton v. State*, 280 Ga. 811, 815–816 (2006) (quoting *Phillips v. State*, 258 Ga. 228, 228, 367 S.E.2d 805 (1988)) (punctuation omitted). “The state cannot be more specific than the evidence permits.” *Eberhardt v. State*, 257 Ga. 420, 421 (1987) (citation omitted).

Wyatt suggests that the first indictment’s allegation that he caused Andrea’s injuries by striking her “against a hard object” demonstrates that the evidence allows the State to be more specific in identifying the object used. But “hard object” was hardly a precise description in the first place, and the State and the grand jury were not precluded from determining, after re-examining the evidence, or obtaining additional evidence, that the specific object used to damage Andrea’s brain cannot be proved. In that case, alleging that the object which caused her fatal injuries is “unknown” is more accurate and provides better notice of how the State plans to prove the aggravated assault at trial.

Based on the indictment he will defend against at trial, Wyatt knows that the State intends to prove that on April 11, 2009, a day when Wyatt admits Andrea was in his custody, he used an object that is likely to result in serious bodily injury when used offensively to fatally injure her by causing damage to her brain. Wyatt also knows that the State claims not to know—and thus does not intend to prove—what specific object he used to assault Andrea. That is sufficient notice for Wyatt to prepare a defense to the charges of aggravated assault and felony murder based on aggravated assault—notice that may be supplemented, of course, by the pretrial discovery he receives and any investigation his counsel conducts. If at trial the State proves the case differently, definitively specifying the object used to assault Andrea, then Wyatt might raise a claim of fatal variance between the allegations in the indictment and the proof at trial, but that is a different claim than the one now before us. For these reasons, the trial court erred in granting Wyatt’s special demurrers as to Counts 2 and 5.

(b) *Aggravated Battery*

Count 4 alleges that on April 11, 2009, Wyatt “unlawfully and maliciously caus[ed] bodily harm to [Andrea] ... by rendering useless a member of her body, to wit: her brain, by causing bleeding to and damage to the brain.” Count 1 charges felony murder based on that aggravated battery. Wyatt contends that the State should have alleged the acts that constituted the aggravated battery, not just the resulting injury. The State responds that, just as it cannot specify

the object used to assault Andrea, it cannot specify the manner in which Wyatt committed aggravated battery against her, because the nature of her brain injuries and the attempts to treat them obscured the source of those injuries. We conclude that even if the State could determine the specific manner in which the aggravated battery was perpetrated, it was not required to include that detail in the indictment.

Aggravated battery is defined as “maliciously caus[ing] bodily harm to another by depriving him or her of a member of his or her body, by rendering a member of his or her body useless, or by seriously disfiguring his or her body or a member thereof.” OCGA § 16–5–24(a). The manner in which the defendant caused one of these three kinds of bodily harm is not an element of the offense, but Wyatt maintains that the indictment must nevertheless allege the way in which he rendered Andrea's brain useless so that he can adequately prepare his defense. As best we can tell, Georgia's appellate courts have never before decided whether the manner of an aggravated battery must be alleged in an indictment in order to survive a special demurrer. Long ago, however, this Court addressed the level of specificity required in an indictment for the lesser included offense of battery, concluding that allegations of battery need not be specific: [A]n indictment for assault and battery is expressed in more general terms, and simply alleges that on a given day, in the county, the defendant, with force and arms, committed an assault upon another named person, and then and there unlawfully beat, bruised and ill-treated him. The exact manner and means of the battery are left to be developed by the evidence. A battery may be committed in ways innumerable, and the indictment will apply to one way as well as another. *Hill v. State*, 63 Ga. 578, 583 (1879). See also *Bard v. State*, 55 Ga. 319, 320 (1875) (explaining that for purposes of an indictment for assault or assault and battery, allegations that the defendant “with force and arms, and a knife, a weapon likely to produce death, in and upon [the victim] ... did make an assault,” provided “a full description of [the] offense”).

In accordance with this precedent, the indictment's allegation that Wyatt “unlawfully and maliciously cause[d] bodily harm” to Andrea, particularly when read in conjunction with the charge of aggravated assault, provided all the detail required to charge battery, and we see no reason to require a charge of aggravated battery to detail the manner of the underlying battery with greater specificity. The element that distinguishes *aggravated* battery is not the *way* the battery was committed, but rather the resulting *injury*, and here the indictment properly identified the injury by alleging that Wyatt caused bleeding and damage to Andrea's brain, rendering it useless. As with aggravated assault, what must be specified is the fact that aggravates the crime.

Thus, like the counts alleging aggravated assault, the counts alleging aggravated battery sufficiently apprise Wyatt of what he must defend against at trial. He knows that the State will contend that he maliciously caused damage to Andrea's brain on April 11, 2009, and that such damage rendered her brain useless; under the circumstances of this case, he is entitled to no more.⁸ Accordingly, the trial court also erred in granting the special demurrers as to Counts 1 and 4.

Townsend v. State, 357 Ga. App. 111 (2020), *reconsideration denied* (Oct. 15, 2020).

Following a jury trial, Quentin Townsend was convicted of three counts of theft by taking and one count of forgery in the first degree. He now appeals, arguing that the trial court erred in failing to merge his convictions, and that his order of restitution must be vacated. Although we affirm the trial court's order awarding restitution, and conclude that the convictions for theft by

taking and forgery do not merge, for the reasons that follow, we vacate Townsend's convictions and sentences for theft by taking, and remand the case for the trial court to merge these convictions so that only one theft by taking conviction remains and resentence Townsend accordingly. On remand, the trial court must also correct a scrivener's error in the restitution order.

Viewing the evidence in the light most favorable to the verdict, *Jackson v. Virginia*, 443 U. S. 307 (1979), the record shows that the two victims were interested in opportunities for ownership of minor league basketball teams. An acquaintance suggested that they contact Townsend, who owned another minor league team with his wife. Ultimately, the victims met with Townsend and decided to invest money for an interest in an Atlanta team. The victims formed Jayhawk Development, LLC, to handle the business related to this investment. Not long after this initial collaboration, the victims decided they wanted to move to ownership of a team in a different minor league, the NBA D-League ("NBADL"), and they discussed the options with Townsend. Townsend told the victims that he knew people in the NBADL and that they needed to put together an application to submit to the league. Townsend told them that the fee to obtain a team license was \$1 million, but that they would only have to put in \$500,000 if they could get a major league team to sponsor them. Townsend then suggested that they put up a significant amount of funds as a show of good faith. For their 20 percent share of the team, the victims would need to offer \$200,000.

In January 2008, the victims gave Townsend \$40,000 toward their ownership interest. Townsend told them that he was in contact with the NBADL and the Atlanta Spirit, the owners of the Atlanta Hawks, and he gave the victims a NBADL ownership application to complete. Townsend also showed them a letter that appeared to be from a member of the NBADL operations department setting out all of the financial obligations and the expected operating budget for ownership of a team.

Based on that letter, in February 2008, the victims gave Townsend another \$60,000 toward their ownership interest in a NBADL team. However, they later learned that no major league team would sponsor them, and as a result, Townsend told the victims that they would need to proffer their share of the entire \$1 million to show they were serious about bringing a NBADL team to Atlanta. In June 2008, the victims gave Townsend another \$100,000. Townsend's deception continued over the summer of 2008 when he told the victims that members of the NBADL leadership were coming to Atlanta and that he would be meeting with them to discuss the victims' NBADL application. In reality, the NBADL had never given Townsend approval to move forward with the process to obtain a NBADL team, and the purported letter from the operations manager that Townsend showed the victims was fake. And Townsend never actually submitted the victims' ownership application to the NBADL. Eventually, the victims realized that Townsend was attempting to defraud them, and they contacted police and filed a civil suit against him. When he learned of the suit, Townsend agreed to reimburse the victims, and he signed a consent judgment in the civil case. Nevertheless, he failed to repay the money.

Based on this scam, Townsend was indicted for three counts of theft by taking and a single count of forgery arising from the fake NBADL letter. Following a trial, at which Townsend testified, the jury convicted him of all counts.

With respect to his theft by taking convictions, Townsend argues that the offenses in Counts 1 and 2 merge because they involve the same crime committed on different dates, but the

date was not made a material element. We are constrained to agree.

It is a longstanding principle of Georgia law that a date or range of dates alleged in an indictment, without more, is not a material allegation of the indictment, and, consequently, unless the indictment specifically states that the alleged dates are material, the State may prove that the alleged crime was committed on any date within the statute of limitation. Thus, such an averment of materiality is necessary to overcome a plea of double jeopardy to a subsequent charge of committing the same act on a separate date. *To make such dates a material allegation, the indictment must “specifically allege” that the date of the offense is material.*

(Citations and punctuation omitted; emphasis supplied.) *Thomas v. State*, 352 Ga. App. 640, 642 (1) (a) (2019).

In Counts 1, 2, and 3 of the indictment, Townsend was charged with taking an amount over \$500 from the victims on three different dates. Specifically, the indictment alleged that, on separate dates, Townsend

did unlawfully take a sum of United States currency, the property of [the victims], with a value exceeding \$500.00, with the intention of depriving said owner of said property, *this count not included in any other count of this indictment*[.]

(Emphasis supplied.)

The State contends that this language is sufficient to make the date material and to protect Townsend from double jeopardy concerns. In light of our recent decision in *Thomas*, we are constrained to conclude otherwise. *Thomas*, 352 Ga. App. at 642-643 (1) (a) (“[N]umerous cases hold that if the counts in the indictment are identical except for the dates alleged, and the dates were not made essential averments, only one conviction can stand.”) (citation and punctuation omitted). Here, as in *Thomas*, the allegations in the indictment failed to particularize the dates, such as by specifying the amount of money taken on each occasion, and therefore, the date was not a material element in the indictment. See *id.* at 643 (1) (a). See also *Brown v. State*, 355 Ga.App. 308, 313 (3), 844 S.E.2d 182, 189 (3) (2020) (date was a material averment where indictment alleged “said date being a material element of the offense”).

We have never opined what language is required to make the date material in the absence of express language stating that it is. But, we conclude that simply stating that the offenses in each count are “not included in the other counts” does not “specifically allege” that the date is material. See *Hunt v. State*, 336 Ga. App. 821, 825 (1) (b) (2016) (convictions merged despite language in indictment that the second count occurred on an “occasion different” or “on a different date” than the first count).

As a result, Townsend is correct that his convictions for theft by taking must merge. And, as the sentences imposed on each count were to run consecutively, we must vacate the sentences and remand with instructions to merge the three theft offenses and resentence Townsend for only one theft conviction, in addition to the forgery conviction.

Marlin v. State, 273 Ga. App. 856 (2005).

A Tift County jury convicted Eugene Marlin of armed robbery. The trial court denied Marlin's motion for a new trial. Marlin appeals, contending that his attorney was ineffective and that there was insufficient evidence to support his conviction. For the reasons that follow, we affirm.

On appeal, we view the evidence in a light most favorable to the jury's verdict, and the

defendant no longer enjoys a presumption of innocence. “We do not weigh the evidence or decide the witnesses' credibility, but only determine if the evidence is sufficient to sustain the convictions.” Accordingly, the evidence shows that on December 17, 2001, Marlin entered the South Georgia Bank in Tifton and approached teller Dawn Marchant. He showed Marchant a note which said “stay calm, I have a gun. I will shoot you. Give me all your fifties and hundreds or I'll shoot everybody in here.” Marlin had a hand under his shirt, and Marchant believed he had a gun. She gave him all the fifties and hundreds she had, because she thought he would shoot if she did not. These events were captured on the bank's surveillance cameras, and the footage was shown to the jury. Marchant and another teller identified Marlin as the perpetrator in a lineup and at trial.

Marlin fled in a Mercury Marquis, which was subsequently recovered by police. Fingerprints taken from the bank and the car matched Marlin's fingerprints. After his arrest, Marlin's mother came to the police station, and Marlin asked her to retrieve some clothing from his car. A detective went with her, and saw amongst the clothing a t-shirt similar to the one worn in the robbery. He obtained a search warrant and retrieved the t-shirt, which was gray with a picture of Mark Twain smoking a cigarette. Marlin's sister-in-law testified she had given him the shirt, and it was the same as the one worn by the perpetrator in the surveillance pictures from the bank. A search of Marlin's residence produced other items similar to ones worn by the perpetrator during the robbery.

The indictment charged Marlin with taking “United States Currency [which is] the property of South Georgia Bank, from the immediate presence of [Marchant].” Marlin contends that this description was not specific enough, and, therefore, counsel should have filed a demurrer to the indictment seeking to have it dismissed or amended. He asserts that her failure to do so was ineffective assistance of counsel, which warrants reversal of his conviction. We disagree.

A demurrer, even if filed by counsel, would not have been granted, because the indictment sufficiently described what was stolen. When theft is alleged, the description of the stolen property should be simply such as, in connection with the other allegations, will affirmatively show the accused to be guilty, will reasonably inform him of the transaction charged, and will put him in a position to make the needful preparations for his defense. It is not essential to a charge ... that the indictment do more than inform the accused generally of the items which it is contended were taken. The indictment here was detailed enough for Marlin to understand what he was alleged to have taken, and from whom. Thus, Marlin cannot have been prejudiced by counsel's failure to file a demurrer which would have been denied.

Leverette v. State, 291 Ga. 834 (2012).

In 2000, appellant David Leverette entered guilty pleas to charges arising from the malice murder of his wife and was sentenced to life imprisonment plus several terms of years to be served concurrently with each other and with the life sentence. In June 2011, appellant filed a motion for out-of-time appeal, which the trial court denied after holding a hearing. Leverette now appeals the denial of his motion for an out-of-time appeal. “[A]n appeal will lie from a judgment entered on a guilty plea only if the issue on appeal can be resolved by facts appearing in the record[.]” and the trial court's denial of a motion for out-of-time appeal is reviewed for abuse of discretion. *Brown v. State*, 290 Ga. 321(1) (2012). We examine those assertions of error that can

be resolved by facts appearing in the record.

Appellant contends the indictment was fatally flawed in that it did not state the venue of the crimes. The indictment was returned in the Superior Court of Elbert County, and each count of the indictment charged that appellant committed the crime “in the County and State aforesaid....” Since the Georgia Constitution requires that “all criminal cases shall be tried in the county where the crime was committed” (Ga. Const. 1983, Art. VI, Sec. II, Par. VI), an indictment need only set forth the Georgia county in which the crime is alleged to have occurred and failure to set out the street address at which the crime took place is not a fatal flaw. See *West v. State*, 296 Ga.App. 58(1) (2009) (proof of county in which the crime was committed, not the street address of the site establishes venue).

Wainwright v. State, 208 Ga. App. 777 (1993).

Wainwright was convicted of six counts of aggravated assault with a deadly weapon. OCGA § 16–5–21(a)(2). He was sentenced as a recidivist, under OCGA § 17–10–7(a), to six concurrent twenty-year terms, to serve fourteen years in prison and six years on probation. The offenses were committed in the early morning hours on February 2, 1992. Wainwright, his friend Stephens, and another friend arrived at a local establishment shortly before closing time. Bobby Ingram and a number of his relatives and friends were there playing pool and drinking. Ingram suggested that his party adjourn to his home. The evidence is in conflict as to whether Wainwright and his two friends were invited as well, but they went with the others to Ingram's trailer and were not prevented from entering. An argument later developed between Stephens and Ingram, and Ingram asked Wainwright and his friends several times to leave.

The evidence about what transpired thereafter sharply conflicted. Wainwright testified that he and his friends were in the process of leaving when the host and a number of the guests, armed with various weapons and household implements, attacked him. The State's witnesses all testified that they had been unarmed and had not provoked Wainwright, and that after Stephens and one of the other guests began scuffling, Wainwright attacked several of those present with a metal level taken from his truck. Several of them suffered severe beatings, and at least one sustained broken limbs.

Since 1974 when Georgia adopted judge sentencing, OCGA § 17–10–2, it is not required that the prior convictions be included in the indictment but only that the accused receive notice of the state's intention to seek recidivist punishment and of the identity of the prior convictions. [Cits.]” *Favors v. State*, 182 Ga.App. 179(1) (1987). Of course, if the prior conviction is an element of the crime, it must be alleged and proved. *Favors*, supra at 180(2). Also, where the nature of the offense is changed from misdemeanor to felony by its repetition, such as felony shoplifting under OCGA § 16–8–14(b)(1)(C), recidivism must be alleged in the indictment “so that the indictment reflects the maximum punishment to which the defendant can be sentenced.” *Darty v. State*, 188 Ga.App. 447, 448, 373 S.E.2d 389 (1988).

In Wainwright's case, the maximum penalty for one aggravated assault was twenty years. OCGA § 16–5–21(b). That was not changed by OCGA § 17–10–7. The grand jury exposed him to a maximum 20–year sentence, and he was given notice of it by the indictment. OCGA § 17–10–7 merely gives direction as to the imposition of punishment under certain aggravated circumstances. *Anderson v. State*, 176 Ga.App. 255, 256 (1985).

Where the prior convictions do no more than subject defendant to a greater risk of the maximum sentence (OCGA § 17–10–7(a)) or even to a certainty of the maximum sentence (OCGA § 17–10–7(b)) for the crime as indicted, the prior convictions need not be alleged in the indictment. Imposition of the maximum sentence has already been authorized by the grand jury's action, and adequate advance notice to defendant is assured by OCGA § 17–10–2(a).

Arraignments

At the end of this chapter, you should be able to answer these questions:

1. What is arraignment?
2. What is the process for arraignment?
3. Can you waive formal arraignment?
4. What happens if you waive? If you don't?

Ga. Unif. Super. Ct. R. 30.2

Before arraignment the court shall inquire whether the accused is represented by counsel and, if not, inquire into the defendant's desires and financial circumstances. If the defendant desires an attorney and is indigent, the court shall authorize the immediate appointment of counsel.

Upon the call of a case for arraignment, unless continued for good cause, the accused, or the attorney for the accused, shall answer whether the accused pleads “guilty,” “not guilty” or desires to enter a plea of *nolo contendere* to the offense or offenses charged; a plea of not guilty shall constitute the joining of the issue.

Upon arraignment, the attorney, if any, who announces for or on behalf of an accused, or who is entered as counsel of record, shall represent the accused in that case throughout the trial, unless other counsel and the defendant notify the judge prior to trial that such other counsel represents the accused and is ready to proceed, or counsel is otherwise relieved by the judge.

O.C.G.A. § 17-7-91

(a) In all criminal cases the court shall fix a date on which the defendant shall be arraigned. The clerk of the court, at least five days prior to the date set therefor, shall mail to the accused and his attorney of record, if known, notice of the date which has been fixed for arraignment. For such first service of notice, the clerk shall receive the fee prescribed in Code Section 15-6-77. This notice may be served by the sheriff of the county in which the court is situated or his lawful deputies. If the defendant has posted a bond or recognizance, a copy of the notice shall be mailed to each surety on the bond.

(b) On the date fixed by the court the accused shall be arraigned. The court shall receive the plea of the accused and enter the plea as provided for in this chapter. In those cases in which a plea of not guilty is entered, the court shall set the case down for trial at such time as shall be determined by the court.

(c) The appearance and entering of a plea by the accused shall be a waiver of the notice required in this Code section.

O.C.G.A. § 17-7-93

(a) Upon the arraignment of a person accused of committing a crime, the indictment or accusation shall be read to him and he shall be required to answer whether he is guilty or not

guilty of the offense charged, which answer or plea shall be made orally by the accused person or his counsel.

(b) If the person pleads “guilty,” the plea shall be immediately recorded on the minutes of the court by the clerk, together with the arraignment; and the court shall pronounce the judgment of the law upon the person in the same manner as if he or she had been convicted of the offense by the verdict of a jury. At any time before judgment is pronounced, the accused person may withdraw the plea of “guilty” and plead “not guilty.”

O.C.G.A. § 17-7-94

If the person accused of committing a crime, upon being arraigned, pleads “not guilty” or stands mute, the clerk shall immediately record upon the minutes of the court the plea of “not guilty,” together with the arraignment; and the arraignment and plea shall constitute the issue between the accused and the state.

O.C.G.A. § 17-7-96

The arraignment and plea of the person accused of committing a crime shall be entered on the indictment or accusation by the prosecuting attorney or other person acting as prosecuting officer on the part of the state.

Sapp v. State, 338 Ga. App. 628 (2016).

In two related enumerations, Sapp contends that she received inadequate notice of her arraignment and was never formally arraigned. The State concedes that it cannot show that Sapp was ever formally arraigned on the charges against her, and that Sapp did not waive arraignment.

The record demonstrates that before jury selection, the trial court requested that Sapp sign the accusation. Subsequently, the following exchange occurred:

SAPP: From what I'm reading its says defendant, Lawanda Sapp, waives copy of the accusation. I do not. Waive list of witnesses, I do not. Waive formal arraignment, I do not.

COURT: We've already gone through all that. We're going to trial now.... [Y]ou have a copy of this. We're going to trial today. We scheduled this case for trial today so you're not waiving anything.

...

SAPP: I'm going to put I do not waive anything.

COURT: Perfect. You have been here, as I recollect, at least two or three times.

SAPP: I'm just going by what the paper says, as Lawanda Sapp waives.

COURT: You can put anything you want down there. You don't waive anything, I understand.

...

COURT: I know you have been here at least once, if not twice.

STATE: Judge, we're showing arraignment was on December 7, calendar call was on January 8. The State concedes that there is no record of Sapp's arraignment other than the court notice filed on November 4, 2015 setting the date of arraignment for December 7, 2015.

It acknowledges that the State cannot show that Sapp was formally arraigned and aware of the charges against her in conjunction with OCGA § 17-16-212 or OCGA § 17-7-933, and that because she objected to the lack of a formal arraignment, “the trial court should have arraigned her ... and this Court should reverse the sentence.”

“ ‘Generally, a person indicted for or charged with an offense against the laws of this state is entitled as a matter of right to be arraigned before pleading to the indictment....’ [Cit.]” *Shorter v.*

State, 155 Ga.App. 609, 610 (1980). While, OCGA § 17-7-91 (c) permits waiver upon “appearance and entering of a plea,” it is reversible error for a trial court to require a defendant to go to trial on an indictment “when [she] was not formally arraigned and refused specifically to waive such arraignment.” *Presnell v. State*, 159 Ga.App. 598 (1981). See *Hicks v. State*, 145 Ga.App. 669 (1978) (no waiver if accused makes timely express invocation of right to arraignment despite entry of plea).

In this case, the State concedes that it cannot demonstrate that Sapp was formally arraigned and that Sapp refused to waive a formal arraignment. Thus, we reverse Sapp's conviction for speeding.

Moss v. State, 298 Ga. 613 (2016).

Finally, Appellant points to the State's failure to formally arraign him until after the close of evidence at trial, when the court noted that he had not been arraigned while reviewing the indictment before sending it to the jury. But Appellant never objected at trial to the lack of an earlier arraignment, and “any error in the lack of arraignment was waived by [his] failure to raise the issue prior to verdict.” *Spear v. State*, 270 Ga. 628 (1999). Moreover, Appellant's rights were not affected by the late arraignment, as he does not assert that he was unaware of the charges against him, both sides participated in discovery and filed motions, and it is clear from his proceeding to trial that he was offering a plea of not guilty. See *Singleton v. State*, 324 Ga.App. 141, 145 & n. 9 (2013).

For these reasons, Appellant's claim that his right to due process was violated has no merit.

Sevostiyanova v. State, 313 Ga. App. 729 (2012).

Sevostiyanova contends that her convictions should be reversed because she was never formally arraigned on the two misdemeanor counts of striking an unattended vehicle. However, the record shows that Sevostiyanova waived formal arraignment as to these charges on June 11, 2008. After the accusation was amended on June 15, 2009, Sevostiyanova entered a “not guilty” plea to Counts 1 and 2, thus again waiving formal arraignment. Moreover, Sevostiyanova voiced no objection to the alleged lack of arraignment before or at trial. “Any error in the lack of arraignment was waived by [her] failure to raise the issue prior to verdict.” Even if there had been no waiver, “procedural errors occurring at the arraignment stage are subject to a harmless error analysis,” and appellant has failed to show harm in this case. As trial counsel testified at the hearing on the motion for new trial, she and Sevostiyanova were well aware of and discussed the charges against her. This enumeration presents no basis for reversal.

Price v. State, 223 Ga. App. 185 (1996).

Price contends that he was denied due process because no arraignment was held. However, the record shows that Price and his attorney signed a not guilty plea and specifically waived formal arraignment in February 1992. Price does not deny signing the waiver. He simply asserts on appeal that he did not sign the form until January 1993, just before closing arguments. Assuming that Price did sign the waiver and plea during rather than before trial, he has failed to show any harm resulting from the procedure. Moreover, Price voiced no objection at trial either to signing the waiver during trial or to the fact that no formal arraignment had been held.

Therefore, his right to a formal arraignment was waived on that basis as well. See *Frazier v. State*, 204 Ga.App. 795 (1992)

Discovery

At the end of this chapter, you should be able to answer these questions:

1. What is discovery?
2. What are the differences in discovery between felony and misdemeanor cases?
3. What is the discovery timeline?
4. What is discoverable? What is not?
5. What is reciprocal discovery?
6. What happens if you don't opt in to reciprocal discovery?

O.C.G.A. § 17-16-1

As used in this chapter, the term:

(1) "Possession, custody, or control of the state or prosecution" means an item which is within the possession, custody, or control of the prosecuting attorney or any law enforcement agency involved in the investigation of the case being prosecuted.

(2) "Statement of a witness" means:

(A) A written or recorded statement, or copies thereof, made by the witness that is signed or otherwise adopted or approved by the witness;

(B) A substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or

(C) A summary of the substance of a statement made by a witness contained in a memorandum, report, or other type of written document but does not include notes or summaries made by counsel.

3) "Witness" does not include the defendant.

O.C.G.A. § 17-16-2

(a) This article shall apply to all criminal cases in which at least one felony offense is charged in the event that at or prior to arraignment, or at such time as the court permits, the defendant provides written notice to the prosecuting attorney that such defendant elects to have this article apply to the defendant's case. When one defendant in a multidefendant case demands discovery under this article, the provisions of this article shall apply to all defendants in the case, unless a severance is granted.

(b) Except as provided in subsection (c) of this Code section, this article shall not apply to juvenile court proceedings.

(c) This article shall be deemed to have been automatically invoked, without the written notice provided for in subsection (a) of this Code section, when a defendant has sought discovery pursuant to Chapter 11 of Title 9, the "Georgia Civil Practice Act," pursuant to Part 8 of Article 6 of Chapter 11 of Title 15, or pursuant to the Uniform Rules for the Juvenile Courts of Georgia where such discovery material is the same as the discovery material that may be provided under this article when a written notice is filed pursuant to subsection (a) of this Code section.

(d) Except as provided under Code Section 17-16-8, this article is not intended to authorize discovery or inspection of attorney work product.

(e) This article shall apply also to all criminal cases in which at least one felony offense is charged which was docketed, indicted, or in which an accusation was returned prior to January 1, 1995, if both the prosecuting attorney and the defendant agree in writing that the provisions of this article shall apply to the case.

(f) Except as provided in paragraph (3) of subsection (b) of Code Section 17-16-4, if a defendant has elected to have the provisions of this article apply, the provisions of this article shall also apply to sentencing hearings and the sentencing phase of a death penalty trial.

O.C.G.A. § 17-16-3

Prior to arraignment, every person charged with a criminal offense shall be furnished with a copy of the indictment or accusation and a list of witnesses that may be supplemented pursuant to the other provisions of this article.

O.C.G.A. § 17-16-4

(a)

(1) The prosecuting attorney shall, no later than ten days prior to trial, or at such time as the court orders, disclose to the defendant and make available for inspection, copying, or photographing any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the state or prosecution and that portion of any written record containing the substance of any relevant oral statement made by the defendant, whether before or after arrest, in response to interrogation by any person then known to the defendant to be a law enforcement officer or member of the prosecuting attorney's staff. The prosecuting attorney shall also disclose to the defendant the substance of any other relevant oral statement made by the defendant, before or after arrest, in response to interrogation by any person then known by the defendant to be a law enforcement officer or member of the prosecuting attorney's staff if the state intends to use that statement at trial. The prosecuting attorney shall also disclose to the defendant the substance of any other relevant written or oral statement made by the defendant while in custody, whether or not in response to interrogation. Statements of conspirators that are attributable to the defendant and arguably admissible against the defendant at trial also shall be disclosed under this Code section. Where the defendant is a corporation, partnership, association, or labor union, the court may grant the defendant, upon its motion, discovery of any similar such statement of any witness who was:

(A) At the time of the statement, so situated as an officer or employee as to have been legally able to bind the defendant in respect to conduct constituting the offense; or

(B) At the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been legally able to bind the defendant in respect to that alleged conduct in which the witness was involved.

(2) The prosecuting attorney shall, no later than ten days prior to trial, or as otherwise ordered by the court, furnish to the defendant a copy of the defendant's Georgia Crime Information Center criminal history, if any, as is within the possession, custody, or

control of the state or prosecution. Nothing in this Code section shall affect the provisions of Code Section 17-10-2.

(3)

(A) Except as provided in subparagraph (B) of this paragraph, the prosecuting attorney shall, no later than ten days prior to trial, or as otherwise ordered by the court, permit the defendant at a time agreed to by the parties or ordered by the court to inspect and copy or photograph books, papers, documents, photographs, tangible objects, audio and visual tapes, films and recordings, or copies or portions thereof and to inspect and photograph buildings or places which are within the possession, custody, or control of the state or prosecution and are intended for use by the prosecuting attorney as evidence in the prosecution's case-in-chief or rebuttal at the trial or were obtained from or belong to the defendant. Evidence that is within the possession, custody, or control of the Forensic Sciences Division of the Georgia Bureau of Investigation or other laboratory for the purpose of testing and analysis may be examined, tested, and analyzed at the facility where the evidence is being held pursuant to reasonable rules and regulations adopted by the Forensic Sciences Division of the Georgia Bureau of Investigation or the laboratory where the evidence is being held.

(B) With respect to any books, papers, documents, photographs, tangible objects, audio and visual tapes, films and recordings, or copies or portions thereof which are within the possession, custody, or control of the state or prosecution and are intended for use by the prosecuting attorney as evidence in the prosecution's case-in-chief or rebuttal at the trial of any violation of Part 2 of Article 3 of Chapter 12 of Title 16, such evidence shall, no later than ten days prior to trial, or as otherwise ordered by the court, be allowed to be inspected by the defendant but shall not be allowed to be copied.

(4) The prosecuting attorney shall, no later than ten days prior to trial, or as otherwise ordered by the court, permit the defendant at a time agreed to by the parties or ordered by the court to inspect and copy or photograph a report of any physical or mental examinations and of scientific tests or experiments, including a summary of the basis for the expert opinion rendered in the report, or copies thereof, if the state intends to introduce in evidence in its case-in-chief or in rebuttal the results of the physical or mental examination or scientific test or experiment. If the report is oral or partially oral, the prosecuting attorney shall reduce all relevant and material oral portions of such report to writing and shall serve opposing counsel with such portions no later than ten days prior to trial. Nothing in this Code section shall require the disclosure of any other material, note, or memorandum relating to the psychiatric or psychological treatment or therapy of any victim or witness.

(5) The prosecuting attorney shall, no later than ten days prior to trial, or at such time as the court orders but in no event later than the beginning of the trial, provide the defendant with notice of any evidence in aggravation of punishment that the state intends to introduce in sentencing.

(b)

(1) The defendant within ten days of timely compliance by the prosecuting attorney but no later than five days prior to trial, or as otherwise ordered by the court, shall permit the prosecuting attorney at a time agreed to by the parties or as ordered by the court to

inspect and copy or photograph books, papers, documents, photographs, tangible objects, audio and visual tapes, films and recordings, or copies or portions thereof and to inspect and photograph buildings or places, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in the defense's case-in-chief or rebuttal at the trial.

(2) The defendant shall within ten days of timely compliance by the prosecuting attorney but no later than five days prior to trial, or as otherwise ordered by the court, permit the prosecuting attorney at a time agreed to by the parties or as ordered by the court to inspect and copy or photograph a report of any physical or mental examinations and of scientific tests or experiments, including a summary of the basis for the expert opinion rendered in the report, or copies thereof, if the defendant intends to introduce in evidence in the defense's case-in-chief or rebuttal the results of the physical or mental examination or scientific test or experiment. If the report is oral or partially oral, the defendant shall reduce all relevant and material oral portions of such report to writing and shall serve opposing counsel with such portions no later than five days prior to trial. Nothing in this Code section shall require the disclosure of any other material, note, or memorandum relating to the psychiatric or psychological treatment or therapy of any defendant or witness.

(3)

(A) The defendant shall, no later than the announcement of the verdict of the jury or if the defendant has waived a jury trial at the time the verdict is published by the court, serve upon the prosecuting attorney all books, papers, documents, photographs, tangible objects, audio and visual tapes, films and recordings, or copies or portions thereof and to inspect and photograph buildings or places which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in the presentence hearing.

(B) The defendant shall, no later than the announcement of the verdict of the jury or if the defendant has waived a jury trial at the time the verdict is published by the court, serve upon the prosecuting attorney all reports of any physical or mental examinations and scientific tests or experiments, including a summary of the basis for the expert opinions rendered in the reports, or copies thereof, if the defendant intends to introduce in evidence in the presentence hearing the results of the physical or mental examination or scientific test or experiment. If the report is oral or partially oral, the defendant shall reduce all relevant and material oral portions of such report to writing and shall serve opposing counsel with such portions.

(C) The defendant shall, no later than five days before the trial commences, serve upon the prosecuting attorney a list of witnesses that the defendant intends to call as a witness in the presentence hearing. No later than the announcement of the verdict of the jury or if the defendant has waived a jury trial at the time the verdict is published by the court, the defendant shall produce for the opposing party any statement of such witnesses that is in the possession, custody, or control of the defendant or the defendant's counsel that relates to the subject matter of the testimony of such witnesses unless such statement is protected from disclosure by the privilege contained in paragraph (5), (6), (7), or (8) of subsection (a) of Code Section 24-5-501.

(c) If prior to or during trial a party discovers additional evidence or material previously requested or ordered which is subject to discovery or inspection under this article, such party shall promptly notify the other party of the existence of the additional evidence or material and make this additional evidence or material available as provided in this article.

(d) Upon a sufficient showing that a discovery required by this article would create a substantial threat of physical or economic harm to a witness, the court may at any time order that the discovery or inspection be denied, restricted, or deferred or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court subject to further order of the court and to be made available to the appellate court in the event of an appeal.

(e) Discovery with respect to alibi witnesses shall be as provided for in Code Section 17-16-5.

O.C.G.A. § 17-16-20

The provisions of this article shall apply only to misdemeanor cases or to felony cases docketed, indicted, or in which an accusation was returned prior to January 1, 1995, if the prosecuting attorney and the defendant do not agree in writing that the provisions of Article 1 of this chapter shall apply.

O.C.G.A. § 17-16-21

Prior to arraignment, every person charged with a criminal offense shall be furnished with a copy of the indictment or accusation and, on demand, with a list of the witnesses on whose testimony the charge against such person is founded. Without the consent of the defendant, no witness shall be permitted to testify for the state whose name does not appear on the list of witnesses as furnished to the defendant unless the prosecuting attorney shall state that the evidence sought to be presented is newly discovered evidence which the state was not aware of at the time of its furnishing the defendant with a list of the witnesses.

O.C.G.A. § 17-16-22

(a) At least ten days prior to the trial of the case, the defendant shall be entitled to have a copy of any statement given by the defendant while in police custody. The defendant may make such request for a copy of any such statement, in writing, within any reasonable period of time prior to trial.

(b) If the defendant's statement is oral or partially oral, the prosecution shall furnish, in writing, all relevant and material portions of the defendant's statement.

(c) Failure of the prosecution to comply with a defendant's timely written request for a copy of such defendant's statement, whether written or oral, shall result in such statement being excluded and suppressed from the prosecution's use in its case-in-chief or in rebuttal.

(d) If the defendant's statement is oral, no relevant and material, incriminating or inculpatory, portion of the statement of the defendant may be used against the defendant unless it has been previously furnished to the defendant, if a timely written request for a copy of the statement has been made by the defendant.

(e) This Code section shall not apply to evidence discovered after a request has been filed. If a request has been filed, such evidence shall be produced as soon as possible after it has been discovered.

O.C.G.A. § 17-16-23

(a) As used in this Code section, the term “written scientific reports” includes, but is not limited to, reports from the Division of Forensic Sciences of the Georgia Bureau of Investigation; an autopsy report by the coroner of a county or by a private pathologist; blood alcohol test results done by a law enforcement agency or a private physician; and similar types of reports that would be used as scientific evidence by the prosecution in its case-in-chief or in rebuttal against the defendant.

(b) In all criminal trials the defendant shall be entitled to have a complete copy of any written scientific reports in the possession of the prosecution which will be introduced in whole or in part against the defendant by the prosecution in its case-in-chief or in rebuttal. The request for a copy of any written scientific reports shall be made by the defendant in writing at arraignment or within any reasonable time prior to trial. If such written request is not made at arraignment, it shall be within the sound discretion of the trial judge to determine in each case what constitutes a reasonable time prior to trial. If the scientific report is in the possession of or available to the prosecuting attorney, the prosecuting attorney must comply with this Code section at least ten days prior to the trial of the case.

(c) Failure by the prosecution to furnish the defendant with a copy of any written scientific report, when a proper and timely written demand has been made by the defendant, shall result in such report being excluded and suppressed from evidence in the prosecution's case-in-chief or in rebuttal.

Bello v. State, 300 Ga. 682 (2017).

With respect to due process, our analysis begins with the settled principle that “[t]here is no general constitutional right to discovery in a criminal case.” *Weatherford v. Bursey*, 429 U.S. 545, 559 (III) (1977). Because the Constitution does not generally entitle the accused to pretrial discovery, statutory limitations of pretrial discovery are not generally impermissible. The constitutional guarantee of due process does, however, promise that an accused will be afforded a meaningful opportunity to prepare and present a defense, see *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973), and in some cases, the fulfillment of that promise may require the prosecution to allow some pretrial discovery of its case against the accused.

Indeed, this Court has recognized that due process sometimes may require that the accused upon timely request be afforded a meaningful opportunity to have critical evidence against him examined by his own lawyers and experts. For instance, we held in *Sabel v. State*, 248 Ga. 10, 18 (6) (1981), that due process demanded that the accused be afforded an opportunity to have paint samples tested by an expert of his choosing. We explained that the State had used an expert comparison of those paint samples to identify the accused as the perpetrator of several acts of vandalism, that the paint samples were, therefore, “critical evidence,” and that the evidence was by its nature “subject to varying expert opinion.” *Id.* at 17-18 (6).

Likewise, we held in *Patterson v. State*, 238 Ga. 204, 204-206 (1977), that one accused of unlawfully possessing marijuana generally must be afforded an opportunity to have the substance that the prosecution has identified as marijuana tested by an expert of his choosing, at least in a case in which the accused disputes the prosecution's identification of the substance and makes a timely and reasonable request for testing.

To the extent that due process requires the prosecution to disclose or make evidence available to the accused, it does not “necessarily require disclosure of evidence in a specific form or

manner.” And even when due process demands that the accused be afforded an opportunity before trial to have critical evidence tested by an expert of his choosing, it does not always require that the prosecution simply surrender the evidence to the custody and control of the accused and his defense team.

Indeed, in *Patterson*, although we held that one accused of possessing marijuana may be constitutionally entitled to have the suspected marijuana examined by his own expert, we explained that “the defendant does not have an absolute, unqualified right to examine such evidence.” 238 Ga. at 206. We recognized the need for “appropriate safeguards to ensure that the evidence is unchanged and preserved for evidentiary use at the trial,” and we said that appropriate safeguards “would generally require that the defendant's expert be allowed to examine the substance in the state laboratory under the control and supervision of the state rather than [the prosecution] relinquishing custody and possession of the substance to him.”

Id. Likewise, in *Sabel*, we explained that, even when due process demands an opportunity for a defense expert to test critical evidence before trial, “such evidence should remain in the state's control and supervision even if the testing, due to more sophisticated equipment elsewhere, is conducted away from the state laboratory.” 248 Ga. at 68 (6).

State v. Charbonneau, 281 Ga. 46 (2006).

To obviate the need for the statutorily-required notice contravenes the very purpose of Georgia's Criminal Procedure Discovery Act (“Act”), OCGA § 17-16-1 et seq., which is to establish a closely symmetrical scheme of discovery in criminal cases that maximizes the presentation of reliable evidence, minimizes the risk that a judgment will be predicated on incomplete or misleading evidence, and fosters fairness and efficiency in criminal proceedings. (Citation and punctuation omitted.) *State v. Dickerson*, 273 Ga. 408, 410 (2001). Certainly, fairness or efficiency in the trial of a criminal case is not promoted by permitting a defendant to surprise the State at trial with a claim of alibi. The need for a defendant to provide notice under OCGA § 17-16-5(a) exists even in the situation, like the present, in which the State ostensibly is already aware that the defendant is claiming to be elsewhere on the day of the crime. The fact of prejudice to the State, or lack thereof, or the availability of other remedies is irrelevant. This is so because the statute provides no exception for such prior knowledge, and because common sense dictates that the mere claim to be elsewhere when confronted by authorities, as in this case, is a far cry from intending to present the legal defense of alibi. See OCGA § 16-3-40.2.

State v. Dickerson, 273 Ga. 408 (2001).

Rufus Joe Dickerson was indicted for rape. Dickerson made the pretrial election to proceed under the provisions of the Act, thereby imposing reciprocal disclosure of discovery upon both the State and the defense. See *State v. Lucious*, 271 Ga. 361(1) (1999). Pursuant to OCGA § 17-16-8(a), the State furnished Dickerson with a list of witnesses it intended to call at trial. Several witnesses named on the list lacked information concerning their dates of birth. Dickerson filed a motion to compel discovery of the criminal history records of these witnesses, or their dates of birth, in sufficient time to request and receive that information from the Georgia Crime Information Center (“GCIC”). The trial court denied the motion and subsequent motion for reconsideration, ruling that the State could not be compelled to produce information not within its possession.

The defense contacted one of the listed witnesses in an attempt to obtain information concerning her criminal history; however, she refused to discuss the case. One business day prior

to the commencement of trial, the witness furnished her date of birth to the defense. Although Dickerson used that information to request the witness' criminal history from the GCIC, he did not receive a response at the time the witness was called to testify for the State. Nevertheless, defense counsel proceeded with cross-examination; a continuance was not requested. A response to the GCIC request was received after the conclusion of trial. It revealed that the witness had been convicted of a crime of moral turpitude, a fact which Dickerson submits could have been used to impeach her testimony.

On appeal, the Court of Appeals held that the State has a duty to produce the information listed in OCGA § 17–16–8(a); but that the defense in this case waived its right to assert error on appeal by failing to request a continuance during trial. We granted cross-petitions for review brought by the parties. We affirm both rulings.

1. When a defendant opts into reciprocal discovery under the Act, OCGA § 17–16–8(a) requires that the prosecuting attorney “shall” furnish to defense counsel “not later than ten days before trial ... the names, current locations, dates of birth, and telephone numbers of [the State's] witnesses.” The obligation then becomes reciprocal—the defendant's attorney is required to furnish the same information within a specified time period. *Id.* The requirement is excused only “for good cause” shown. *Id.*

The purpose of the Act is to establish a closely symmetrical scheme of discovery in criminal cases that maximizes the presentation of reliable evidence, minimizes the risk that a judgment will be predicated on incomplete or misleading evidence, and fosters fairness and efficiency in criminal proceedings.

Lucious, supra at 363. Any imbalance is to favor the defendant. *Id.*

Consistent with those objectives and recognizing that OCGA § 17–16–8(a) is written in mandatory language, we hold that a party charged with producing the statutorily required information may not rest solely on the fact that it is not within their possession. Instead, the statute imposes an affirmative duty on the producing party to attempt to acquire the information. Otherwise, a defendant who invokes the provisions of the Act is afforded an empty right. If, after a diligent effort to obtain the information, a party has demonstrated an inability to do so, the trial court is authorized to exercise its discretion in deciding whether good cause has been shown for nondisclosure and in fashioning a remedy under OCGA § 17–16–6.3. See also *White v. State*, 271 Ga. 130(3) (1999). Both the obligations under § 17–16–8(a) and the sanctions and remedies under § 17–16–6 are mutually imposed. Therefore, the State may seek the same remedy as the defense for nondisclosure. See *Thompson v. State*, 237 Ga.App. 466(3) (1999) (where defense failed to provide information required under OCGA § 17–16–8(a) and nondisclosure was prejudicial to the State, the court did not abuse its discretion in excluding the defense witness). Compare *Hill v. State*, 232 Ga.App. 561 (1998) (absent a showing of prejudice to the State, exclusion of a defense witness resulting from violations of OCGA § 17–16–8(a) was an abuse of discretion).

As was aptly stated in the concurring opinion of the Court of Appeals, *Dickerson*, supra, Blackburn, P.J., concurring at p. 599, 526 S.E.2d 443:

As the statute obligates the State to give the [specified] information to the defendant, it has a duty to attempt to obtain the information about its witnesses. The State cannot fulfill its obligation by simply looking in its file. The statute clearly requires the parties to provide four pieces of information, and only in the rarest of circumstances should the information truly be unavailable.... That burden is the cost to the parties of receiving the

benefits of the discovery process. The legislature intended for both sides to comply with the law, and the statute contemplates a reasonable effort by both sides to meet their statutory obligations.

“If compliance can be so easily avoided, the discovery statute is rendered meaningless.” *Id.* at 598, 526 S.E.2d 443.

2. Generally a defendant has a duty to request a continuance to cure any prejudice which may have resulted from the State's failure to comply with the requirements of OCGA § 17-16-1 et seq. See *Franklin v. State*, 224 Ga.App. 578(2) (1997); *Bell v. State*, 224 Ga.App. 191 (1997). And if the defendant has demonstrated that he used due diligence, the trial court is authorized to grant the request. OCGA § 17-8-20.

Had Dickerson requested and obtained a continuance until such time as he received a response from the GCIC, any potential prejudice could have been cured. See *Knight v. State*, 271 Ga. 557(3) (1999). Under the circumstances, we agree with the Court of Appeals that Dickerson waived the right to assert error on appeal by his failure to seek a continuance. See generally *Watts v. State*, 265 Ga. 888(2) (1995) (defendant procedurally barred from complaining of failure to order a continuance where no motion therefor was made); *Jenkins v. State*, 235 Ga.App. 547(3)(a) (1998) (failure to move for continuance precludes defendant from asserting he was not afforded ample time to investigate admissibility of evidence).

Brown v. State, 274 Ga. 202 (2001)

After a witness for the State testified regarding a telephone conversation she had with Brown after his arrest, Brown moved for a mistrial based on the State's failure to supply the defense with the witness's statement.

Brown's motion relied primarily on the reciprocal discovery provisions of OCGA § 17-16-1 et seq., and the trial court denied the motion because Brown had not opted in to those reciprocal discovery provisions.

Brown argues on appeal that he should be deemed to have opted in to the reciprocal discovery because the State's promise of an “open file” led trial counsel to believe he would not need to formally opt in.

At trial, however, defense counsel told the trial court that he accepted the State's offer because it would be better than the reciprocal discovery process in that he would be permitted to view evidence the State would not be required to provide under the reciprocal discovery statute. Having chosen not to provide the written notice required by OCGA § 17-16-2(a), Brown was not entitled to have the other provisions of the reciprocal discovery process applied to his case. *Wright v. State*, 226 Ga.App. 848(4) (1997). The trial court did not err in ruling that Brown's failure to opt in to reciprocal discovery rendered inapplicable the sanctions provided for in OCGA § 17-16-6. *State v. Lucious*, 271 Ga. 361(4) (1999).

Jury Instructions

At the end of this chapter, you should be able to answer these questions:

1. What are jury instructions?
2. What is purpose of jury instructions?
3. How should they be formatted?
4. When should an objection be made to a jury charge?
5. What recourse is available if you don't object?

Ga. Unif. Super. Ct. R. 10.3

All requests to charge shall be numbered consecutively on separate sheets of paper and submitted to the court in duplicate by counsel for all parties at the commencement of trial, unless otherwise provided by pre-trial order; provided, however, that additional requests may be submitted to cover unanticipated points which arise thereafter.

O.C.G.A. § 5-5-24

(a) Except as otherwise provided in this Code section, in all civil cases, no party may complain of the giving or the failure to give an instruction to the jury unless he objects thereto before the jury returns its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury. Objection need not be made with the particularity formerly required of assignments of error and need only be as reasonably definite as the circumstances will permit. This subsection shall not apply in criminal cases.

(b) In all cases, at the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may present to the court written requests that it instruct the jury on the law as set forth therein. Copies of requests shall be given to opposing counsel for their consideration prior to the charge of the court. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury but shall instruct the jury after the arguments are completed. The trial judge shall file with the clerk all requests submitted to him, whether given in charge or not.

(c) Notwithstanding any other provision of this Code section, the appellate courts shall consider and review erroneous charges where there has been a substantial error in the charge which was harmful as a matter of law, regardless of whether objection was made hereunder or not.

O.C.G.A. § 17-8-56

(a) The judges of the superior, state, and city courts shall, when the counsel for either party requests it before argument begins, write out their charges and read them to the jury; and it shall be error to give any other or additional charge than that so written and read.

(b) The charge so written out and read shall be filed with the clerk of the court in which it was given and shall be accessible to all persons interested in it. The clerk shall give certified copies of the charge to any person applying therefor, upon payment of the usual fee.

(c) This Code section shall not apply when there is an official stenographer or reporter of the court in attendance thereon who takes down in shorthand and writes out the full charge of the trial judge in the case upon the direction of court.

O.C.G.A. § 17-8-58

(a) Any party who objects to any portion of the charge to the jury or the failure to charge the jury shall inform the court of the specific objection and the grounds for such objection before the jury retires to deliberate. Such objections shall be done outside of the jury's hearing and presence.

(b) Failure to object in accordance with subsection (a) of this Code section shall preclude appellate review of such portion of the jury charge, unless such portion of the jury charge constitutes plain error which affects substantial rights of the parties. Such plain error may be considered on appeal even if it was not brought to the court's attention as provided in subsection

(a) of this Code section.

Cheddersingh v. State, 290 Ga. 680 (2012).

In a criminal case, a verdict form is erroneous when the form would mislead jurors of reasonable understanding, or the trial court erroneously instructed the jury on the presumption of innocence, the State's burden of proof, the possible verdicts that could be returned, or how the verdict should be entered on the printed form.

Rucker v. State, 270 Ga. 431, 435(5) (1999). A preprinted verdict form is treated as part of the jury instructions which “are read and considered as a whole in determining whether there is error.” *Brown v. State*, 283 Ga. 327, 330(2) (2008) (Citations and punctuation omitted.). Here, the trial court's oral instructions informed the jury that the defendant was innocent until proven guilty beyond a reasonable doubt, and that the burden of proof is upon the State and never shifts to the defendant. Nonetheless, this Court has recognized that “ ‘the presence of ... written instructions in the jury room ... serve[s] to enlighten, rather than confuse, the jury.’ [Cit.]” *Howard v. State*, 288 Ga. 741, 745(3) (2011). When, as here, the written instructions that the jury has with it in the jury room are infirm, the expected result is not enlightenment, but confusion. Compare *Arthur v. Walker*, 285 Ga. 578, 579–580 (2009), in which correct written instructions were with the jury during deliberations. We conclude that the verdict form would mislead jurors of reasonable understanding as to the presumption of innocence and the proper burden of proof for the jury's consideration, *Rucker*, supra, and that this constituted error despite the inclusion of proper language elsewhere in the jury instructions when taken as a whole. See also *Laster v. State*, 276 Ga. 645, 649–650(5) (2003), in which the court's instructions regarding the verdict form gave improper guidance as to completing the verdict if the jury found that the State failed to meet its burden of proof and were found to be reversible error, requiring a new trial.

However, at trial, Cheddersingh did not raise any objection to the verdict form. Thus, he failed in his duty to “inform the court of the specific objection and the grounds for such objection before the jury retire[d] to deliberate.” OCGA § 17–8–58(a). Nonetheless, he argues that the verdict form constituted plain error, and that under OCGA § 17–8–58(b), the asserted error must therefore be reviewed. See *Sapp v. State*, 290 Ga. 247, 249–250(2) (2011).

We first note that the language of OCGA § 17–8–58 refers to the jury “charge.” We conclude that the statute applies not only to instructions given orally to the jury, but necessarily must apply to any written instructions given to the jury. See generally *Finley v. State*, 286 Ga. 47, 50–51(6)(7) (2009). Preprinted verdict forms have been treated as a portion of the jury instructions. See *Brown v. State*, 283 Ga. 327, 330(2) (2008). Use of such a form is intended to assist the jury in arriving at a lawful verdict, see *Rucker*, supra at 434–435(5), and a party is necessarily obligated to raise any objection to such a form as set forth in OCGA § 17–8–58(a). Accordingly, when objection is not made, error is reviewed as provided in OCGA § 17–8–58(b).

In *State v. Kelly*, 290 Ga. 29, 32–33(2)(a) (2011). . .we set forth the test for determining whether there is plain error in jury instructions under OCGA § 17–8–58(b) as follows.

First, there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the trial court proceedings. Fourth and finally, if the above three prongs are satisfied, the appellate court has the *discretion* to remedy

the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

Id. at 33(2)(a) (Citations and punctuation omitted.).

As noted above, the verdict form used here must be considered erroneous. As to an affirmative waiver of that error, at trial, the court asked: “Is the verdict form acceptable to the defense?” Counsel for Cheddersingh responded: “I believe so. Let me look at it one more time.” No objection was made. But, to constitute an affirmative waiver under *Kelly*, supra, a “deviation from a legal rule” must have been “intentionally relinquished or abandoned.” As stated in *United States v. Olano*, 507 U.S. 725, 733(II)(A) (1993), upon which *Kelly* particularly relied, “[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the ‘intentional relinquishment or abandonment of a known right.’ [Cits.]” The exchange with the trial court does not show that Cheddersingh *intentionally* relinquished his right to have the burden of proof properly stated in the verdict form; rather, the failure to object is more appropriately described as a forfeiture of the right. Nor can we discern any tactical reason on the part of the defense to embrace such a burden-shifting verdict form. Accordingly, the error in the verdict form was not intentionally waived under *Kelly*.

Regarding the second prong of the *Kelly* test, the error was also obvious and not subject to reasonable dispute. “Nothing is more fundamental to the jury's consideration of a criminal case than its understanding and application of the State's burden of proof beyond a reasonable doubt.” *Jones v. State*, 252 Ga.App. 332, 334(2)(a) (2001). And, this Court has repeated the correct standards regarding the presumption of innocence and the burden of proof on numerous occasions. The United States Supreme Court has stated that “ ‘[p]lain’ is synonymous with ‘clear’ or, equivalently, ‘obvious.’ ” *Olano*, supra at 734. Indeed, the United States Supreme Court has said that plain error includes that which is “so ‘plain’ the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it.” *United States v. Frady*, 456 U.S. 152, 163(III)(A) (1982). Here, near the end of the instructions to the jury, the court said: “This is your verdict form. It says: Count one, Murder. As to the offense of murder, we the jury, unanimously and beyond a reasonable doubt find the defendant guilty or not guilty.” We believe that this verbalization of the written charge should have alerted both the trial court and the prosecutor, as well as defense counsel, to the error, which should have provided an opportunity for the court to promptly correct it.

The third prong of the *Kelly* test is that “the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the trial court proceedings.” *Kelly*, supra at 33(2)(a) (Punctuation omitted). By using a verdict form that advised the jury that it was empowered to state that it “beyond a reasonable doubt find[s] the Defendant [not guilty],” the trial court actively removed the presumption of innocence from Cheddersingh's trial. “ ‘The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.’ [Cit.]” *Tillman*, supra at 292–293(1). That principle is

a basic component of a fair trial under our system of criminal justice, and the right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. [Cit.] The presumption of innocence, the burden of proof, and the standard of proof are the fundamental doctrines of American criminal jurisprudence and the bedrock of determining guilt or innocence in a criminal case. [Cit.]

Id. at 293, 637 S.E.2d 720 (Punctuation omitted.). Accordingly, under all the circumstances of this case, the error presented here must be considered to have affected Cheddersingh's "substantial rights" such that the third prong of the *Kelly* test is met.

As to the fourth prong of the *Kelly* test, in which our discretion to remedy the error "ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings," supra at 33(2)(a) (Punctuation omitted.), the necessity of doing so is beyond dispute. The presumption of innocence is fundamental to a fair trial and a conviction resulting from a procedure in which the trial court misinformed the jury regarding the effect of that presumption affects not only the fairness of that proceeding itself, but public confidence in the judicial process as a whole. See *Tillman*, supra at 295(2).

Cheddersingh must be awarded a new trial.

White v. State, 355 Ga. App. 89, 91 (2020).

White claims that the trial court erred in its jury instructions on malice and self-defense. White acknowledges that he did not object to those instructions at trial, so we review them only for plain error. In reviewing for plain error, "the proper inquiry is whether the instruction was erroneous, whether it was obviously so, and whether it likely affected the outcome of the proceedings." *Manning v. State*, 303 Ga. 723, 727 (3) (2018) (citation and punctuation omitted). (a) *Malice instruction*.

In response to a question from the jury, the trial court gave the jury the following pattern definition of malice for the offense of aggravated battery:

Malice is not ill will or hatred. For the purpose of this [C]ode section, malice means an actual intent to cause the particular harm produced, that is, bodily harm, without justification or excuse. Malice is also the wanton and willful doing of an act with an awareness of a plain and strong likelihood that such particular harm may result. Intention may be shown by the circumstances connected with *the offense*.

(Emphasis supplied.) White contends that the use of the phrase "the offense," as emphasized above, presumed the existence of a crime and thus constituted an improper comment on the evidence by the trial court. We disagree.

OCGA § 17-8-57 (a) (1) provides that "[i]t is error for any judge, during any phase of any criminal case, to express or intimate to the jury the judge's opinion as to whether a fact at issue has or has not been proved or as to the guilt of the accused." But "[t]hat statute is violated only when the court's charge assumes certain things as facts and intimates to the jury what the judge believes the evidence to be." *Camphor v. State*, 272 Ga. 408, 414 (6) (c) (2000) (citation and punctuation omitted). "And in order to determine whether a trial court has improperly expressed an opinion in its charge as to what has or has not been proved, the whole charge may be considered." *Hartzler v. State*, 332 Ga. App. 674, 681-682 (4) (2015) (citations and punctuation omitted).

Considering the jury charge as a whole, "we find that the trial court did not intimate its opinion that the evidence showed that [an offense had been committed]. The trial court merely stated [the definition of malice for aggravated battery]." *Buffington v. State*, 171 Ga. App. 919, 923-924 (8) (1984) (rejecting claim that jury charge defining murder improperly expressed court's opinion that crime had in fact been committed). The use of the phrase "the offense" within that definition referred to the charged crime and "did not assume or seem to assume[the existence of an offense], as contended." *McMullen v. State*, 199 Ga. 521, 525 (1) (1945) (punctuation omitted).

Furthermore, ... we note that the trial judge [had] specifically instructed the jury that “[b]y no ruling or comment that the court has made during the progress of the trial [has the court] intended to express any opinion [up]on the facts of [this] case, [upon] the credibility of the witnesses, [upon] the evidence[,] or [upon the guilt or innocence of the defendant].” Thus, the trial court did not err by referring to [“the offense”] in [the definition of malice].

Hartzler, 332 Ga. App. at 682 (4) (citations and punctuation omitted). Since “we [have] conclude[d] that the charge regarding malice did not improperly comment on the evidence,” *Carter v. State*, 269 Ga. 891, 893 (6) (1998), it follows that there was no plain error.

(b) *Self-defense instruction*.

White claims that the jury charge on self-defense was insufficient because it did not include the principle of law that the state had the burden of disproving such a defense beyond a reasonable doubt. While that principle was not set forth in the court's self-defense charge, it was included at another point in the jury instructions. During its charge on the state's burden of proof, the court instructed the jury that White bore no burden of proof and that “[w]hen a defense is raised by the evidence, the burden is on the [s]tate to negate or disprove it beyond a reasonable doubt.” Thus, considering the jury instructions as a whole, “[w]e find no error, as the court gave a charge that adequately covered the same principle[] of law as the [suggested] charge.” *Carver v. State*, 258 Ga. 824, 825 (3) (1989).

Viewed as a whole, it is apparent that the court's jury charge properly instructed the jury on the malicious intent required for the indicted offense of aggravated battery. Under these circumstances, White has not shown deficient performance since an objection to a correct statement of the law would have been meritless, and he has not shown prejudice because there is no reasonable likelihood that the outcome of the trial would have been different had counsel made the suggested objection. “Consequently, we cannot find [White's] lawyer[] ineffective for failing to object to the ... jury instruction[] on [general] intent.” *Downey v. State*, 298 Ga. 568, 574 (4) (b), 783 S.E.2d 622 (2016).

Edge v. State, 261 Ga. 865 (1992).

Our holding requires some precision in the charge to the jury where the evidence would authorize a conviction for felony murder or voluntary manslaughter. A sequential charge requiring the jury to consider voluntary manslaughter *only* if they have considered and found the defendant not guilty of malice murder and felony murder is not appropriate where there is evidence that would authorize a charge on voluntary manslaughter. The “sequential” charge eliminates the jury's full consideration of voluntary manslaughter because, if it concludes a felony murder occurred, it would not then go on to consider evidence of provocation or passion which might authorize a verdict for voluntary manslaughter. Instead, the trial court should instruct the jury so as to ensure adequate consideration of charges for both forms of homicide.

Pleas and Sentencing

At the end of this chapter, you should be able to answer these questions:

1. When can a judge accept a plea?
2. Who can engage in plea discussions?
3. How may a sentence be structured?
4. How must a sentence be structured?
5. What are the differences between concurrent and consecutive sentences?

6. What is a split sentence?
7. What is probation?
8. Is a nolo contendere plea the same as a guilty plea?
9. What is the recidivism statute and how does it work?
10. When can fines and fees be attached to a sentence?
11. How does service of time in custody get calculated?
12. When can someone use First Offender?
13. When can someone use Conditional Discharge?

Ga. Unif. Super. Ct. R. 33.1

(A) A defendant may plead guilty, not guilty, or in the discretion of the judge, nolo contendere. A plea of guilty or nolo contendere should be received only from the defendant personally in open court, except when the defendant is a corporation, in which case the plea may be entered by counsel or a corporate officer.

(B) A defendant may plead nolo contendere only with the consent of the judge. Such a plea should be accepted by the judge only after due consideration of the views of the parties and the interest of the public in the effective administration of justice. Procedurally, a plea of nolo contendere should be handled under these rules in a manner similar to a plea of guilty.

Ga. Unif. Super. Ct. R.33.2

(A) A defendant shall not be called upon to plead before having an opportunity to retain counsel, or if defendant is eligible for appointment of counsel, until counsel has been appointed or right to counsel waived. A defendant with counsel shall not be required to enter a plea if counsel makes a reasonable request for additional time to represent the defendant's interest, or if the defendant has not had a reasonable time to consult with counsel.

(B) A defendant without counsel should not be called upon to plead to any offense without having had a reasonable time to consider this decision. When a defendant without counsel tenders a plea of guilty or nolo contendere to an offense, the court should not accept the plea unless it is reaffirmed by the defendant after a reasonable time for deliberation, following the advice from the court required in section 33.8.

Ga. Unif. Super. Ct. R.33.3

(A) In cases in which it appears that the interests of the public in the effective administration of criminal justice (as stated in section 33.6) would thereby be served, the prosecuting attorney may engage in plea discussions for the purpose of reaching a plea agreement. The prosecuting attorney should engage in plea discussions or reach a plea agreement with the defendant only through defense counsel, except when the defendant is not eligible for or does not desire appointment of counsel and has not retained counsel.

(B) The prosecuting attorney, in reaching a plea agreement, may agree to one or more of the following, as dictated by circumstances of the individual case:

- (1) to make or not to oppose favorable recommendations as to the sentence which should be imposed if the defendant enters a plea of guilty or nolo contendere;
 - (2) to seek or not to oppose dismissal of the offense charged if the defendant enters a plea of guilty or nolo contendere to another offense reasonably related to defendant's conduct;
- or,

(3) to seek or not to oppose dismissal of other charges or potential charges against the defendant if the defendant enters a plea of guilty or nolo contendere.

Ga. Unif. Super. Ct. R.33.4

(A) Defense counsel should conclude a plea agreement only with the consent of the defendant, and should ensure that the decision to enter or not enter a plea of guilty or nolo contendere is ultimately made by the defendant.

(B) To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and of considerations deemed important by him in reaching a decision.

Ga. Unif. Super. Ct. R.33.5

(A) The trial judge should not participate in plea discussions.

(B) If a tentative plea agreement has been reached, upon request of the parties, the trial judge may permit the parties to disclose the tentative agreement and the reasons therefor in advance of the time for the tendering of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether the judge will likely concur in the proposed disposition if the information developed in the plea hearing or presented in the presentence report is consistent with the representations made by the parties. If the trial judge concurs but the final disposition differs from that contemplated by the plea agreement, then the judge shall state for the record what information in the presentence report or hearing contributed to the decision not to sentence in accordance with the plea agreement.

(C) When a plea of guilty or nolo contendere is tendered or received as a result of a plea agreement, the trial judge should give the agreement due consideration, but notwithstanding its existence, must reach an independent decision on whether to grant charge or sentence leniency under the principles set forth in section 33.6 of these rules.

Ga. Unif. Super. Ct. R.33.6

(A) It is proper for the judge to grant charge and sentence leniency to defendants who enter pleas of guilty or nolo contendere where the interests of the public in the effective administration of criminal justice are thereby served. Among the considerations which are appropriate in determining this question are:

- (1) that the defendant by entering a plea has aided in ensuring the prompt and certain application of correctional measures;
- (2) that the defendant has acknowledged guilt and shown a willingness to assume responsibility for conduct;
- (3) that the leniency will make possible alternative correctional measures which are better adapted to achieving rehabilitative, protective, deterrent or other purposes of correctional treatment, or will prevent undue harm to the defendant from the form of conviction;
- (4) that the defendant has made public trial unnecessary when there are good reasons for not having the case dealt with in a public trial;
- (5) that the defendant has given or offered cooperation when such cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct;

(6) that the defendant by entering a plea has aided in avoiding delay (including delay due to crowded dockets) in the disposition of other cases and thereby has increased the probability of prompt and certain application of correctional measures to other offenders.

(B) The judge should not impose upon a defendant any sentence in excess of that which would be justified by any of the rehabilitative, protective, deterrent or other purposes of the criminal law merely because the defendant has chosen to require the prosecution to prove the defendant's guilt at trial rather than to enter a plea of guilty or nolo contendere.

Ga. Unif. Super. Ct. R.33.7

The judge shall not accept a plea of guilty or nolo contendere without first determining, on the record, that the plea is voluntary. By inquiry of the prosecuting attorney and defense counsel, the judge should determine whether the tendered plea is the result of prior plea discussions and a plea agreement, and, if it is, what agreement has been reached. If the prosecuting attorney has agreed to seek charge or sentence leniency which must be approved by the judge, the judge must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the judge. The judge should then address the defendant personally and determine whether any other promises or any force or threats were used to obtain the plea.

Ga. Unif. Super. Ct. R.33.8

The judge should not accept a plea of guilty or nolo contendere from a defendant without first:

(A) Determining on the record that the defendant understands the nature of the charge(s);

(B) Informing the defendant on the record that by entering a plea of guilty or nolo contendere one waives:

(1) the right to trial by jury;

(2) the presumption of innocence;

(3) the right to confront witnesses against oneself;

(4) the right to subpoena witnesses;

(5) the right to testify and to offer other evidence;

(6) the right to assistance of counsel during trial;

(7) the right not to incriminate oneself; and that by pleading not guilty or remaining silent and not entering a plea, one obtains a jury trial;

(C) Where a defendant is not represented by counsel, informing the defendant of his right to be assisted by counsel in entering the plea, as well as at trial, and that the defendant is knowingly and voluntarily waiving that right; and

(D) Informing the defendant on the record:

(1) of the terms of any negotiated plea;

(2) that a plea of guilty may have an impact on his or her immigration status if the defendant is not a citizen of the United States;

(3) of the maximum possible sentence on the charge, including that possible from consecutive sentences and enhanced sentences where provided by law; and/or

(4) of the mandatory minimum sentence, if any, on the charge.

This information may be developed by questions from the judge, the prosecuting attorney or the defense attorney or a combination of any of these.

Ga. Unif. Super. Ct. R.33.9

Notwithstanding the acceptance of a plea of guilty, judgment should not be entered upon such plea without such inquiry on the record as may satisfy the judge that there is a factual basis for the plea.

Ga. Unif. Super. Ct. R.33.10

If the trial court intends to reject the plea agreement, the trial court shall, on the record, inform the defendant personally that (1) the trial court is not bound by any plea agreement; (2) the trial court intends to reject the plea agreement presently before it; (3) the disposition of the present case may be less favorable to the defendant than that contemplated by the plea agreement; and (4) that the defendant may then withdraw his or her guilty plea as a matter of right. If the plea is not then withdrawn, sentence may be pronounced.

Ga. Unif. Super. Ct. R.33.11

A verbatim record of the proceedings at which a defendant enters a plea of guilty or nolo contendere shall be made and preserved. The record should include:

- (A) The inquiry into the voluntariness of the plea (as required in section 33.7);
- (B) The advice to the defendant (as required in section 33.8);
- (C) The inquiry into the accuracy of the plea (as required in section 33.9), and, if applicable;
- (D) The notice to the defendant that the trial court intends to reject the plea agreement and the defendant's right to withdraw the guilty plea before sentence is pronounced. [In State Court, see State Court Rule 33.11.]

Ga. Unif. Super. Ct. R.33.12

(A) After sentence is pronounced, the judge should allow the defendant to withdraw a plea of guilty or nolo contendere whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice.

(B) In the absence of a showing that withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw a plea of guilty or nolo contendere as a matter of right once sentence has been pronounced by the judge.

O.C.G.A. § 15-6-3

The terms of court for the superior courts for each of the judicial circuits shall commence as follows [in this statute].

O.C.G.A. § 17-7-93

(a) Upon the arraignment of a person accused of committing a crime, the indictment or accusation shall be read to him and he shall be required to answer whether he is guilty or not guilty of the offense charged, which answer or plea shall be made orally by the accused person or his counsel.

(b) If the person pleads "guilty," the plea shall be immediately recorded on the minutes of the court by the clerk, together with the arraignment; and the court shall pronounce the judgment of the law upon the person in the same manner as if he or she had been convicted of the offense by the verdict of a jury. At any time before judgment is pronounced, the accused person may withdraw the plea of "guilty" and plead "not guilty."

(c) In addition to any other inquiry by the court prior to acceptance of a plea of guilty, the court shall determine whether the defendant is freely entering the plea with an understanding that if he or she is not a citizen of the United States, then the plea may have an impact on his or her immigration status. This subsection shall apply with respect to acceptance of any plea of guilty to any state offense in any court of this state or any political subdivision of this state.

O.C.G.A. § 17-7-94

If the person accused of committing a crime, upon being arraigned, pleads “not guilty” or stands mute, the clerk shall immediately record upon the minutes of the court the plea of “not guilty,” together with the arraignment; and the arraignment and plea shall constitute the issue between the accused and the state.

O.C.G.A. § 17-7-95

(a) The defendant in all criminal cases other than capital felonies in any court of this state, whether the offense charged is a felony or a misdemeanor, may, with the consent and approval of the judge of the court, enter a plea of nolo contendere instead of a plea of guilty or not guilty.

(b) Should the judge allow a plea of nolo contendere to be entered, he shall thereupon be authorized to impose such sentence as may be authorized by law as to the offense charged.

(c) Except as otherwise provided by law, a plea of nolo contendere shall not be used against the defendant in any other court or proceedings as an admission of guilt or otherwise or for any purpose; and the plea shall not be deemed a plea of guilty for the purpose of effecting any civil disqualification of the defendant to hold public office, to vote, to serve upon any jury, or any other civil disqualification imposed upon a person convicted of any offense under the laws of this state. The plea shall be deemed and held to put the defendant in jeopardy within the meaning of Article I, Section I, Paragraph XVIII of the Constitution of this state after sentence has been imposed.

O.C.G.A. § 17-10-1

(a)

(1)

(A) Except in cases in which life imprisonment, life without parole, or the death penalty may be imposed, upon a verdict or plea of guilty in any case involving a misdemeanor or felony, and after a presentence hearing, the judge fixing the sentence shall prescribe a determinate sentence for a specific number of months or years which shall be within the minimum and maximum sentences prescribed by law as the punishment for the crime. The judge imposing the sentence is granted power and authority to suspend or probate all or any part of the entire sentence under such rules and regulations as the judge deems proper, including service of a probated sentence in the sentencing options system, as provided by Article 6 of Chapter 3 of Title 42, and including the authority to revoke the suspension or probation when the defendant has violated any of the rules and regulations prescribed by the court, even before the probationary period has begun, subject to the conditions set out in this subsection; provided, however, that such action shall be subject to the provisions of Code Sections 17-10-6.1 and 17-10-6.2.

(B) When a defendant with no prior felony conviction is convicted of felony offenses or is charged with felony offenses and is sentenced pursuant to

subsection (a) or (c) of Code Section 16-13-2 or Article 3 of Chapter 8 of Title 42, and the court imposes a sentence of probation or not more than 12 months of imprisonment followed by a term of probation, the court shall include a behavioral incentive date in its sentencing order that does not exceed three years from the date such sentence is imposed. Within 60 days of the expiration of such incentive date, if the defendant has not been arrested for anything other than a nonserious traffic offense as defined in Code Section 35-3-37, has been compliant with the general and special conditions of probation imposed, and has paid all restitution owed, the Department of Community Supervision shall notify the prosecuting attorney and the court of such facts. The Department of Community Supervision shall provide the court with an order to terminate such defendant's probation which the court shall execute unless the court or the prosecuting attorney requests a hearing on such matter within 30 days of the receipt of such order. The court shall take whatever action it determines would be for the best interest of justice and the welfare of society.

(2)

(A) Active probation supervision shall terminate in all cases no later than two years from the commencement of active probation supervision unless specially extended or reinstated by the sentencing court upon notice and hearing and for good cause shown; provided, however, that in those cases involving:

(i) The collection of restitution, the period of active probation supervision shall remain in effect for so long as any such obligation is outstanding, or until termination of the sentence, whichever first occurs;

(ii) A conviction under Chapter 15 of Title 16, the "Georgia Street Gang Terrorism and Prevention Act," the period of active probation supervision shall remain in effect until the termination of the sentence, but shall not exceed five years unless as otherwise provided in this paragraph; or

(iii) A conviction that requires the defendant to register on the state sexual offender registry pursuant to Code Section 42-1-12, the period of active probation supervision shall remain in effect until the court orders unsupervised probation, or until termination of the sentence, whichever first occurs.

(B) Probation supervision shall not be required for defendants sentenced to probation while the defendant is in the legal custody of the Department of Corrections or the State Board of Pardons and Paroles.

(3)

(A) Any part of a sentence of probation revoked for a violation other than a subsequent commission of any felony, a violation of a special condition, or a misdemeanor offense involving physical violence resulting in bodily injury to an innocent victim which in the opinion of the trial court constitutes a danger to the community or a serious infraction occurring while the defendant is assigned to an alternative probation confinement facility shall be served in a probation detention center, probation boot camp, weekend lock up, or confinement in a local jail or detention facility, or other community correctional alternatives available to the court or provided by the Department of Corrections.

(B) A parolee or probationer charged with a misdemeanor involving physical injury or an attempt to commit physical injury or terroristic threats or with a new felony shall not be entitled to bond pending a hearing on the revocation of his or her parole or probation, except by order of a judge of the superior, state, or magistrate court wherein the alleged new offense occurred after a hearing and upon determination of the superior, state, or magistrate court that the parolee or probationer does not constitute a threat to the community; provided, however, that this subparagraph does not authorize state or magistrate court judges to grant bail for a person charged with any offense listed in subsection (a) of Code Section 17-6-1.

(4) In cases of imprisonment followed by probation, the sentence shall specifically provide that the period of probation shall not begin until the defendant has completed service of the confinement portion of the sentence. No revocation of any part of a probated sentence shall be effective while a defendant is in the legal custody of the State Board of Pardons and Paroles.

(5)

(A) When a defendant has been sentenced to probation, the court shall retain jurisdiction throughout the period of the probated sentence as provided for in subsection (g) of Code Section 42-8-34. Without limiting the generality of the foregoing, the court may shorten the period of active probation supervision or unsupervised probation on motion of the defendant or on its own motion, or upon the request of a community supervision officer, if the court determines that probation is no longer necessary or appropriate for the ends of justice, the protection of society, and the rehabilitation of the defendant. Prior to entering any order for shortening a period of probation, the court shall afford notice to the victim or victims of all sex related offenses or violent offenses resulting in serious bodily injury or death and, upon request of the victim or victims so notified, shall afford notice and an opportunity for hearing to the defendant and the prosecuting attorney.

(b)

(1) As used in this subsection, the term:

(A) "Developmental disability" shall have the same meaning as set forth in Code Section 37-1-1.

(B) "Indigent" means an individual who earns less than 100 percent of the federal poverty guidelines unless there is evidence that the individual has other resources that might reasonably be used without undue hardship for such individual or his or her dependents.

(C) "Significant financial hardship" means a reasonable probability that an individual will be unable to satisfy his or her financial obligations for two or more consecutive months.

(D) "Totally and permanently disabled" shall have the same meaning as set forth in Code Section 49-4-80.

(2) In determining the financial obligations, other than restitution, to impose on the defendant, the court shall consider:

- (A) The defendant's financial resources and other assets, including whether any such assets are jointly controlled;
- (B) The defendant's earnings and other income;
- (C) The defendant's financial obligations, including obligations to dependents;
- (D) The period of time during which the probation order will be in effect;
- (E) The goal of the punishment being imposed; and
- (F) Any other factor the court deems appropriate.

(3) In any case involving a violation of local ordinance, misdemeanor, or felony in which the defendant has been punished in whole or in part by a fine, the court shall be authorized to allow the defendant to satisfy such fine or any fee imposed in connection with probation supervision through community service as set forth in Article 3 of Chapter 3 of Title 42. One hour of community service shall equal the dollar amount of one hour of paid labor at the minimum wage under the federal Fair Labor Standards Act of 1938, in effect on January 1, 2018, unless otherwise specified by the court. A defendant shall be required to serve the number of hours in community service which equals the number derived by dividing the amount owed by the defendant, including moneys assessed by a provider of probation services, by the federal minimum hourly wage or by the amount specified by the court. If the court orders educational advancement, the court shall determine the numbers of hours required to be completed. Prior to or subsequent to sentencing, a defendant, or subsequent to sentencing, a community supervision officer, may request that the court make all or any portion of the amount owed by the defendant be satisfied under this subsection.

(4) At the time of sentencing, the court may waive the imposition of a fine, exclusive of the payment of statutory surcharges, upon a determination that a defendant has a significant financial hardship or inability to pay or other extenuating factors exist that prohibit payment or collection of such fine. When determining significant financial hardship, the court may consider whether the defendant is indigent and whether the defendant or his or her dependents has a developmental disability or is totally and permanently disabled. If the court waives the imposition of a fine under this paragraph, it shall instead impose a theoretical fine and the defendant shall be required to pay the statutory surcharges associated therewith.

(c) In any case involving a felony in which the defendant previously appeared before a juvenile court, the records of the dispositions of the defendant as well as any evidence used in any juvenile court hearing shall be available to the district attorney, the defendant, and the superior court judge in determining sentencing as provided in Code Section 15-11-703.

(d) Within one year of the date upon which the sentence is imposed, or within 120 days after receipt by the sentencing court of the remittitur upon affirmance of the judgment after direct appeal, whichever is later, the court imposing the sentence has the jurisdiction, power, and authority to correct or reduce the sentence and to suspend or probate all or any part of the sentence imposed. The time periods prescribed in this subsection require the defendant to file a motion within such time periods; however, the court shall not be constrained to issue its order or hear the matter within such time periods. Prior to entering any order correcting, reducing, or modifying any sentence, the court shall afford notice and an opportunity for a hearing to the prosecuting attorney. Any order modifying a sentence which is entered without notice and an opportunity for a hearing as provided in this subsection shall be void. This subsection shall not

limit any other jurisdiction granted to the court in this Code section or as provided for in subsection (g) of Code Section 42-8-34.

(e)

(1)

(A) In sentencing a defendant convicted of a felony to probated confinement, the sentencing judge may make the defendant's participation in a work release program operated by a county a condition of probation, provided that such program is available and the administrator of such program accepts the inmate.

(B) Any defendant accepted into a county work release program shall thereby be transferred into the legal custody of the administrator of said program; likewise, any defendant not accepted shall remain in the legal custody of the Department of Corrections.

(2) Work release status granted by the court may be revoked for cause by the sentencing court in its discretion or may be revoked by the state or local authority operating the work release program for any reason for which work release status would otherwise be revoked.

(3) The provisions of this subsection shall not limit the authority of the commissioner to authorize work release status pursuant to Code Section 42-5-59 or apply to or affect the authority to authorize work release of county prisoners, which shall be as provided for in Code Sections 42-1-4 and 42-1-9 or as otherwise provided by law.

(4) This subsection shall not apply with respect to any violent felony or any offense for which the work release status is specifically prohibited by law, including but not limited to serious violent felonies as specified in Code Section 17-10-6.1.

O.C.G.A. § 17-10-1.3

(a) In determining whether to probate all or any part of any sentence of confinement in any felony, misdemeanor, or ordinance violation case, the sentencing court shall be authorized to make inquiry into whether the person to be sentenced is lawfully present in the United States under federal law.

(b) If the court determines that the person to be sentenced is not lawfully present in the United States, the court shall be authorized to make inquiry into whether the person to be sentenced would be legally subject to deportation from the United States while serving a probated sentence.

(c) If the court determines that the person to be sentenced would be legally subject to deportation from the United States while serving a probated sentence, the court may:

(1) Consider the interest of the state in securing certain and complete execution of its judicial sentences in criminal and quasi-criminal cases;

(2) Consider the likelihood that deportation may intervene to frustrate that state interest if probation is granted; and

(3) Where appropriate, decline to probate a sentence in furtherance of the state interest in certain and complete execution of sentences.

(d) This Code section shall apply with respect to a judicial determination as to whether to suspend all or any part of a sentence of confinement in the same manner as this Code section applies to determinations with respect to probation.

O.C.G.A. § 17-10-1.4

- (a) As used in this Code section, the term “split sentence” means any felony sentence that includes a term of imprisonment followed by a term of probation.
- (b) In any case where a judge on or after July 1, 2015, sentences a defendant to a split sentence, post-incarceration supervision of the defendant shall be conducted exclusively by the Department of Community Supervision and not by the State Board of Pardons and Paroles, regardless of whether the defendant has served the full period of incarceration ordered in the sentence or has been released prior to the full period of incarceration by parole, conditional release, or other action of the State Board of Pardons and Paroles.

O.C.G.A. § 17-10-3

- (a) Except as otherwise provided by law, every crime declared to be a misdemeanor shall be punished as follows:
- (1) By a fine not to exceed \$1,000.00 or by confinement in the county or other jail, county correctional institution, or such other places as counties may provide for maintenance of county inmates, for a total term not to exceed 12 months, or both;
 - (2) By confinement under the jurisdiction of the Board of Corrections in a state probation detention center pursuant to Code Section 42-8-35.4 for a determinate term of months which shall not exceed a total term of 12 months; or
 - (3) If the crime was committed by an inmate within the confines of a state correctional institution, by confinement under the jurisdiction of the Board of Corrections in a state correctional institution or such other institution as the Department of Corrections may direct for a term which shall not exceed 12 months.
- (b) Either the punishment provided in paragraph (1) or (2) of subsection (a) of this Code section, but not both, may be imposed in the discretion of the sentencing judge. Misdemeanor punishment imposed under either paragraph may be subject to suspension or probation. The sentencing courts shall retain jurisdiction to amend, modify, alter, suspend, or probate sentences under paragraph (1) of subsection (a) of this Code section at any time, but in no instance shall any sentence under the paragraph be modified in a manner to place a county inmate under the jurisdiction of the Board of Corrections, except as provided in paragraph (2) of subsection (a) of this Code section.
- (c) In all misdemeanor cases in which, upon conviction, a six-month sentence or less is imposed, it is within the authority and discretion of the sentencing judge to allow the sentence to be served on weekends by weekend confinement or during the nonworking hours of the defendant. A weekend shall commence and shall end in the discretion of the sentencing judge, and the nonworking hours of the defendant shall be determined in the discretion of the sentencing judge; provided, however, that the judge shall retain plenary control of the defendant at all times during the sentence period. A weekend term shall be counted as serving two days of the full sentence. Confinement during the nonworking hours of a defendant during any day may be counted as serving a full day of the sentence.
- (d) In addition to or instead of any other penalty provided for the punishment of a misdemeanor involving a traffic offense, or punishment of a municipal ordinance involving a traffic offense, with the exception of habitual offenders sentenced under Code Section 17-10-7, a judge may impose any one or more of the following sentences:

- (1) Reexamination by the Department of Driver Services when the judge has good cause to believe that the convicted licensed driver is incompetent or otherwise not qualified to be licensed;
 - (2) Satisfactory completion of a defensive driving course or defensive driving program approved by the Department of Driver Services;
 - (3) Within the limits of the authority of the charter powers of a municipality or the punishment prescribed by law in other courts, imprisonment at times specified by the court or release from imprisonment upon such conditions and at such times as may be specified; or
 - (4) Probation or suspension of all or any part of a penalty upon such terms and conditions as may be prescribed by the judge. The conditions may include driving with no further motor vehicle violations during a specified time unless the driving privileges have been or will be otherwise suspended or revoked by law; reporting periodically to the court or a specified agency; and performing, or refraining from performing, such acts as may be ordered by the judge.
- (e) Any sentence imposed under subsection (d) of this Code section shall be reported to the Department of Driver Services as prescribed by law.
- (f) The Department of Community Supervision shall lack jurisdiction to supervise misdemeanor offenders, except when the sentence is made concurrent to a probated felony sentence or as provided in Code Section 42-8-109.5. Except as provided in this subsection, the Department of Corrections shall lack jurisdiction to confine misdemeanor offenders.
- (g) This Code section will have no effect upon any offender convicted of a misdemeanor offense prior January 1, 2001, and sentenced to confinement under the jurisdiction of the Board of Corrections or to the supervision of the Department of Corrections.

O.C.G.A. § 17-10-7

(a) Except as otherwise provided in subsection (b) or (b.1) of this Code section, any person who, after having been convicted of a felony offense in this state or having been convicted under the laws of any other state or of the United States of a crime which if committed within this state would be a felony and sentenced to confinement in a penal institution, commits a felony punishable by confinement in a penal institution shall be sentenced to undergo the longest period of time prescribed for the punishment of the subsequent offense of which he or she stands convicted, provided that, unless otherwise provided by law, the trial judge may, in his or her discretion, probate or suspend the maximum sentence prescribed for the offense.

(b)

(1) As used in this subsection, the term “serious violent felony” means a serious violent felony as defined in subsection (a) of Code Section 17-10-6.1.

(2) Except as provided in subsection (e) of Code Section 17-10-6.1, any person who has been convicted of a serious violent felony in this state or who has been convicted under the laws of any other state or of the United States of a crime which if committed in this state would be a serious violent felony and who after such first conviction subsequently commits and is convicted of a serious violent felony for which such person is not sentenced to death shall be sentenced to imprisonment for life without parole. Any such sentence of life without parole shall not be suspended, stayed, probated, deferred, or withheld, and any such person sentenced pursuant to this paragraph shall not be eligible for any form of pardon, parole, or early release administered by the State Board of

Pardons and Paroles or for any earned time, early release, work release, leave, or any other sentence-reducing measures under programs administered by the Department of Corrections, the effect of which would be to reduce the sentence of life imprisonment without possibility of parole, except as may be authorized by any existing or future provisions of the Constitution.

(b.1) Subsections (a) and (c) of this Code section shall not apply to a second or any subsequent conviction for any violation of subsection (a), paragraph (1) of subsection (i), or subsection (j) of Code Section 16-13-30.

(c) Except as otherwise provided in subsection (b) or (b.1) of this Code section and subsection (b) of Code Section 42-9-45, any person who, after having been convicted under the laws of this state for three felonies or having been convicted under the laws of any other state or of the United States of three crimes which if committed within this state would be felonies, commits a felony within this state shall, upon conviction for such fourth offense or for subsequent offenses, serve the maximum time provided in the sentence of the judge based upon such conviction and shall not be eligible for parole until the maximum sentence has been served.

(d) For the purpose of this Code section, conviction of two or more crimes charged on separate counts of one indictment or accusation, or in two or more indictments or accusations consolidated for trial, shall be deemed to be only one conviction.

(e) This Code section is supplemental to other provisions relating to recidivous offenders.

O.C.G.A. § 17-10-8

(a) In a felony case, when a statutory fine amount is not set by law, upon conviction, the court may impose a fine not to exceed \$100,000.00.

(b) In any case when probation is revoked, the defendant shall not be entitled to any rebate or refund of any part of the fine paid.

O.C.G.A. § 17-10-8.1

In any case in which a defendant receives legal defense services pursuant to Chapter 12 of Title 17 where the defendant has not paid the application fee required by Code Section 15-21A-6 and the court has not waived such fee at the time of sentencing, the court shall impose such fee as a condition of probation.

O.C.G.A. § 17-10-10

(a) Where at one term of court a person is convicted on more than one indictment or accusation, or on more than one count thereof, and sentenced to imprisonment, the sentences shall be served concurrently unless otherwise expressly provided therein.

(b) Where a person is convicted on more than one indictment or accusation at separate terms of court, or in different courts, and sentenced to imprisonment, the sentences shall be served concurrently, one with the other, unless otherwise expressly provided therein.

(c) This Code section shall apply alike to felony and misdemeanor offenses.

(d) This Code section shall govern and shall be followed by the Department of Corrections in the computation of time that sentences shall run.

O.C.G.A. § 17-10-11

(a) Except as provided in subsection (b) of this Code section, upon conviction for an offense, a person shall be given full credit for each day spent in confinement in any penal institution or

facility and in any institution or facility for treatment or examination for a disability, as such term is defined in Code Section 37-1-1, infirmity, or other physical condition, including:

- (1) Pretrial confinement, for any reason, since the date of arrest for the offense which is the subject of the sentence; and
 - (2) Posttrial confinement awaiting the remittitur from an appellate court or transfer to the Department of Corrections or other court ordered institution or facility.
- (b) The court may exclude credit for time served in pretrial confinement when its sentence:
- (1) Requires the person to complete a program at a probation detention center as set forth in Code Section 42-8-35-4;
 - (2) Allows the person to participate in a work release program as set forth in Code Section 42-1-4; or
 - (3) Is for a misdemeanor offense for time spent in confinement in a jurisdiction other than the one in which the arrest for such offense occurred.
- (c) The credit or credits set forth in subsection (a) of this Code section shall be applied toward the convicted person's sentence and shall be considered by the State Board of Pardons and Paroles in determining the eligibility of such person for parole.
- (d) This Code section shall apply to sentences for all crimes, whether classified as violations, misdemeanors, or felonies, and to all courts having criminal jurisdiction located within the boundaries of this state.

O.C.G.A. § 17-10-13

The punishments prescribed by this Code shall be assessed only after a legal adjudication of guilt in a court having jurisdiction.

O.C.G.A. § 42-8-60

- (a) When a defendant has not been previously convicted of a felony, the court may, upon a guilty verdict or plea of guilty or nolo contendere and before an adjudication of guilt, without entering a judgment of guilt and with the consent of the defendant, defer further proceedings and:
- (1) Place the defendant on probation; or
 - (2) Sentence the defendant to a term of confinement.
- (b) The court shall not sentence a defendant under the provisions of this article unless the court has reviewed the defendant's criminal record as such is on file with the Georgia Crime Information Center.
- (c) When a court imposes a sentence pursuant to this article, it:
- (1) Shall state in its sentencing order the prospective effective date of the defendant being exonerated of guilt and discharged as a matter of law, assuming the defendant successfully complies with its sentencing order, provided that such date may not have taken into account the awarding of credit for time served in custody; and
 - (2) May limit access to certain information as provided in subsection (b) of Code Section 42-8-62.1.
- (d) The court may enter an adjudication of guilt and proceed to sentence the defendant as otherwise provided by law when the:
- (1) Defendant violates the terms of his or her first offender probation;
 - (2) Defendant is convicted for another crime during the period of his or her first offender sentence; or

(3) Court determines that the defendant is or was not eligible for first offender sentencing under this article.

(e) A defendant sentenced pursuant to this article shall be exonerated of guilt and shall stand discharged as a matter of law as soon as the defendant:

(1) Completes the terms of his or her probation, which shall include the expiration of the sentence by virtue of the time frame of the sentence passing, provided that such sentence has not otherwise been tolled or suspended;

(2) Is released by the court under Code Section 42-8-37, 42-8-103, or 42-8-103.1 prior to the termination of the period of his or her probation; or

(3) Is released from confinement and parole, provided that the defendant is not serving a split sentence.

(f) The court shall not sentence a defendant under the provisions of this article who has been found guilty of or entered a plea of guilty or a plea of nolo contendere for:

(1) A serious violent felony as such term is defined in Code Section 17-10-6.1;

(2) A sexual offense as such term is defined in Code Section 17-10-6.2;

(3) Trafficking of persons for labor or sexual servitude as prohibited by Code Section 16-5-46;

(4) Neglecting disabled adults, elder persons, or residents as prohibited by Code Section 16-5-101;

(5) Exploitation and intimidation of disabled adults, elder persons, and residents as prohibited by Code Section 16-5-102;

(6) Sexual exploitation of a minor as prohibited by Code Section 16-12-100;

(7) Electronically furnishing obscene material to a minor as prohibited by Code Section 16-12-100.1;

(8) Computer pornography and child exploitation as prohibited by Code Section 16-12-100.2;

(9)

(A) Any of the following offenses when such offense is committed against a law enforcement officer while such officer is engaged in the performance of his or her official duties:

(i) Aggravated assault in violation of Code Section 16-5-21;

(ii) Aggravated battery in violation of Code Section 16-5-24; or

(iii) Obstruction of a law enforcement officer in violation of subsection (b) of Code Section 16-10-24, if such violation results in serious physical harm or injury to such officer.

(B) As used in this paragraph, the term "law enforcement officer" means:

(i) A peace officer as such term is defined in paragraph (8) of Code Section 35-8-2;

(ii) A law enforcement officer of the United States government;

(iii) An individual employed as a campus police officer or school security officer;

(iv) A game warden; and

(v) A jail officer employed at a county or municipal jail; or

(10) Driving under the influence as prohibited by Code Section 40-6-391.

(g) When a defendant has not been previously convicted of a felony, the court may, after an adjudication of guilt, sentence the defendant pursuant to this article as provided in Code Section

42-8-66 or modify a sentence as provided in subsection (f) of Code Section 17-10-1 so as to allow a sentence pursuant to this article.

(h) A defendant shall not avail himself or herself of this article on more than one occasion.

O.C.G.A. § 16-13-2

(a) Whenever any person who has not previously been convicted of any offense under Article 2 or Article 3 of this chapter or of any statute of the United States or of any state relating to narcotic drugs, marijuana, or stimulant, depressant, or hallucinogenic drugs, pleads guilty to or is found guilty of possession of a narcotic drug, marijuana, or stimulant, depressant, or hallucinogenic drug, the court may without entering a judgment of guilt and with the consent of such person defer further proceedings and place him on probation upon such reasonable terms and conditions as the court may require, preferably terms which require the person to undergo a comprehensive rehabilitation program, including, if necessary, medical treatment, not to exceed three years, designed to acquaint him with the ill effects of drug abuse and to provide him with knowledge of the gains and benefits which can be achieved by being a good member of society. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed accordingly. Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him. Discharge and dismissal under this Code section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this Code section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. Discharge and dismissal under this Code section may occur only once with respect to any person.

(b) Notwithstanding any law to the contrary, any person who is charged with possession of marijuana, which possession is of one ounce or less, shall be guilty of a misdemeanor and punished by imprisonment for a period not to exceed 12 months or a fine not to exceed \$1,000.00, or both, or public works not to exceed 12 months.

(c) Persons charged with an offense enumerated in subsection (a) of this Code section and persons charged for the first time with nonviolent property crimes which, in the judgment of the court exercising jurisdiction over such offenses, were related to the accused's addiction to a controlled substance or alcohol who are eligible for any court approved drug treatment program may, in the discretion of the court and with the consent of the accused, be sentenced in accordance with subsection (a) of this Code section. The probated sentence imposed may be for a period of up to five years. No discharge and dismissal without court adjudication of guilt shall be entered under this subsection until the accused has made full restitution to all victims of the charged offenses. Discharge and dismissal under this Code section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this Code section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. Discharge and dismissal under this Code section may not be used to disqualify a person in any application for employment or appointment to office in either the public or private sector.

(d)

(1) As used in this subsection, the term:

(A) "Criminal history record information" shall have the same meaning as set forth in Code Section 35-3-30.

(B) "Restrict" or "restriction" shall have the same meaning as set forth in Code Section 35-3-37.

(2)

- (A) At the time of sentencing, the defendant may seek to limit public access to his or her sentencing information, and the court may, in its discretion, order that:
- (i) The defendant's records shall be restricted in accordance with Code Section 35-3-37;
 - (ii) The criminal file, docket books, criminal minutes, final record, all other records of the court, and the defendant's criminal history record information in the custody of the clerk of court, including within any index, be sealed and unavailable to the public; and
 - (iii) The defendant's criminal history record information of arrest, including any fingerprints or photographs taken in conjunction with such arrest, be restricted by law enforcement agencies, jails, or detention centers.
- (B) When considering the defendant's request under this paragraph, the court shall weigh the public's interest in the defendant's criminal history record information being publicly available and the harm to the defendant's privacy and issue written findings of fact thereupon.
- (C) The court shall specify the date that such prohibited dissemination, sealing, and restrictions will take effect.

Beasley v. State, 345 Ga. App. 247 (2018).

Keith Malik Beasley was indicted for felony theft by shoplifting. He appeals the denial of his motion to quash and special demurrer, arguing that his prior nolo contendere plea to shoplifting was not a conviction for purposes of the sentencing provision of the shoplifting statute and therefore that he cannot be found guilty of a felony in this case. We agree and reverse.

Beasley was charged with theft by shoplifting and giving a false name and date of birth. The indictment informed Beasley that he was being charged with felony theft by shoplifting under OCGA § 16-8-14 (b) (1) (C) because he had three prior convictions of theft by shoplifting. Beasley filed a motion to quash and special demurrer, arguing that he could not be charged with felony theft by shoplifting because one of his prior charges was resolved by a plea of nolo contendere. The trial court denied Beasley's motion. We granted Beasley's application for interlocutory appeal, and this appeal followed.

Beasley does not contest that he has two prior shoplifting convictions for purposes of the statute. But he argues that his plea of nolo contendere cannot be used as a third conviction since the shoplifting statute does not explicitly allow the use of a plea of nolo contendere. We agree. Beasley's argument is supported by the plain language of the statutes at issue.

Our analysis turns on current and former versions of the presentence hearing, recidivism, and nolo contendere statutes. The relevant parts of those statutes are set out in the margin. The nolo contendere statute directs: "Except as otherwise provided by law, a plea of nolo contendere shall not be used against the defendant in any other court or proceedings as an admission of guilt or otherwise or for any purpose..." OCGA § 17-7-95 (c). The sentencing provision in the theft by shoplifting statute does not otherwise provide: "Upon conviction of a fourth or subsequent offense for shoplifting, where the prior convictions are either felonies or misdemeanors, or any combination of felonies and misdemeanors, as defined by this Code section, the defendant commits a felony..." OCGA § 16-8-14 (b) (1) (C). So the relevant sentencing provision does not provide that a plea of nolo contendere counts as a conviction.

The applicable statutory definition of “conviction” does not otherwise provide either. The definition of “conviction” generally applicable under Title 16, Crimes and Offenses, provides, “ ‘Conviction’ includes a final judgment of conviction entered upon a verdict or finding of guilty of a crime or upon a plea of guilty.” There are, as detailed in the margin, additional or superceding definitions of “conviction” in the statutes regarding a number of offenses. But “conviction” does not appear in the definitions provision of the statutes regarding theft, OCGA §§ 16–8–1 through 16–8–23.

So under the plain language of the applicable statutes, a *nolo contendere* plea does not count as a prior conviction for sentencing purposes under the theft by shoplifting statute. See *Corbitt v. State*, 190 Ga. App. 509, 509 (1) (1989) (under the plain language of the *nolo contendere* statute, a defendant’s plea of *nolo contendere* cannot be admitted as a similar transaction); *Beal v. Braunecker*, 185 Ga. App. 429, 432 (2) (1987) (under the plain language of the *nolo contendere* statute, a defendant’s plea of *nolo contendere* is not admissible to support a plaintiff’s claim for punitive damages).

While we “have sanctioned the use of past *nolo contendere* pleas for sentencing purposes under recidivist statutes, we have not approved such use when proof of the prior conviction is an element of the crime.” *Blackmon v. State*, 266 Ga. App. 877, 879 (2004) (citation omitted). But the first clause of that sentence is inconsistent with subsequent Supreme Court of Georgia authority. The qualification in *Blackmon* is the controlling principle today. Our Supreme Court has since clarified that “any fact that serves to enhance a mandatory minimum sentence is an element of the crime...” *Jeffrey v. State*, 296 Ga. 713, 718 (3) (2015) (overruling prior decision that held that “the family violence aspect of [an] aggravated assault—which elevates the mandatory minimum sentence from one year to three years—was merely a sentencing factor and not an element of the aggravated assault offense”) (citations and emphasis omitted).

So the prior shoplifting convictions that would elevate Beasley’s mandatory minimum sentence—to a year’s imprisonment from 30 days imprisonment, 120 days confinement in a community correctional facility, or 120 days house arrest (compare subsections (b) (1) (B) and (b) (1) (C) of OCGA § 16–8–14)—are not merely sentencing factors but are an element of the shoplifting offense. Because “we have not approved [the use of *nolo contendere* pleas] when proof of the prior conviction is an element of the crime,” *Blackmon*, *supra*, 266 Ga. App. at 879, the state may not use Beasley’s *nolo contendere* plea to shoplifting to elevate the current case to a felony.

Coleman v. State, 352 Ga. App. 45 (2019).

Anthony Coleman appeals his conviction for making a false statement, arguing that the trial court erred in denying his motion for an order of exoneration and restriction of access to his criminal records under Georgia’s First Offender Act because his sentence was ambiguous. For the reasons set forth *infra*, we affirm.

Following a jury trial, Coleman was convicted of one count of making a false statement, but acquitted of the remaining counts in the indictment. And on May 16, 2016, Coleman was sentenced to five years of probation and a fine of \$1,000. Then, on August 22, 2018, Coleman filed a “Motion to Terminate Probation and Enter an Order of Exoneration and a Motion Pursuant to [OCGA] § 42-8-62.1[1] to Restrict Access to the Criminal Records in the Above-Styled Case.” In the motion, Coleman alleged that he had completed his required community service, paid \$750 of the fine and was prepared to pay the balance, and had been released for active probation supervision. Coleman also claimed that he had no prior criminal record before

the sentence imposed in this case, and that he had faithfully performed the statutory requirements necessary for the court to grant his requests. In sum, Coleman contended that his “probation should be terminated and a conditional discharge/first offender should be entered pursuant to [OCGA] § 42-8-60 as ‘not guilty[,]’ ” and “[a]ccess to the conditional discharge/first[-]offender sentence should be restricted pursuant [to OCGA] § 42-8-62.1 (b) (1).”

The trial court held a hearing on Coleman's motion, at which the State did not oppose his request to terminate probation. But Coleman's other requests were based on his alleged status as a first offender, and the State disputed that he was sentenced as a first offender. In response, Coleman argued that his sentencing order was ambiguous as to whether he was adjudicated guilty or sentenced as a first offender and that this ambiguity must be resolved in his favor. The State disagreed, contending, *inter alia*, that the sentencing form was not ambiguous and the court was not authorized to sentence Coleman as a first offender because he was ineligible for such status at the time his sentence was entered. Ultimately, the trial court granted Coleman's request to terminate his probation, but denied his other requests. This appeal follows.

Coleman's sole argument on appeal is that the trial court erred in denying his motion for an order of exoneration and restriction of access to his criminal records under the First Offender Act because his sentence was ambiguous and should be construed in his favor. We disagree.

As indicated by the title of the First Offender Act, defendants are not entitled to be sentenced as a first offender more than once. And here, while Coleman alleged in his motion that he had no prior criminal record, at his 2016 sentencing hearing, his trial counsel informed the court, without prompting, that Coleman was ineligible for first-offender status.

Specifically, in his closing argument, Coleman's counsel stated: “I don't know how many times [Coleman] got arrested, but he's got one prior conviction. Unfortunately[,] he used his first offender in that, so he's not eligible for first offender. So by this sentence[,] ... he would be a *convicted felon*.” Thus, Coleman admitted that the trial court was not authorized to sentence him under the Act because he had been given first-offender status in a prior proceeding. But regardless of whether Coleman qualified for first-offender status, his sentencing form unambiguously shows that he was not sentenced as a first offender.

Turning to the merits of his argument on appeal, Coleman is correct that sentences for criminal offenses should be “certain, definite, and free from ambiguity; and [when] the contrary is the case, the benefit of the doubt should be given to the accused.” And here, Coleman contends that the following language on the sentencing form creates an ambiguity as to whether he was sentenced as a first offender: “The Defendant is adjudged guilty *or* sentenced under First Offender/Conditional Discharge for the above-stated offense(s)” But this sentence merely establishes that Coleman was either being adjudged guilty *or* sentenced as a first offender, not both. Moreover, this statement is entirely consistent with Georgia law because when a defendant is sentenced as a first offender, “there is no adjudication of guilt [and] there is no conviction.” Additionally, the sentencing form indicates, in bold print, that the “[d]isposition” of the charged offense is “Guilty.” And while the box on the form indicating the defendant was being sentenced as a repeat offender is not checked, neither is the box indicating the defendant was a first offender. In sum, because a first-offender sentence is not an adjudication of guilt and Coleman's sentencing form indicates that he was being convicted of the charged offense, the form was not ambiguous as to whether Coleman received first-offender status, as it made clear that he did not.

For all these reasons, we affirm the trial court's denial of Coleman's motion for an order of exoneration and to restrict access to his criminal record.⁹

State v. Langley, 855 S.E.2d 376 (Ga. Ct. App. 2021).

In this case, we must determine whether the trial court may probate a sentence imposed under OCGA § 16-11-131 (b), which makes it unlawful for a person on probation to possess a firearm. The trial court concluded that it had the discretion to probate a portion of the sentence, and the State appealed. After considering the relevant statutory language, we conclude that the trial court lacked the discretion to impose the probated sentence. Accordingly, we vacate the sentence, and remand the case for resentencing.

The facts are undisputed. In 1987, Dennis Mark Langley was convicted of murder. Following his release from incarceration, he began his term of probation. In 2019, the department of community supervision conducted a search of his home, as permitted by the terms of his probation, and discovered several firearms. As a result, Langley was charged with possession of a firearm by a convicted felon, in violation of OCGA § 16-11-131 (b). He pled guilty, and the trial court sentenced him to ten years, to serve six months in prison with the remainder on probation. The State now appeals, arguing that Langley's sentence is void because the trial court lacked the discretion to impose a probated sentence under the plain language of the sentencing statute. We agree.

“The interpretation of a statute is, of course, a question of law, which is reviewed de novo on appeal. Indeed, when only a question of law is at issue, as here, we owe no deference to the trial court's ruling and apply the ‘plain legal error’ standard of review.” (Citations and punctuation omitted.) *Mays v. State*, 345 Ga. App. 562, 563 (2018).

Where the trial court imposes a sentence the law does not allow, that sentence is void. *Wilder v. State*, 343 Ga. App. 110, 112 (2017). In determining whether the statutory language vested the trial court with the discretion to impose a probated sentence, we turn to the rules of statutory construction.

When interpreting any statute, we necessarily begin our analysis with familiar and binding canons of construction. In considering the meaning of a statute, our charge as an appellate court is to presume that the General Assembly meant what it said and said what it meant. Toward that end, we must afford the statutory text its plain and ordinary meaning, consider the text contextually, read the text in its most natural and reasonable way, as an ordinary speaker of the English language would, and seek to avoid a construction that makes some language mere surplusage. Further, when the language of a statute is plain and susceptible to only one natural and reasonable construction, courts must construe the statute accordingly. (Citations and punctuation omitted.) *Mays*, 345 Ga. App. at 564; see also *Major v. State*, 301 Ga. 147, 150 (1) (2017).

Here, Langley was convicted of possession of a firearm by a convicted felon, in violation of OCGA § 16-11-131 (b). That statute provides, in relevant part, that “if the felony for which the person is on probation or has been previously convicted is a forcible felony, then upon conviction of receiving, possessing, or transporting a firearm, such person *shall be imprisoned for a period of five years.*” (Emphasis supplied.). The term “forcible felony” includes Langley's prior conviction for murder. OCGA § 16-11-131 (e). Nevertheless,

trial courts generally have the discretion to fashion sentences that fit the crimes for which the defendant is convicted, so long as the sentences fall within the statutory ranges. It is, however, within the power of the legislature to direct the punishment to be prescribed for second offenders and to leave no discretion to the trial judge.

(Citations and punctuation omitted.) *Blackwell v. State*, 302 Ga. 820, 828 (4) (2018); see also OCGA § 17-10-1 (a) (1) (A) (2018) (“The judge imposing the sentence is granted power and

authority to suspend or probate all or any part of the entire sentence under such rules and regulations as the judge deems proper[.]”).

To resolve the issue before us in this appeal, we therefore must determine whether the specific provision of OCGA § 16-11-131 (b) abrogates the trial court's general discretion under § 17-10-1 (a) (1) (A) to impose a probated sentence. Because we are faced with the interplay of these two statutes, we note that statutory interpretation principles require that a specific statute control over a general statute unless there is a contrary legislative intent. *State v. Jones*, 265 Ga. App. 493, 494 (2) (2004).

The legislative intent here is unambiguous given the plain language of OCGA § 16-11-131 (b), and thus, that specific statute prevails over OCGA § 17-10-1. Here, our search for the legislature's intent is short: the plain language of the statute requires the trial court to impose a term of imprisonment “for a period of five years,” and its use of the term “shall” mandates that the defendant serve all of that term in prison. OCGA § 16-11-131 (b); *Jones*, 265 Ga. App. at 494 (2) (the statutory language “shall be imprisoned for not less than ten years” meant that the trial court lacked discretion to probate a portion of the ten-year sentence). The trial court's imposition of a probated sentence directly contravened the legislature's intent as set forth in the plain language of the statute. *Id.* Thus, the trial court lacked the discretion to impose the sentence that it did because the sentence was void. Accordingly, we must vacate the sentence and remand the case for resentencing.

Huynh v. State, 855 S.E.2d 63, 64–66 (Ga. Ct. App. 2021).

This is the second appearance of this case in this Court. In *Huynh v. State*, 347 Ga. App. XXVII (Aug. 1, 2018) (unpublished), we vacated Nghia Van Huynh's sentence because the Superior Court of Gwinnett County erred in sentencing Huynh to two 20-year terms in confinement for two counts of child molestation (Counts 4 and 13) without including a probationary term in the sentences. See OCGA § 17-10-6.2 (b) (2012); *State v. Riggs*, 301 Ga. 63 (2017). On remand, the trial court resentenced Huynh to two 15-year terms to serve 10 years in confinement on Counts 4 and 13.1 Huynh now appeals from the trial court's denial of his motion to modify the sentences he received on resentencing, apparently arguing that he had been released from custody and could not lawfully be resentenced. We affirm.

In the first appearance of this case, we noted that

[o]n April 13, 2012, Huynh entered an *Alford* plea to three counts of child molestation and received an aggregate sentence of 40 years, with 25 years in confinement. The sentence was structured as twenty years to serve on Count 4; twenty years with the first five in confinement on Count 10, and twenty years to serve on Count 13. The sentence on Count 10 ran consecutively to that on Count 4, and the sentence on Count 13 ran concurrently with the other two counts.[2]

(Footnotes omitted.) Acting pro se, Huynh appealed from the denial of his motion to correct a void sentence, asserting that former OCGA § 17-10-6.2 (b) required that his sentences on Counts 4 and 13 include at least one year of probation. We agreed, vacated Huynh's sentences on Counts 4 and 13, and remanded the case to the trial court for resentencing.

During a September 14, 2018 resentencing hearing, Huynh attempted to raise arguments outside the scope of resentencing, including a claim that his original plea was not knowingly and voluntarily entered. The trial court determined that it did not have jurisdiction to address Huynh's additional arguments, and instead sentenced Huynh in an October 3, 2018 resentencing order to

fifteen years with the first ten in confinement each on Counts 4 and 13. The sentence for Count 13 ran consecutively to the sentence for Count 10, which itself ran consecutively to the sentence for Count 4.

On June 25, 2019, Huynh filed a timely pro se motion to modify his new sentences, contending that “some of the charges should have merged” and that “there is additional and relevant information that the court did not hear prior to sentencing.” During the hearing on his motion, however, Huynh did not address these arguments; rather, he claimed that he “didn't do anything to the children” and that he was released from custody on August 29, 2018 but was immediately and unlawfully arrested again by Gwinnett County officers. The trial court denied Huynh's motion in a December 10, 2019 order, and this appeal followed.

In two related enumerations of error, Huynh contends that he was released by the Department of Corrections “for specific crimes” and taken to Gwinnett County to be resentenced on those same crimes “without implementing all aspects of due process of law, including arrest, formal charging, arraignment, etc.” He further questions whether a resentencing under such circumstances would be a “legally valid sentence.” We conclude that the trial court correctly denied Huynh's motion to modify his sentence.

“Whether to grant a motion to correct a sentence under OCGA § 17-10-1 (f) lies within the discretion of the trial court. So long as the sentence imposed by the court falls within the parameters prescribed by law, we will not disturb it.” (Citation and punctuation omitted.) *Patterson v. State*, 347 Ga. App. 105, 107 (1) (2018). Relevant to this case, “a person convicted of a first offense of child molestation shall be punished by imprisonment for not less than five nor more than 20 years....” OCGA § 16-6-4 (b) (1).

Here, the trial court resentenced Huynh to two terms of fifteen years with ten years to serve in confinement each on Counts 4 and 13. The trial court also directed that Huynh's sentence for Count 13 run consecutively to the sentence for Count 10, and that the sentence for Count 10 run consecutively to the sentence for Count 4, resulting in an aggregate sentence of 40 years to serve 25 years in confinement. As a threshold matter, then, these sentences fall within the statutory range of sentences for the offense of child molestation. See OCGA § 16-6-4 (b) (1). Moreover, it was within the trial court's discretion to impose consecutive sentences for Huynh's separate offenses of child molestation. See, e.g., OCGA § 17-10-10 (a) (“Where at one term of court a person is convicted on more than one indictment or accusation, or on more than one count thereof, and sentenced to imprisonment, the sentences shall be served concurrently *unless otherwise expressly provided therein.*”) (emphasis supplied); *Dowling v. State*, 278 Ga. App. 903, 904 (2006) (“a trial court has discretion to impose consecutive sentences for separate offenses”).

And while Huynh's aggregate sentence was the same, the sentences for each individual offense were less severe than his original sentences. See, e.g., *Johnson v. State*, 307 Ga. App. 499 (2010) (“Due process prohibits the imposition of a more severe sentence as a result of vindictiveness against a defendant for successfully attacking his conviction.”) (citation and punctuation omitted). Accordingly, Huynh's new sentences raise no due process concerns. See, e.g., *Fair v. State*, 281 Ga. App. 518, 519 (1) (2006) (“a concurrent sentence may be converted into a consecutive sentence without being considered ‘more severe’ ”); *Alvarado v. State*, 248 Ga. App. 810, 811 (1) (2001) (affirming resentencing order where trial court “converted [the defendant's] existing sentence from a concurrent sentence into a consecutive one without increasing the length of the sentence”). Huynh's remaining vehicle in pursuit of a remedy, if any he has, is a petition for habeas corpus. See OCGA § 9-14-40 et seq.; *Patterson*, 347 Ga. App. at

109 (1) (“An extraordinary motion for new trial is not a remedy available to [Huynh] because he pled guilty. Construing [Huynh's] pleading as a motion to withdraw his guilty plea or a motion in arrest of judgment is equally ineffectual because both sorts of motions must be filed within the same term of court at which the guilty plea or judgment being challenged was entered.”) (citation and punctuation omitted).

In sum, because the trial court's sentences fall within the statutory range of punishment for the offense of child molestation, the trial court did not err in its resentencing order. We therefore affirm the trial court's order denying Huynh's motion to modify his sentence.

Griggs v. State, 314 Ga. App. 158 (2012).

Nathaniel Griggs appeals from the trial court's grant of the State's motions to correct a void sentence and to clarify a clerical error. For the reasons that follow, we affirm.

After a jury trial, Griggs was convicted of Count 1—aggravated battery,1 Count 2—aggravated battery, Count 4—burglary, and Count 5—kidnapping with bodily injury. At sentencing, the trial court merged the first count of aggravated battery with the kidnapping conviction and sentenced Griggs to life imprisonment for Kidnapping, and 20 years each on Counts 2 and 4. The written verdict form indicated that both Counts 2 and 4 were to run consecutive to Count 5. This Court affirmed Griggs's conviction on appeal.

Subsequent to his conviction, the Supreme Court of Georgia decided the case of *Garza v. State*, and based on the holding in that case, Griggs filed a petition for habeas corpus, which the habeas court granted by voiding his conviction for kidnapping with bodily injury. The State moved for correction of a void sentence in the trial court because the State argued that Count 1 (aggravated battery), which originally was merged with the now voided kidnapping charge, required imposition of a sentence of a specific number of years. Simultaneously, the State moved for the trial court to correct a clerical error in order for the written sentence to conform to the oral pronouncement at the original sentencing hearing. The State maintained that the court's oral pronouncement of the original sentence was for Griggs to serve life imprisonment on the merged Counts 1 and 5, followed by a consecutive sentence of 20 years for Count 2, followed by a consecutive sentence of 20 years for Count 4, rather than life imprisonment followed by concurrent 20–year sentences.

At the resentencing hearing, the trial court sentenced Griggs to 20 years on each count to be served consecutively to each other. On appeal, Griggs challenges the trial court's sentence, arguing that the trial court was without authority to clarify its written sentence by pronouncing that Counts 2 and 4 would run consecutive to each other in addition to running consecutive to Count 1, which required a specific sentence after the life sentence for his kidnapping charge was voided. He also argues that the resulting sentence was vindictive. For the reasons that follow, we affirm.

1. “Under OCGA § 17–10–1(a)(1), the sentencing judge shall prescribe a determinate sentence for a specific number of months or years and in conformity with other statutory sentencing requirements.” In this case, after the kidnapping conviction was voided, the trial court was authorized to sentence Griggs to a term of years on Count 1, which for aggravated battery could consist of up to 20 years. Thus, it was not erroneous for the trial court to impose a sentence of 20 years for Count 1.

2. Moreover, the trial court did not err by correcting its written sentence to conform with its oral pronouncement. “Except as provided by statute, a sentencing court has no power to modify a valid sentence of imprisonment after the term of court in which it was imposed has

expired.” Nevertheless, a sentencing court also possesses “inherent power to correct its records at any time to show the true intent of the sentencing court at the time the original sentence was imposed.” Here, the trial court was authorized to correct the clerical error appearing in its written sentence as compared to its original oral pronouncement. The trial court, after reviewing the original transcript, determined that its original pronouncement and intent was for Counts 2 and 4 to be served consecutive to each other as well as to Count 1 (previously the voided Count 5 with which Count 1 was merged). Accordingly, there was no error in the trial court's correction of that portion of Griggs's sentence.

3. Finally, because the final sentence of 60 years to serve is not longer than the original sentence of life followed by additional terms of years, we find no merit in Griggs's argument that the trial court was vindictive in imposing the new sentence as it did.

State v. Lin, 268 Ga. App. 702 (2004).

This appeal regards Lin's misdemeanor conviction and sentencing for driving under the influence of alcohol.

The State contends, and Lin agrees, that, following Lin's entry of a guilty plea, the trial court erred in illegally sentencing Lin to a term of incarceration and probation totaling less than 12 months, thereby violating the statutory sentencing requirements of the Georgia DUI statute. As the court erred in sentencing Lin, we vacate the sentence and remand the case for resentencing pursuant to OCGA § 40-6-391(c)(1)(E).

Georgia's DUI statute, OCGA § 40-6-391(c)(1)(E), provides explicitly that, after the first conviction for driving under the influence, the defendant shall be sentenced to, among other penalties, “*a period of probation of 12 months less any days during which the defendant is actually incarcerated.*” (Emphasis supplied.) Based on this mandate, the legislature's clear purpose was to ensure that anyone convicted of DUI would serve an actual sentence of 12 months of combined confinement and probation, regardless of the fact that there may be factors which would reduce the confinement time which a defendant might serve. Even if the confinement time is reduced, such period of reduction is automatically included under the probation sentence.

In this case, the record shows that, on January 20, 2004, Lin, a political refugee from and legal citizen of Burma, pled guilty to one count of driving under the influence of alcohol and one count of disobedience of a traffic control device. After the trial court accepted his plea, Lin asked the trial court “to allow him to be sentenced to 11 months and 29 days as opposed to 12 months so as not to endanger him with [U.S. I]mmigration.”

In an apparent attempt to accommodate Lin's request, the trial court executed a standard sentencing form, the language of which does not track the mandatory sentencing requirements of OCGA § 40-6-391(c)(1)(E). The trial court did not sentence Lin to 12 months probation less any time actually served, as required by OCGA § 40-6-391(c)(1)(E). Instead, the trial judge sentenced him to confinement for 11 months and 29 days.

In a subsequent “Provided that” section of the form, the judge then added, in reference to the initial sentence just imposed, that Lin is to “serve 79 hours *of this sentence* in confinement and may serve the remainder of 11 months and 29 days on probation.” (Emphasis supplied.) Clearly, a proper reading of the language involved, while not intended, provides that Lin was sentenced to confinement for 11 months 29 days under the initial sentence, with credit against such sentence for the 79 hours that he had already served, with the remainder of 11 months 29

days to be served on probation. Such a sentence is void, as it violates the maximum 12-month sentence for a misdemeanor conviction under Georgia law.

While it has been argued that the language of the sentence form provides a sentence to Lin of 79 hours confinement, plus 11 months 29 days probation, which sentence would be in excess of 12 months, this is not a reasonable construction of the language involved. Even if the sentence did so provide, then it would be void, as it also violates the maximum 12-month sentence for a misdemeanor conviction under Georgia law.

It is likely that the trial court actually intended to impose a total sentence of 11 months 29 days, as requested by Lin, with confinement to be limited to the 79 hours that Lin had already served, with the remaining balance to be served on probation. A proper construction of the language used, however, does not allow this interpretation, and even if it did, such a sentence would be error, as it would violate the sentencing requirements of OCGA § 40-6-391(c)(1)(E). While the standard sentencing form used here, along with verbiage errors, greatly contributed to the improper sentence, the major error was the attempt to avoid the application of the sentencing requirements of OCGA § 40-6-391(c)(1)(E), which the court could not do.

For the above reasons, we must vacate the sentence here, and remand the case to the trial court for resentencing consistent with this opinion.

Where to Find Examples and Forms of These Documents

1. Examples

- a. Most of these will be behind a paywall, but you can sometimes see the language and you can sometimes access the whole document
- b. Athens-Clarke County
 - i. <https://www.athensclarkeclerkofcourt.com/WebCaseSearch/mainpage.asp>
x
- c. Fulton County
 - i. <https://publicrecordsaccess.fultoncountyga.gov/Portal/>
- d. Cobb County
 - i. <https://ctsearch.cobbsuperiorcourtclerk.com>
 1. Records -> Search by Case Type
 2. Select Criminal
 3. Use dropdown menu
- e. <https://typographyforlawyers.com/sample-documents.html>

2. Forms

- a. CourtTrax Fines and Fees Calculator
 - i. <https://www.courttrax.org/calculator/calculator.aspx>
- b. Family Violence/Protective Order Forms
 - i. <https://www.gscca.org/file/family-violence-forms>
 - ii. <https://www.gasupreme.us/superior-court-standard-forms/>
- c. Sentencing Forms
 - i. <https://www.gasupreme.us/superior-court-standard-forms/>
 - ii. <https://www.gaclerks.org/Resources/JudicialCouncilSentencingForms.asp>
x
- d. Summons, Sheriff's Entry of Service, Service by Publication, Notice of Publication

- i. <https://www.gasupreme.us/superior-court-standard-forms/>
- e. Misdemeanor Citation, Accusation, and Summons
 - i. https://www.gasupreme.us/wp-content/uploads/2018/12/Uniform_Misdemeanor_Citation_Form-FINAL_ADOPTED_12-7-18.pdf
- f. Report for Failure to Pay Restitution
 - i. <https://www.gaclerks.org/Resources/FailureToPayRestitution.aspx>
- g. Expungement
 - i. <https://southernjudicialcircuit.com/self-help-forms/criminal-law/>
- h. Writ of Habeas Corpus
 - i. <https://southernjudicialcircuit.com/self-help-forms/criminal-law/>
- i. Motion to Seal Record of First Offender
 - i. <https://southernjudicialcircuit.com/self-help-forms/criminal-law/>
- j. Motion to Modify Sentence
 - i. <https://southernjudicialcircuit.com/self-help-forms/criminal-law/>
- k. Pardon/Restoration of Civil Rights
 - i. <https://southernjudicialcircuit.com/self-help-forms/criminal-law/>
- l. Request to Proceed In Forma Pauperis
 - i. <https://southernjudicialcircuit.com/self-help-forms/criminal-law/>
- m. Certificate of Services
 - i. <https://www.southernjudicialcircuit.com/selfhelp/miscforms/certificate.pdf>
 - ii. https://www.dekalbsuperiorcourt.com/wp-content/uploads/2014/08/fillable_coserv1.pdf
 - iii. <https://s3.us-west-2.amazonaws.com/cobbcounty.org.if-us-west-2/prod/2018-07/General-Certificate-Of-Service.pdf>
- n. Notice of Hearing
 - i. <https://www.southernjudicialcircuit.com/selfhelp/miscforms/Notice.pdf>
 - ii. <https://southernjudicialcircuit.com/self-help-forms/miscellaneous-forms/>
- o. Rule Nisi
 - i. <https://www.southernjudicialcircuit.com/selfhelp/miscforms/rulenisa.pdf>
 - ii. https://www.dekalbsuperiorcourt.com/wp-content/uploads/2014/08/fillable_rnisi.pdf
 - iii. <https://s3.us-west-2.amazonaws.com/cobbcounty.org.if-us-west-2/prod/2018-07/General-Rule-Nisi.pdf>
- p. Criminal Witness Subpoena
 - i. <https://cccdn.blob.core.windows.net/cdn/Files/Courts/forms/Superior%20Forms/Forms/Criminal%20Witness%20Subpoena.pdf>
 - ii. <https://courts.chathamcountyga.gov/Superior/OnlineForms>
- q. Record Restriction (forms within presentation)
 - i. <https://cccdn.blob.core.windows.net/cdn/Files/Courts/forms/Superior%20Forms/Forms/Record%20Restrictions.pdf>
- r. Entry of Appearance
 - i. <https://ga-fultoncountysuperiorcourt2.civicplus.com/DocumentCenter/View/790/Entry-of-Appearance-Form-PDF>
- s. Indigent Defense Application

i. <https://www.gwinnettcourts.com/superior/forms-and-documents>