

Spring 2002

## Criminal Law Section Newsletter

### Notes From The Editor



*IN MEMORIAM*  
William W. Daniel

**S**uperior Court Judge William W. Daniel of the Atlanta Judicial Circuit died recently. I have been asked to write about him because I was the assistant district attorney assigned to his court for 13 years. What do you say about a man you have known and respected for over 20 years?

We have all relied on his massive work, Georgia Criminal Trial Practice. For us it is the one source we can go to for quick reference. Most of us, however, do not realize what an undertaking this work has been. This book exists because of one man, Bill Daniel. He got the idea for his book because other attorneys told him he should reduce his extensive trial notebooks to a textbook. He did exactly that. Over the years, he would read all the advance sheets and continually update his book. He would take this work wherever he went: vacation, home, on the bench. Why would anyone spend so much time on a project to benefit so many others? The answer is very simple. Bill Daniel loved the law! He was proud of being a lawyer and proud of our judicial system.

### CONTENTS

**Article - page 2**

**Cases - page 6**

Bill Daniel was more than a great trial judge, lawyer and legal scholar. He was one of the finest men I have known. He was dignified and courteous to whomever he met. He was unassuming. He always introduced himself as Bill Daniel, never Judge Daniel. He was thoughtful and treated everyone fairly. He loved life. He had so many different pursuits. For example, he was the Grand Master of the Georgia Masons, an accomplished cattleman and a respected Sunday School teacher. He was one of the most energetic men I have known. He loved his family and his country. He served with distinction in World War II and Korea. He was proud to be an American.

## Criminal Law Section Newsletter

Although his resume would run for pages because of all his achievements, in the final analysis, it is what other people think of Bill Daniel as a person that matters most. My grandfather used to say that the only thing a man takes with him when he dies is his reputation. Bill Daniel was loved and respected by everyone that knew him. He was a real southern gentleman.

One of Judge Bill Daniel's favorite Biblical passages was from Micah 6:8

“He has showed you, O man, what is good  
And what does the Lord require of you?  
To act justly and to love mercy  
and to walk humbly with your God.”

Bill Daniel lived that passage every day of his life and I am going to miss him!

*Tom Jones*

770/433-3350

### GEORGIA RICO BASICS

*By Jeffrey S. Bazinet*

In 1980, the Georgia General Assembly passed the Georgia Racketeer Influenced and Corrupt Organizations Act, which is more commonly known as the “Georgia RICO Act” or “Georgia RICO.”<sup>1</sup> State prosecutors have brought relatively few cases under Georgia RICO. One reason for the lack prosecutions may be prosecutors’ lack of familiarity with the statute. Recent cases involving the murder of Sheriff-elect Sidney Dorsey and the discovery of hundreds of bodies at the Tri-State Crematory in Walker County, however, may bring Georgia RICO cases to greater prominence.<sup>2</sup> This article’s purpose is to familiarize persons involved in Georgia’s criminal justice system with the basics of the Georgia RICO Act.

#### **The Georgia RICO Act’s Purpose**

The Georgia RICO Act’s purpose is to “impose sanctions against those who violate [the Act] and

to provide compensation to persons injured or aggrieved by such violations.”<sup>3</sup> The Georgia General Assembly intended the Act to apply to “an interrelated pattern of criminal activity motivated by or the effect of which is pecuniary gain or economic or physical threat of injury.”<sup>4</sup> The Act’s purpose does not include the prosecution of “isolated incidents of misdemeanor conduct or acts of civil disobedience.”<sup>5</sup> The Georgia General Assembly has mandated that courts construe the Act to “effectuate the remedial purposes embodied in its operative provisions.”<sup>6</sup>

Early statutory language regarding the General Assembly’s intent referred to “organized criminal elements.”<sup>7</sup> This language caused some courts to conclude that the statute required a nexus with organized crime.<sup>8</sup> In 1997, the Georgia General Assembly removed any doubt as to a required organized crime nexus by amending the statute’s purpose by removing the “organized

criminal elements” language.<sup>9</sup>

### **The Statute of Limitations**

The statute of limitations for Georgia RICO violations is five years from the time the prohibited conduct ceases.<sup>10</sup> O.C.G.A. § 17-3-2(2) tolls the statute of limitations during any period in which “[t]he person committing the crime is unknown or the crime is unknown.”<sup>11</sup> So long as a grand jury returns an indictment “within five years of the time when the victim and the State first learned of the offenses,” the Georgia RICO Act’s statute of limitations will not be violated.<sup>12</sup>

### **Venue**

O.C.G.A. § 17-2-2(a) provides that “[c]riminal actions shall be tried in the county where the crime was committed.”<sup>13</sup> In any criminal proceeding brought under the Georgia RICO Act, the Georgia RICO violation is considered committed in “any county in which an incident of racketeering occurred or in which an interest or control of an enterprise or real or personal property is acquired or maintained.”<sup>14</sup> Venue is proper, therefore, in any county where “an incident of racketeering occurred or in which an interest or control of an enterprise or real or personal property is acquired or maintained.”

### **Pleading Requirements**

The Georgia RICO Act does not require that the state plead a RICO case with any more specificity than required for any other criminal case.<sup>15</sup> The State must simply describe the alleged predicate acts and enterprises sufficiently enough to put the defendant on notice of the crimes with which the state is charging the defendant and against which the defendant must defend.<sup>16</sup>

### **The Georgia RICO Act’s Vocabulary**

The Georgia RICO Act, like other RICO statutes, has a specialized vocabulary.<sup>17</sup> To understand the Georgia RICO Act, it is absolutely necessary to understand what the terms “enterprise,” “racketeering activity,” and “pattern of racketeering activity” mean.

### **Enterprise**

The Georgia RICO Act defines the term “enterprise” to mean “any person, sole proprietorship, partnership, corporation, business trust, union chartered [under Georgia law], or other legal entity; or any unchartered union association, or group of individuals associated in fact” including both illicit and licit enterprises and governmental entities.<sup>18</sup> “An ‘enterprise’ is not a criminal act in itself; it is a description of the entities involved in the RICO violations, and may include entities involved in illicit as well as licit activities. It is the racketeering activity, i.e. the pattern of racketeering (‘predicate acts’) which is illegal, not the enterprise.”<sup>19</sup> “None of the provisions of the [Georgia] RICO Act, however, requires that each defendant in an enterprise have full knowledge of all facets and elements of the enterprise and all its members or actors.”<sup>20</sup> A corporation and its employees can make up an association in fact enterprise.<sup>21</sup>

Georgia RICO does not always require proof of an enterprise.<sup>22</sup> At least one early case indicates that the State must prove that an enterprise exists.<sup>23</sup> This is not correct.<sup>24</sup> Two of the four ways a person may violate the Georgia RICO Act require proof of an enterprise.<sup>25</sup>

### **Racketeering Activity**

The Georgia RICO statute incorporates Georgia law, federal law, and other states’ criminal law into its two-part definition of the term “racketeering activity.”<sup>26</sup> Courts and practitioners also refer to individual acts of racketeering activity as “predicate acts.”

Under the Georgia RICO Act, the term “racketeering activity” means “to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit crime which is chargeable by indictment under” certain Georgia criminal statutes.<sup>27</sup> The enumerated criminal statutes pertain to controlled substances, homicide, bodily injury, arson, burglary, forgery, theft, prostitution, obscene materials, bribery, witness tampering, perjury, evidence tampering, commercial gambling, distilling liquors and alcoholic beverages, firearms violations, securities viola-

tions, credit card fraud, computer crimes, kidnapping, carjacking, making terroristic threats, and conduct defined as “racketeering activity” under the federal RICO act, among other things.<sup>28</sup>

The Georgia RICO Act also defines the term “racketeering activity” to mean “any act or threat involving murder, kidnapping, gambling, arson, robbery, theft, receipt of stolen property, bribery, extortion, obstruction of justice, dealing in narcotic or dangerous drugs, or dealing in securities which is chargeable under the laws of the United States or any of the several states and which is punishable by imprisonment for more than one year.”<sup>29</sup>

The Georgia General Assembly’s inclusion of the federal RICO act’s definition of “racketeering activity” in the Georgia RICO Act’s definition of the same has caused some courts to conclude that the offenses set forth in the federal RICO act cannot be predicate acts for Georgia RICO because the federal acts are not “chargeable by indictment” under Georgia law.<sup>30</sup> The Georgia Court of Appeals, however, has held that the federal offenses are predicate acts under Georgia RICO.<sup>31</sup>

To constitute racketeering activity within the meaning of the Georgia RICO Act, conduct must be criminal.<sup>32</sup> That means that the person committing an act of racketeering activity must have the requisite mens rea to be found guilty of the crime.<sup>33</sup> Further, evidence insufficient to support a conviction on at least two of the alleged predicate acts is insufficient to sustain a Georgia RICO conviction.<sup>34</sup> Moreover, if the State includes alleged predicate acts as separate criminal acts in an indictment, the State “uses up” the evidence, “so that there is none left to form the basis for the separate offenses enumerated” in the RICO counts.<sup>35</sup>

#### **Pattern of Racketeering Activity**

A pattern of racketeering activity consists of “at least two acts of racketeering activity in furtherance of one or more incidents, schemes, or

transactions that have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents.”<sup>36</sup> At least one of the incidents of racketeering must have occurred after July 1, 1980, and within four years of a prior incident of racketeering activity.<sup>37</sup> Periods of time during which the person committing the acts of racketeering activity are excluded when measuring the four-year period.<sup>38</sup> No matter how many predicate acts the State alleges, it needs to prove only two interrelated acts to prove that a pattern exists.<sup>39</sup>

Two or more acts which are a “single transaction” cannot constitute a pattern.<sup>40</sup> Acts are single transactions when they are “in reality ‘two sides of the same coin - ordinary and customary aspects of a single transaction.’”<sup>41</sup> “The fact that elements of two crimes may have been present at two separate points in time does not create two predicate acts out of what is in reality a single transaction.”<sup>42</sup> Two distinct criminal acts, however, can constitute a pattern even though they are related to the same underlying transaction.<sup>43</sup>

#### **Violations of Georgia RICO**

There are four ways to violate the Georgia RICO Act:

1. Directly or indirectly acquire or maintain any interest in or control of any enterprise, real property or personal property through a pattern of racketeering or the proceeds derived from a pattern of racketeering activity;<sup>44</sup>
2. Directly or indirectly participate in an enterprise through a pattern of racketeering activity while being employed by, or associated with, the enterprise;<sup>45</sup>
3. Conspire or endeavor to directly or indirectly acquire or maintain any interest in, or control of, any enterprise, real property or personal property through a pattern of racketeering or the proceeds derived from a pattern of racketeering activity;<sup>46</sup> or

4. Conspire or endeavor to directly or indirectly participate in an enterprise through a pattern of racketeering activity while being employed by, or associated with, the enterprise.<sup>47</sup>

#### **Criminal Penalties**

A conviction under Georgia RICO is a felony.<sup>48</sup> The statute calls for incarceration for a minimum of five and a maximum of twenty years or payment of a fine, or both.<sup>49</sup>

The trial court must hold a hearing to determine the amount of a fine assessed under the Georgia RICO Act.<sup>50</sup> Fines assessed under Georgia RICO are in lieu of other fines authorized by law.<sup>51</sup> The fine cannot exceed “the greater of \$25,000.00 or three times the amount of any pecuniary value gained” by the convicted defendant by the defendant’s Georgia RICO violation.<sup>52</sup> For the purposes of assessing fines under Georgia RICO, the term “pecuniary value” means “[a]nything of value in the form of money, a negotiable instrument, a commercial interest, or anything else, the primary significance of which is economic advantage; or . . . [a]ny other property or service which has a value in excess of \$100.00.”<sup>53</sup>

#### **Georgia RICO and Federal RICO Compared**

The Georgia General Assembly patterned the Georgia RICO Act after the federal RICO statute.<sup>54</sup> From time to time, especially in the years immediately following the Georgia RICO Act’s enactment, Georgia courts have referred to federal RICO cases for guidance.<sup>55</sup> There are differences, however, between the two statutes.<sup>56</sup> Commentators have stated that:

Despite some similar terminology, Georgia RICO is substantially broader than its federal counterpart, and the Georgia courts have held that the differences between the two statutes reflect intentional choices by the Georgia legislature. For this reason, Georgia RICO is not a “baby RICO” statute, but rather is a true independent cause of action that is potentially more potent than its federal role model.<sup>57</sup>

For example, the Georgia RICO Act provides for more substantive offenses than the federal RICO statute.<sup>58</sup> Georgia RICO also defines “racketeering activity” much more broadly than the federal RICO statute does.<sup>59</sup> Further, it takes much less to prove a “pattern of racketeering activity” under Georgia RICO than it does under federal RICO.<sup>60</sup> Perhaps the largest difference between the two is that Georgia RICO does not always require the existence of an enterprise.<sup>61</sup>

#### ***Dover v. State*: An Imperfect Illustration of a Georgia RICO Prosecution not Involving an Enterprise**

Very few Georgia RICO prosecutions have not alleged participation in a pattern of racketeering activity through an enterprise. One such case is *Dover v. State*.<sup>62</sup> *Dover*, however, is imperfect in that the State failed to prove venue as to several of the predicate acts. Nonetheless, the case illustrates how the State can frame a Georgia RICO case without alleging or proving an enterprise’s existence.

In *Dover v. State*, two defendants solicited a group of persons to set fire to two different dwellings for the purpose of receiving monies from insurance policies on those dwellings.<sup>63</sup> After the dwellings burned, both defendants submitted insurance claims via the United States mail and received remuneration on those claims.<sup>64</sup> One of the defendants also made what the State alleged were false statements to officials investigating one of the fires.<sup>65</sup> A grand jury indicted both defendants on Georgia RICO charges.<sup>66</sup> Both indictments alleged that the defendants had endeavored to acquire and maintain, and actually acquired and maintained, money through a pattern of racketeering activity involving arson and mail fraud in violation of O.C.G.A. §§ 16-14-4(a) and (c).<sup>67</sup> The indictment of the defendant who had allegedly made false statements to the fire officials further alleged that the defendant made false statements as part of the pattern of racketeering activity.<sup>68</sup> The jury convicted the defendants on the Georgia RICO charges.<sup>69</sup> The Georgia



Court of Appeals overturned one those convictions, however, because the State had failed to prove venue as to the alleged predicate acts.<sup>70</sup> Nevertheless, *Dover* shows how a Georgia RICO case can be pleaded so as not to require proof of an enterprise.

**Thompson v. State: An Illustrative Case of Participation in a Pattern of Racketeering Activity through an Enterprise**

The case of *Thompson v. State* illustrates how the concepts of racketeering activity, a pattern of racketeering activity, and enterprise fit together.<sup>71</sup> In *Thompson*, four persons entered into an agreement to operate a joint venture limited partnership called Southern Financial Services (“SFS”).<sup>72</sup> The partners set up SFS as an “assumption business” through which SFS would acquire vehicles from customers who were having trouble making payments on consignment, assume responsibility for making said payments, re-sell the vehicle to another person, and use the proceeds from the sale to pay the lienholder, thereby relieving the customer of the burden of payment.<sup>73</sup> SFS generally required that secondary purchasers make a \$1,000 cash down payment followed by monthly payments.<sup>74</sup> SFS was supposed to send appropriate portions of those monthly payments to the lienholder as part of SFS’ assumption of responsibility for the lien’s payment.<sup>75</sup> The partners, however, did not do so.<sup>76</sup> Instead, the divided up the secondary purchasers’ cash payments amongst themselves, either directly or through payments from SFS’ bank account.<sup>77</sup> As a result, the lienholders foreclosed on the liens, causing the secondary purchasers to lose the vehicles they had bought along with the money they invested.<sup>78</sup> The partners handled “several dozen” vehicles in this manner.<sup>79</sup>

The grand jury indicted two of SFS’ partners on RICO charges under O.C.G.A. § 16-14-4(b).<sup>80</sup> The acts of racketeering activity consisted of multiple acts of theft by taking, theft by deception, and theft by conversion for accepting money from consignees and failing to assume

the payments for the vehicles and failing to pay the lienholders.<sup>81</sup> The pattern of racketeering activity consisted of repeated incidents of the alleged theft crimes involving the “several dozen” vehicles.<sup>82</sup> SFS was the enterprise through which the partners participated in the pattern of racketeering activity.<sup>83</sup> The jury found both defendants guilty of violating Georgia RICO.<sup>84</sup> The Georgia Court of Appeals upheld the convictions.<sup>85</sup>

**Conclusion**

Prosecutors have used the Georgia RICO Act relatively infrequently. Two recent cases, however, may make Georgia RICO prosecutions more prominent. The DeKalb County District Attorney has already indicted former DeKalb County Sheriff Derwin Brown under Georgia RICO.<sup>86</sup> Those charges relate to a murder-for-hire scheme. News reports also indicate that the District Attorney for the Lookout Mountain Judicial Circuit may indict Tri-States Crematory operator Ray Brent Marsh on Georgia RICO violations.<sup>87</sup> The sensational nature of the acts alleged in those cases, combined with nationwide media attention, may cause a rise in prosecutions brought under the Georgia RICO Act.

**Footnotes for this article appear on page 11**



**Recent Decisions Taken From West Georgia Cases**

**Weight and Sufficiency 552(3). Degree of Proof.**

Ga.App. 2001. To support verdict, circumstantial evidence need not only include reasonable hypothesis, not exclude every inference or hypothesis, except that of defendant’s guilt. *Johnson v. State*, 251 Ga.App. 455.

## Criminal Law Section Newsletter

### **Capacity to commit and responsibility of crime**

#### **48. In general.**

Ga.App. 2001. A finding of insanity requires proof that the defendant acted under a delusional compulsion, that the crime was connected with the delusion, and that the delusion related to a fact, which, if true, would have justified the act. O.C.G.A. § 16-3-3. *Jackson v. State*, 251 Ga.App. 448.

#### **1170.5(5). Cross-examination.**

Ga.App. 2001. Trial court's failure to permit cross-examination of victim who testified that the defendant pointed a gun at her and ordered her into his car against her will regarding victim's claim for compensation from Georgia Crime Victim's Emergency Fund was not harmless in error; victim was only witness who testified about defendant's use of the gun, use of gun was essential element of crimes charged, and defendant's conviction hinged on victim's credibility. *Bowen v. State*, 252 Ga.App. 382.

### **Best and Secondary Evidence**

#### **398. In general.**

Ga.App. 2001. Best evidence rule does not apply to videotapes. O. C. G.A. § 24-5-4(b). *Reese v. State*, 252 Ga.App. 650.

#### **63.5(5). Particular cases.**

Ga.App. 2001. Police officers lacked reasonable suspicion to stop defendant and conduct a pat-down search; although defendant approached passenger side of car in high-crime area, which officer testified raised his suspicion because drug dealers often approach passenger side to be less conspicuous, officers admitted that they did not witness defendant commit any criminal activity, that defendant merely walked away after talking to them, and defendant did not run, or try to evade officers when they spoke to him. U.S.C.A. Const.Amend. 4. *Holmes v. State*, 252 Ga.App. 286.

### **Pleas.**

#### **273.1(4). Ascertainment by court; advising and informing accused.**

Ga.App. 2001. Alleged error by trial court in informing defendant who pled guilty to aggravat-

ed child molestation that he could seek sentence review for his conviction did not invalidate defendant's guilt plea, where alleged error occurred after defendant pled guilty. *Reed v. State*, 251 Ga.App. 606.

#### **63.5(5). Particular cases.**

Ga.App. 2001. Police did not have probable cause to initially detain and handcuff defendants even though police had been issued a general search warrant and suspected defendants possessed illegal drugs; officer testified that neither defendant made any kind of threatening gesture, officer testified that nothing in particular made him think defendants were dangerous people, and defendants were not standing inside any buildings to be searched and were not standing close to any person named in search warrant. U.S.C.A. Const.Amend. 4; O.C.G.A. § 17-5-28 (1,2). *Mercer v. State*, 251 Ga.App. 465.

### **Prosecutions**

#### **107. Presumptions and burden of proof.**

Ga.App. 2001. For the equal access rule to rebut an inference of defendant's possession of contraband, affirmative evidence must be presented that a person other than the defendant had equal access to the premises where the contraband was found. *Swanger v. State*, 251 Ga.App. 168.

### **Facts in Issue and relevance**

#### **339.7(4). Number and character of pictures.**

Ga.App. 2001. Physical lineup and photo array were impermissibly suggestive, where defendant was the only individual wearing an orange sleeveless shirt or jacket, which both victims had described the gunman wearing when he robbed them. *Henry v. State*, 251 Ga.App. 274.

### **Admissions**

#### **410. Admissions by representatives of accused or prosecution.**

Ga.App. 2001. Generally, a statement by defense counsel made in the presence of the defendant relating to the defendant's conduct is

## Criminal Law Section Newsletter

considered a statement by the defendant himself if the defendant does not repudiate counsel's authority to make the statement. *Martin v. State*, 251 Ga.App. 149.

### **Murder**

#### **11. In general.**

Ga. 2001. Murder is one offense that can be committed in several ways, including either with malice afterthought or while in the commission of a felony. O.C.G.A. § 16-5-1. *State v. Jones*, 274 Ga. 287.

#### **18(1). In general.**

Ga. 2001. Murder is one offense that can be committed in several ways, including either with malice afterthought or while in the commission of a felony. O.C.G.A. § 16-5-1. *State v. Jones*, 553 S.E.2d 612.

Felony murder conviction is not dependent upon the successful prosecution of the underlying felony. *Id.*

Mere preclusion of the state's capacity to prosecute a subordinate crime because of a time limitation has no effect upon the question of whether such a crime was committed for purposes of felony murder prosecution. *Id.*

Crime of murder is independent of the underlying felony. *Id.*

Underlying felony in a felony murder prosecution need not be charged as a separate substantive offense, and the fact that it is time-bared does not preclude prosecution for felony murder. *Id.*

Felony murder charge may not be separated into its component parts so that if a statute of limitations were a bar to the prosecution of one of the elements of the crime, the major crime, the felony murder charge, would also fall, and thus the expiration of a limitations period for an underlying felony does not preclude a prosecution for felony murder. *Id.*

### **Other offenses.**

#### **374. Proof and effect of other offenses.**

Ga.App. 2001. During a similar transaction hearing, there is no per se right to an evidentiary

hearing or any mandatory obligation on the part of the State to produce testimonial evidence. *Walker v. State*, 251 Ga.App. 479.

### **Arrest on criminal charges.**

#### **63.5(7). Mode of stop; warnings; arrest distinguished.**

Ga.App. 2001. An officer's approach to a stopped vehicle and inquiry into the situation is not a "stop" or "seizure" but falls within the realm of this type of police-citizen encounter involving communication without detention. U.S.C.A. Const.Amend. 4. *Stovall v. State*, 251 Ga.App. 7.

Requests to search made during the course of a first-level police-citizen encounter do not transform such encounter into a second-tier Terry stop; merely requesting consent for a search is not a seizure and does not require articulable suspicion. U.S.C.A. Const.Amend. 4. *Id.*

### **Competency in general.**

#### **394.6(4). Evidence on motion.**

Ga. 2001. Defendant was not required to plead deliberate or reckless disregard for the truth in challenging omissions from a search warrant, or to proffer evidence in support of such allegation; state law required only that motion to suppress state facts showing that search and seizure were unlawful; overruling *Bowe v. State*, 201 Ga.App. 127,410 S.E.2d 765; *Ferrell v. State*, 198 Ga.App. 270, 401 S.E.2d 301; *State v. Mason*, 181 Ga.App. 806, 353 S.E.2d 915; *Amerson v. State*, 177 Ga.App. 97, 338 S.E.2d 528; *Ross v. State*, 169 Ga.App. 655, 314 S.E.2d 674; and *Nutter v. State*, 162 Ga.App. 349, 291 S.E.2d 423. U.S.C.A. Const.Amend. 4; O.C.G.A. § 17-5-30(b). *Watts v. State*, 274 Ga. 373.

### **Nature and elements of crime.**

#### **30. Merge of offenses.**

Ga.App. 2001. Aggravated assault and rape did not merge as mater of fact, where assault with handgun constituted gratuitous physical violence separate from forced sex acts. O.C.G.A. §§ 16-1-6(1). 16-1-7(a)(1). *Cannon v. State*, 250 Ga.App. 777

Aggravated assault may merge into another vio-



## Criminal Law Section Newsletter

lent crime where there was no gratuitous violence employed against victim in addition to force needed to complete other offenses. *Id.*

### **Forfeitures**

#### **Proceedings for enforcement.**

Ga.App. 2001. Record of trial court's findings of fact and conclusions of law was insufficient to show that the court considered the required factors involved in determining whether a forfeiture was an excessive fine, and thus, did not support finding that forfeiture was an excessive fine in violation of defendant's Eight Amendment right, thereby necessitating remand of case for appropriate findings. U.S.C.A Const.Amend. 8. *Salmon v. State*, 249 Ga.App. 591.

#### **Facts in issue and relevance.**

##### **342. Motive of absence of motive.**

Ga. 2001. State is authorized to present evidence of motive, even if such evidence directly involves a defendant's participation in a group or activity that might be deemed unsavory. *Thomas v. State*, 274 Ga. 156.

#### **Defenses in general.**

##### **33. Ignorance or mistake of fact.**

Ga.App. 2001. Mistake of fact is a defense to a crime extent that ignorance of some fact negates existence of mental state required to establish a material element of a crime. O.C.G.A. § 16-3-6, *Davis v. State*, 249 Ga.App. 579.

#### **Parties to offenses.**

##### **59(4). Community of unlawful intent.**

Ga. 2001. Proof that defendant shares a common criminal intent with actual perpetrators is necessary to establish that the defendant was a party to the crime and maybe inferred from the defendant's conduct before, during and after the crime. *Eckman v. State*, 274 Ga. 63.

#### **Preliminary Proceedings.**

##### **627.10(8). Hearing; in camera examination.**

Ga.App. 2001. In determining if informant's identity should be revealed by state, trial court must conduct two-step hearing: (1) court initially should hear evidence to determine if informant us alleged informer-witness or informer-partici-

pant whose testimony appears to be material to defense on issue of guilt or punishment, that testimony for prosecution and defense if or will be in conflict, and that the informant was only available witness who could amplify or contradict these witnesses' testimony, and (2) once thresholds has been met, court must conduct in camera hearing of informant's testimony and balance public interested in protecting flow of information against defendant's right to prepare his defense. *Turner v. State*, 247 Ga.App. 775.

#### **Demonstrative evidence.**

##### **404.80. Replicas and models; objects similar to or illustrate of others.**

Ga. 2001. Replica of murder weapon was admissible in murder trial, where the weapon with such crimes were committed was not found, but the state introduced a rifle of the type believed to be used in the crimes, and it was identified as similar to the weapon with which defendant was seen before and after the crimes. *McCoy v. State*, 273 Ga. 568.

#### **Weapons**

##### **17(3). Admissibility of evidence.**

Ga.App. 2001. Certified copy of foreign state court's case action summary was admissible as proof of defendant's status as a convicted felon, in prosecution for possession of a firearm by a convicted felon, even though it was not stated as a record of conviction, where the summary indicated that defendant was adjudged guilty of a robbery after his guilty plea was accepted and that he was sentenced to 10 years' confinement. O.C.G.A. §§ 24-7-24(b), 16-1-3(4). *Taylor v. State*, 249 Ga.App. 536.

#### **Elements and incidents of offense; definitions.**

Ga. 2001. If there is a reasonable possibility that the jury convicted the defendant of the commission of a crime in a manner not charged in the indictment, then error in charging the jury that they crime might have been committed by either of tow methods if harmful. *Chapman v. State*, 273 Ga. 865.

#### **Argument and conduct of counsel.**

##### **711. Limiting scope of time or argument.**

Ga. 2001. Defense in felony murder prosecution was statutorily entitled to up to two full

## Criminal Law Section Newsletter

hours to make closing arguments, despite fact that death penalty was not being sought with respect to either defendant. O.C.G.A. § 17-8-73. *Chapman v. State*, 273 Ga. 865.

### **Competency in general.**

#### **388.1. In general.**

Ga.App. 2001. Once a procedure has been utilized for a significant period of time, and expert testimony has been received thereon in case after case, the trial court does not have to keep reinventing the wheel and can admit evidence of procedure without requiring expert testimony as a foundation; a once novel technology can and does become commonplace. *Cheatwood v. State*, 248 Ga.App. 617.

#### **394.3. Wiretapping and other interception.**

Ga.App. 2001. For evidence obtained through state-authorized wiretaps to be admissible in a state criminal proceeding it must have been obtained in a manner not inconsistent with the requirements of both the federal and state laws; on the other hand, such evidence must be excluded if it was obtained in a manner inconsistent with the mandate of either the federal or state law. 18 U.S.C.A. § 2518; O.C.G.A. § 16-11-67. *North v. State*, 250 Ga.App. 622.

### **Harmless and reversible error.**

#### **1170(1). In general.**

Ga.App. 2001. Trial court's erroneous exclusions of expert testimony proffered by armed robbery defendant on subject of reliability of eyewitness identifications was not harmless error and required reversal, where only evidence of defendant's involvement in robbery was victims' eyewitness identification of him, and defendant's sole defense was mistaken identity. *Brodes v. State*, 250 Ga.App. 323.

### **Weight and Sufficiency.**

#### **564(2). Degree of Proof.**

Ga.App. 2001. When a criminal defendant pleads not guilty, he or she has challenged venue, and the State will not be permitted to invoke the exception permitting it to establish value with mere slight evidence; quite to the contrary, whenever a criminal defendant pleads not guilty and is put on trial, the State is placed

on notice that at trial; it will be required to establish venue beyond a reasonable doubt. *Jeremiah v. State*, 250 Ga.App. 397.

### **Best and secondary evidence.**

#### **398(1). In general.**

Ga.App. 2001. The "best evidence rule", or the "original document rule", provides that in order to prove the terms in writing, where the terms are material, the original writing must be produced unless it is shown to be unavailable for some reason other than the serious fault of the proponent. *Rocha v. State*, 250 Ga.App. 209.

### **Nature and elements of a crime.**

#### **30. Merger of offenses.**

Ga.App. 2001. Carjacking is not a lesser-included offense of armed robbery; as a matter of statutory law, the crime of motor vehicle hijacking does not merge with any other offense. O.C.G.A. § 16-5-44.1(d). *Callahan v. State*, 250 Ga.App. 193.

### **Sentence and judgment and proceedings after judgment.**

Ga.App. 2001. Refusal to consider first offender treatment as part of sentencing formula or policy by automatic denial constitute an abuse of discretion and constitute reversible error. O.C.G.A. § 42-8-60(a). *Threlkeld v. State*, 250 Ga. App. 44.

### **Arrest on criminal charges.**

#### **63.5(7). Mode of stop; warnings; arrest distinguished.**

Ga.App. 2001. An inquiry and request for identification by law enforcement officers of a citizen is not a stop but a first level police-citizen encounter that does not require reasonable suspicion. *Cox v. State*, 250 Ga.App. 69.

### **Alibi witnesses or defense.**

Ga.App. 2001. State may not rely on its general witness list as a substitute for compliance with statute requiring state to timely notify a defendant of witnesses who will be used to rebut an alibi offense. O.C.G.A. § 17-16-5(b). *Hayes v. State*, 249 Ga.App. 857.

**63.4 (9) Corroboration.**

Ga.App. 2001. Corroboration of the details of a tip by a personal observation of the investigating officers may establish the reliability of the informant, in determining whether there exists probable cause to justify warrantless arrest. U.S.C.A. Const.Amend. 4. *State v. Gunter*, 249 Ga.App. 802.

**Other offenses.**

**372(14). Other particular offenses.**

Ga.App. 2001. That both the charged crime of robbery of a convenience store and another incident during which defendant and two other allegedly robbed an individual of his necklace

and jacket, occurred at night and allegedly involved a handgun did not make then sufficiently similar to permit admitting evidence of the later in the prosecution of the former in order to show defendant's bent of mind and course of conduct. *Humphrey v. State*, 249 Ga.App. 805.

**374. Proof and effect of other offenses.**

Ga. 2001. A certified conviction is insufficient, standing alone, to establish the required nexus between the crime charged and an independent offense, for purposes of admitting the independent offense, for purposes of admitting the independent offense as evidence of similar transaction. *Brown v. State*, 274 Ga. 31.

**FOOTNOTES FROM PAGE 6**

1 See O.C.G.A. § 16-14-1 et seq. (2001). For a discussion of the Georgia RICO Act, see JOHN E. FLOYD, RICO STATE BY STATE: A GUIDE TO LITIGATION UNDER THE STATE RACKETEERING STATUTES (1998) and John E. Floyd & Jill A. Pryor, State RICO Actions, in 4 GEORGIA JURISPRUDENCE: BUSINESS TORTS AND TRADE REGULATION (1995).

2 See Richmond Eustis, Experts Say RICO May Be Best Case Against Crematorium Operator, FULTON COUNTY DAILY REPORT, Feb. 25, 2002; Don Plummer, State Hopes Pieces Show Murder Plot Racketeering Expert Hired to Try Dorsey, ATLANTA JOURNAL CONSTITUTION, Feb. 24, 2002, at C-1.

3 O.C.G.A. § 16-14-2(b) (2001).

4 O.C.G.A. § 16-14-2(b) (2001). For insight into this language, see a legislative history of the amendments written by Lisa M. Gable and published at 14 GA. ST. U.L. REV. 90 (1997).

5 O.C.G.A. § 16-14-2(b) (2001).

6 O.C.G.A. § 16-14-2(b) (2001).

7 See O.C.G.A. § 16-14-2(b) (1996) (amended 1997).

8 See *Georgia Gulf Corp. v. Ward*, 701 F. Supp. 1556, 1561-62 (N.D. Ga. 1987); *Doxie v. Ford Motor Credit Co.*, 603 F. Supp. 624, 628-29 (S.D. Ga. 1984). But see *Larson v. Smith*, 194 Ga. App. 698, 699 (1990); *Seale v. Miller*, 698 F. Supp. 883, 898 n.6 (N.D. Ga. 1988); *Stanton*

*v. Shearson Lehman/American Exp. Inc.*, 622 F. Supp. 293, 294-95 (N.D. Ga. 1985). See generally Robert A. Falanga & Jesse E. Barrow, III, Georgia's Baby RICO Comes of Age, 25 GEORGIA ST. B. J. 153, 158 (1989).

9 See 1997 Ga. Laws 672. For insight into the General Assembly's intent, see a legislative history of the amendments written by Lisa M. Gable and published at 14 GA. ST. U.L. REV. 90 (1997).

10 O.C.G.A. § 16-14-8 (2001).

11 O.C.G.A. § 17-3-2(2) (2001); see also *Adams v. State*, 231 Ga. App. 279 (1998).

12 See *Adams v. State*, 231 Ga. App. 279, 282-83 (1998).

13 O.C.G.A. § 17-2-2(a) (2001).

14 O.C.G.A. § 16-14-11 (2001).

15 See *Grant v. State*, 227 Ga. App. 88, 90-91 (1997); see also *Adams v. State*, 231 Ga. App. 279, 281 (1998).

16 See *Grant v. State*, 227 Ga. App. at 90-91.

17 See O.C.G.A. § 16-14-3 (2001).

18 O.C.G.A. § 16-14-3(6) (2001).

19 *Thompson v. State*, 211 Ga. App. 887, 890 (1994) (internal citations omitted).

20 *Id.*

21 See *Reaugh v. Inner Harbour Hospital, Ltd.*, 214 Ga. App. 259, 264 (1994).

22 See O.C.G.A. §§ 16-14-4(a), (c) (2001).

23 See *Martin v. State*, 189 Ga. App. 483, 485-86 (1988).

24 See O.C.G.A. §§ 16-14-4(a), (c) (2001); *Dover v. State*, 192 Ga. App. 429, 431 (1989).

25 Compare O.C.G.A. § 16-14-4(a) (2001) (requiring no proof of enterprise for conviction), with O.C.G.A. § 16-14-4(b) (2001) (requiring proof of enterprise for conviction) and O.C.G.A. § 16-14-4(c) (2001) (requiring proof of enterprise in some instances and not in others).

26 See O.C.G.A. § 16-14-3(9) (2001).

27 See O.C.G.A. § 16-14-3(9)(A) (2001).

28 See O.C.G.A. §§ 16-14-3(9)(A)(i)-(xxxii) (2001).

29 O.C.G.A. § 16-14-3(9)(B) (2001).

30 See, e.g., *J.G. Williams, Inc. v. Regency Properties, Ltd.*, 672 F. Supp. 1436 (N.D. Ga. 1987); *Mills v. Fitzgerald*, 668 F. Supp. 1554 (N.D. Ga. 1987).

31 See *Georgia ex rel. Bowers v. Dairymen, Inc.*, 813 F. Supp. 1580, 1585 (S.D. Ga. 1991); *Mullen v. Nezhat*, 223 Ga. App. 278, 281-82 (1996).

32 See O.C.G.A. § 16-14-3(9)(A) (2001); see also *Mullen v. Nezhat*, 223 Ga. App. 278, 281

(1996); *Avery v. Chrysler Motors Corp.*, 214 Ga. App. 602, 603-04 (1994).

33 See *Mullen v. Nezhad*, 223 Ga. App. 278, 281 (1996); *Avery v. Chrysler Motors Corp.*, 214 Ga. App. 602, 603-04 (1994).

34 See *Purvis v. State*, 208 Ga. App. 653, 656 (1993).

35 *Martin v. State*, 189 Ga. App. 483, 496 (1988).

36 O.C.G.A. § 16-14-3(8) (2001).

37 See O.C.G.A. § 16-14-3(8) 2001).

38 See O.C.G.A. § 16-14-3(8) 2001).

39 See *Lam v. State*, 208 Ga. App. 324, 325 (1993); see also *Purvis v. State*, 208 Ga. App. 653, 656 (1993).

40 See *Raines v. State*, 219 Ga. App. 893 (1996).

41 *Raines v. State*, 219 Ga. App. 893, 894 (1996) (holding that "[t]he sale of timber from a single parcel of real property, by means of a single deed, in one isolated transaction, cannot be broken down into two predicate acts by separately charging the sale and filing of the deed"); see also *Patterson v. Proctor*, 237 Ga. App. 244 (1999); *Adams v. State*, 231 Ga. App. 279, 281-82 (1998); *Emrich v. Winsor*, 198 Ga. App. 333 (1991); *Cobb v. Kennon Realty Services*, 191 Ga. App. 740, 741-42 (1989) (finding defendant engaged in "one extended transaction"); *Waldschmidt v. Croza*, 177 Ga. App. 707 (1986). But see *Brown v. Freedman*, 222 Ga. App. 213 (1996); *Larson v. Smith*, 194 Ga. App. 698 (1990).

42 *Stargate Software International, Inc. v. Rumph*, 224 Ga. App. 873, 877 (1997).

43 See *Dover v. State* 192 Ga. App. 429, 432 (1989).

44 O.C.G.A. § 16-14-4(a) (2001). O.C.G.A. § 16-14-4(a) "does not require that there be proof of an "enterprise." *Dover v. State*, 192 Ga. App. 429 (1989).

45 O.C.G.A. § 16-14-4(b) (2001).

46 O.C.G.A. § 16-14-4(c) (2001).

47 O.C.G.A. § 16-14-4(c) (2001).

48 O.C.G.A. § 16-14-5(a) (2001).

49 O.C.G.A. § 16-14-5(a) (2001).

50 O.C.G.A. § 16-14-5(c) (2001).

51 O.C.G.A. § 16-14-5(b) (2001).

52 O.C.G.A. § 16-14-5(b) (2001).

53 O.C.G.A. § 16-14-5(d) (2001).

54 See *Chancey v. State*, 256 Ga. 415, 416 (1986).

55 See, e.g., *Dover v. State*, 192 Ga. App. 429, 431 (1989).

56 See *id.* For an in-depth treatment of the differences between Georgia RICO and the federal RICO statute, see Michael P. Kenny & H. Suzanne Smith, *A Comprehensive Analysis of Georgia RICO*, 9 GA. ST. U.L. REV. 537 (1993).

57 Michael P. Kenny & H. Suzanne Smith, *Between Scylla and Charybdis: The Traps of Federal and Georgia RICO*, 28 GA. ST. B.J. 134, 136 (1992) (internal citations omitted).

58 Compare O.C.G.A. § 16-4-4 (2001), with 18 U.S.C. § 1962 (2001). See also Kenny & Smith, *supra* note 57, at 136.

59 Compare O.C.G.A. § 16-14-3 (2001), with 18 U.S.C. § 1961 (2001). See also Kenny & Smith, *supra* note 57, at 136.

60 Compare *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1995) (holding that proof of a pattern under federal RICO requires relatedness plus continuity), with *Dover v. State*, 192 Ga. App. 429 (1989) (holding that Georgia RICO does not require continuity). See also Kenny & Smith, *supra* note 57, at 136.

61 Compare O.C.G.A. § 16-14-4(a) (2001) (requiring no proof of an enterprise), with 18 U.S.C. § 1962 (2001) (requiring proof of an enterprise). See also *Dover v. State*, 192 Ga. App. 429 (1989).

62 192 Ga. App. 429 (1989).

63 192 Ga. App. at 429.

64 *Id.*

65 *Id.*

66 *Id.*

67 5

at 429-30.

68 *Id.* at 430.

69 *Id.*

70 *Id.* at 433. The court reversed the other defendant's conviction on other grounds. See *id.* at 433-36.

71 See *Thompson v. State*, 211 Ga. App. 887 (1994).

72 *Thompson*, 211 Ga. App. at 888.

73 *Id.* at 887.

74 *Id.*

75 *Id.*

76 *Id.* at 887-88.

77 *Id.*

78 *Id.* at 888.

79 *Id.*

80 *Id.*

81 *Id.* at 889.

82 *Id.*

83 *Id.* at 887.

84 *Id.* at 888-89.

85 *Id.* at 891.

86 See Don Plummer, *State Hopes Pieces Show Murder Plot Racketeering Expert Hired to Try Dorsey*, ATLANTA JOURNAL CONSTITUTION, Feb. 24, 2002, at C-1.

87 See Richmond Eustis, *Experts Say RICO May Be Best Case Against Crematorium Operator*, FULTON COUNTY DAILY REPORT, Feb. 25, 2002.