



February 16, 2015

## Parker v. State

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### **Georgia's New Evidence Code Allows Hearsay Evidence to be Admissible in Determining Whether an Out-of-State Person is a Material Witness to a Georgia Criminal Proceeding Under the Uniform Act to Secure the Attendance of Witnesses from Without the State**

In *Parker v. State*, S14G1005 (Feb. 16, 2015), the Supreme Court addressed whether Georgia's new Evidence Code allows hearsay evidence to be admissible in determining whether an out-of-state person is a material witness to a Georgia Criminal proceeding under the Uniform Act to Secure the Attendance of Witnesses from Without the State, O.C.G.A. § 24-13-90 et seq. (the "Uniform Act"). The record showed that appellant was convicted of DUI. Prior to trial, he sought under the Uniform Act a certificate of materiality to designate CMI, Inc., the Kentucky-based manufacturer of the Intoxilyzer 5000, and five named agents or employees of CMI, as material witnesses, in order to secure their appearance in Georgia with the source code for the machine. At the hearing on his motion, appellant offered only hearsay evidence in the form of a transcript of testimony given by his expert witness; two affidavits of his expert; and two published articles and a report about breath testing generally and the Intoxilyzer 5000. The trial court ruled with the State that this hearsay was inadmissible and the Court of Appeals agreed. *Parker v. State*, 326 Ga. 217 (2014).

The Supreme Court stated that O.C.G.A. § 24-1-2 governs the applicability of the new Evidence Code to proceedings in Georgia courts after the new code's effective date of January 1, 2013. As the Court of Appeals found, the trial court's determination of a requested witness's materiality under the Uniform Act was a fact-finding proceeding within the meaning of O.C.G.A. § 24-1-2(b). Accordingly, under O.C.G.A. § 24-1-2(b), the rules of evidence apply to a proceeding for issuance of a material witness certificate under the Uniform Act *unless* one of the exceptions in § 24-1-2(c) or (d) applies. And here, the Court held, such an exception exists.

Under O.C.G.A. § 24-1-2(c)(1), the rules of evidence, other than privileges, shall not apply to "[t]he determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Code Section 24-1-104." O.C.G.A. § 24-1-104 elaborates on what § 24-1-2(c)(1) calls "questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court" as follows: "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subsection (b) of this Code



State Prosecution Support Division

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section. In making this determination, the court shall not be bound by the rules of evidence except those with respect to privileges.” Thus, the Court concluded, under O.C.G.A. § 24-1-2 and O.C.G.A. § 24-1-104, the rules of evidence, other than privileges, do not apply to hearings under the Uniform Act to determine whether an out-of-state person is a material witness to a Georgia criminal proceeding.

Therefore, the Court held, the trial court erred in not considering appellant’s hearsay evidence. Accordingly, the Court vacated appellant’s conviction and remanded the case to the trial court to consider appellant’s proffered evidence.

Traffic prosecutors handling DUI cases involving state-administered breath tests should be aware that *Parker* now makes it possible for trial courts to consider Uniform Act petitions from defendants seeking to obtain a materiality certificate for a witness or witnesses from CMI, Inc. *without an evidentiary hearing*. Furthermore, should a trial court choose to forego an evidentiary hearing, defendants seeking to establish a “logical connection” between the facts of their case and the source code as required by *Cronkite v. State*, 293 Ga. 476 (2013), may be able to do so by submitting their own personal affidavit, which would not be subject to cross examination. Nevertheless, the *Parker* Court also emphasized that the trial court retains the prerogative as the fact-finder to determine the weight and credibility of the evidence submitted, and in making this determination, the court may consider the fact that evidence was presented in the form of hearsay rather than testimony subject to cross-examination or evidence bearing other indications of trustworthiness.