

## THIS WEEK:

- **Ineffective Assistance of Counsel; Cross Examination of Character Witnesses**
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- **Agreements between Victim and Defendant Not to Prosecute; “Equitable Immunity”**

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## Ineffective Assistance of Counsel; Cross Examination of Character Witnesses

*Snipes v. State, S20A0934 (9/8/20)*

Appellant was convicted of the malice murder of a two-year-old in her care. At trial, appellant’s mother testified for appellant. She testified that appellant interacted well with children; that she had never seen appellant discipline any children; that appellant became upset when she saw her sister spanking her sister’s daughter for wetting the bed; and that she thought Neal, a co-defendant, was violent. On cross examination, the State asked the mother a series of questions about whether it would surprise the mother to know that her daughter 1) admitted to pouring hot water on the child’s penis; 2) admitted to holding the child upside down and hitting him with her hand and with a brush and with a belt; 3) admitted to backhanding the victim, causing his head to hit a doorknob; 4) admitted biting the victim on the arm; and 5) admitted during an interview that she was carrying the victim upside down when he hit his head on the wall? After each question, appellant’s mother continued to defend her daughter and deny that she would do what the State was suggesting.

Appellant argued that trial counsel rendered constitutionally ineffective assistance by failing to object to, and seek curative instructions for questions posed to her mother because the questions called for speculation and opinions about the credibility of other witnesses. The Court disagreed.

The Court stated that although it is improper to ask a testifying witness whether another witness is lying, it is often necessary to focus a witness on the differences and similarities between her testimony and that of another witness. This is permissible provided that she is not asked to testify as to the veracity of the other witness. Here, the State’s cross-examination properly explored the witness’s opinions as to appellant’s character when confronted with contrary evidence that had previously been admitted and did not ask the witness to testify as to the veracity of any other witness. The failure to make a meritless objection does not provide a basis upon which to find ineffective assistance of counsel. Accordingly, the Court found that trial counsel did not render ineffective assistance.

## Impeachment; Former OCGA § 24-9-84.1 (a) (2)

*Butler v. State, S20A0870 (9/8/20)*

Appellant was convicted in 2011 for malice murder and two firearms offenses in connection with the shooting death of Walden. The evidence showed that it was undisputed that on the evening of August 17, 2009, appellant pulled out a gun, fired a single fatal shot at Walden, fled from the scene, disposed of the gun, and then denied his involvement to a friend in the days after the shooting. What was disputed was whether that shot was fired in self-defense.

The indictment charged appellant with possession of a firearm by a convicted felon based on evidence of appellant's 2005 felony conviction for obstructing a law enforcement officer. The trial court bifurcated the trial so that the jury would not learn about the felon-in-possession charge and his prior felony conviction until after deciding the other charges. However, during the first phase of the bifurcated trial, the State sought to impeach appellant's testimony using the 2005 obstruction conviction. The State argued that the evidence was probative because it rebutted appellant's self-defense theory that "he was acting peacefully that night." The Court found, pursuant to former OCGA § 24-9-84.1 (a) (2) that the probative value of the evidence outweighed any prejudicial effect and allowed it. The State then cross examined appellant extensively on the prior obstruction and at the close of the first phase of the bifurcated trial, the State introduced into evidence certified copies of the 2005 indictment and plea, which indicated that the conviction was based on kicking an officer.

Appellant contended that the trial court erred in admitting his prior obstruction during the first phase of the bifurcated trial. The State conceded that the trial court applied the wrong legal standard for deciding whether to admit the evidence. Specifically, former OCGA § 24-9-84.1 (a) (2) required the trial court to find that the evidence *substantially outweighed* its prejudicial value, not simply that it outweighed its prejudicial value.

Nevertheless, the State argued, the evidence was admissible under the correct legal standard. Specifically, the State contended that the trial court properly admitted the evidence because appellant testified that he was scared during the encounter with Walden and his credibility was central to the case. The Court noted that the evidence had probative value once appellant testified and his credibility was a key issue. Also, appellant's testimony contrasted with that of the two eyewitnesses regarding who was the aggressor in the fight, the eyewitnesses' stories conflicted on important details, and appellant provided the only testimony that purported to explain why the fight began in the first place (i.e., mistaken identity). Appellant's self-defense claim rested heavily on his credibility. Yet, appellant's prior conviction was not directly related to his credibility — that is, his truthfulness — beyond generalized notions that felons, as a group, are less truthful than non-felons, as a group.

As to prejudice, the prior conviction and the State's questioning — asking whether appellant committed violence against a police officer just doing his job — raised the risk that the jury would make the highly prejudicial and forbidden inference that when appellant shot the victim, he must have been acting in conformity with his violent character rather than in self-defense (i.e., propensity evidence). But, neither appellant's testimony that he obstructed an officer by offering or doing violence nor the indictment showing that he "kicked" the officer (a point never mentioned in testimony) was evidence of a crime similar to the crime for which appellant was on trial; this evidence, without more, was not necessarily so prejudicial as to foreclose its admission. Thus, the Court concluded, it was not apparent that it would have been an abuse of discretion for the trial court to have either admitted or excluded the 2005 felony obstruction conviction under the proper standard.

The State also argued that even if, under the correct legal standard, the trial court would have exercised its discretion to exclude evidence of the 2005 felony obstruction conviction during the first phase of the bifurcated trial, the Court should still affirm appellant's convictions because any error in admitting the evidence was harmless in light of the "overwhelming" evidence of appellant's guilt. The Court disagreed.

Even though the evidence of appellant's guilt was sufficient to support the jury's guilty verdicts under *Jackson v. Virginia*, the Court found that the evidence that appellant was not acting in self-defense when he shot Walden was not particularly strong. Thus, given the relative weakness of the State's evidence of appellant's guilt, the Court could not conclude that it is highly probable that any error in the admission of evidence of appellant's 2005 felony conviction for obstructing a law enforcement officer during the first phase of the bifurcated trial did not contribute to the guilty verdicts and was therefore harmless.

Accordingly, the Court vacated appellant's convictions, and remanded with direction to exercise its discretion to determine under the correct former OCGA § 24-9-84.1 (a) (2) standard if the prior felony conviction was properly admitted. If the trial court decides under the correct standard that the prior felony conviction was properly admitted, then the court should re-enter the judgments of conviction and sentence against appellant, and appellant could then take another appeal challenging that ruling. If, on the other hand, the court decides that the prior felony conviction evidence should have been excluded, then a new trial will be necessary.

## **Discovery Sanctions; Ineffective Assistance of Counsel**

*Parker v. State, S20A0826 (9/8/20)*

Appellant was convicted of malice murder of his aunt's boyfriend and the non-fatal shooting of his aunt. At trial, the jury rejected appellant's defense that he was not guilty by reason of insanity and also rejected the option of finding him guilty but mentally ill. Three experts testified. The defense expert, Dr. Flores, testified that appellant was psychotic at the time of the offense and likely met the criteria for schizoaffective disorder bipolar type. Dr. Flores testified that marijuana use did not explain appellant's psychosis given that his psychotic symptoms began well before the shooting and continued for a period of time after his arrest. The State's expert testified that appellant was psychotic on the day of the shooting but his psychosis was best explained by substance abuse, not schizoaffective disorder. The trial court's expert, appointed pursuant to OCGA § 17-7-130.1, testified that appellant did not suffer from a chronic psychotic illness but rather, had experienced cannabis-induced psychotic disorder.

Before the August 2018 trial, the trial court ordered Dr. Flores to produce a more complete expert report pursuant to OCGA § 17-16-4 (b) (2) by July 17, 2018. Dr. Flores prepared a supplemental report dated July 16, 2018. Dr. Flores later met with appellant for a second time. After she mentioned this second meeting in her testimony, the State objected to her testifying about the second meeting on the basis that it had not been included in her expert report. The trial court agreed with the State, ruling that Dr. Flores could not testify about the second meeting, at least unless the State brought it up on cross-examination, because the failure to advise the State of facts the expert gathered prior to compiling her report violated the discovery statute and the court's order.

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING OCTOBER 9, 2020

Issue 41-20

Appellant argued that the trial court erred in ruling that Dr. Flores could not testify about her second meeting with him because the court did not make findings of prejudice and bad faith pursuant to OCGA § 17-16-6. But, the Court stated, to obtain reversal based on any such error, harm must be shown by the ruling and here, appellant failed to make such a showing. Although appellant argued that the trial court's exclusion of Dr. Flores's testimony regarding her second meeting with him “conveyed to the jury that Dr. Flores's opinion was based on less data than it actually was based on,” the jury in fact heard that Dr. Flores had two meetings with him. After the State sought to exclude Dr. Flores's testimony about the second meeting, appellant elicited Dr. Flores's testimony outside the presence of the jury that the second meeting involved her asking him questions based on the other experts' reports and that the second meeting did nothing to change her opinion. Appellant offered no argument about how this additional testimony might have changed the outcome of the case.

Moreover, the Court found, to the extent appellant meant to argue that the ruling prevented Dr. Flores from telling the jury something more about the substance of the second meeting, his argument failed because he did not show what additional testimony Dr. Flores would have offered had the trial court ruled differently. Appellant made no attempt to make the substance of any such additional testimony known to the trial court — via the expert's proffer or otherwise — and thus this argument was not subject to ordinary appellate review. And further, the Court held, this failure to make the substance of any additional testimony known to the trial court doomed any claim of plain error, as appellant could not show that there was a reasonable probability that, but for the trial court's discovery sanction, the outcome of the trial would have been more favorable to him.

Appellant also argued that his trial counsel was ineffective in several respects related to the State's introduction of evidence that he was a convicted felon at the time of the shooting. The record showed that appellant was charged with one count of possession of a firearm by a convicted felon and one count of possession of a firearm by someone previously having been convicted of a felony involving the use or possession of a firearm. The State introduced at trial two exhibits showing appellant's prior felony convictions. State's Exhibit 120 was a certified conviction for aggravated robbery, including the specification that appellant had used a firearm in committing the offense. The exhibit also showed that appellant had been indicted for two counts of kidnapping and one count of aggravated burglary and that those counts had been nolle prossed. State's Exhibit 121 showed that appellant was convicted of illegal conveyance of weapons or prohibited items onto the grounds of one of several specified government facilities; the exhibit included an indictment alleging that he had conveyed a “drug of abuse” into the facility, and a sentencing order showing that he had received a 30-month prison sentence.

Appellant argued that trial counsel performed deficiently by failing to stipulate to his status as a convicted felon and that he previously had been convicted of a felony involving the use or possession of a firearm. Appellant argued that counsel at least should have sought redaction of irrelevant allegations of conduct for which appellant was not convicted, specifically the two counts of kidnapping and one count of aggravated burglary in State's Exhibit 120.

The Court stated that a trial court may abuse its discretion in failing to allow a defendant to stipulate to his status as a convicted felon where a defendant's prior conviction is of the nature likely to inflame the jury's passions and raise the risk of a conviction based on improper considerations, and the purpose of the evidence is solely to prove the defendant's status as a convicted felon. But even violent crimes, crimes involving firearms, and drug offenses were not likely to inflame the jury's passions in murder cases. And here, appellant failed to show that informing the jury that he had been convicted of aggravated robbery and bringing a prohibited item into a government facility, and that he had been charged with

kidnapping and aggravated burglary, likely inflamed the passions of the jury, particularly in the light of the nature of the charges and the overwhelming evidence against appellant. This made it particularly unlikely that the evidence of appellant's prior convictions affected the outcome of the trial as to the offenses other than those specifically predicated on a prior conviction. The prejudicial impact of the kidnapping and burglary charges included in the documents admitted at trial was low, given that the documents showed that appellant had not been convicted of those crimes. Moreover, given that appellant was charged with possession of a firearm having been previously convicted of a felony involving a firearm, even if counsel had offered a stipulation, and the trial court had accepted that stipulation, the jury still would have heard that he previously had been involved in a crime involving a firearm.

Appellant nonetheless argued that the failure to stipulate was at odds with his defense that he could not tell the difference between right and wrong on the day of the crime. He contended that allowing the jury to see that he previously had been convicted of a violent crime, including details beyond the mere fact of each conviction, undermined that defense and the opinion of his expert witness. But, the Court found, appellant defended the case against him on the basis that he was criminally insane at the time of the crime as a result of a long-running, chronic mental illness, offering evidence that he manifested symptoms even in childhood. This suggested that any mental illness that appellant may have had at the time of the crimes of which he was convicted here was also present at the time of the earlier crimes. Accordingly, the evidence of the earlier crimes had little bearing on whether he suffered from such mental illness. To the extent that the prior convictions could indicate to a jury that appellant was not mentally ill at the time he committed the prior offenses, given that he was found criminally responsible for them, nothing introduced at trial indicated that any mental-health defense was raised in the prior proceedings. Thus, there was no reason for the jury in this case to believe that the factfinders in those prior proceedings considered and rejected such a defense. Consequently, the Court held, any inference the prior convictions might support regarding appellant's prior mental health was too speculative and remote to support reversal here.

Appellant also argued that informing the jury that he had a drug-related conviction was particularly prejudicial given the opinions of the State and trial court experts that appellant's psychosis was drug-induced. But the evidence was strong that appellant had engaged in illegal drug usage. Evidence that appellant had possessed drugs at the time of a prior offense did not undermine the testimony of the defense expert that drug usage did not explain appellant's psychosis at the time of the shootings in this case. Thus, the Court found, appellant did not show a reasonable probability that the outcome of his case would have been different if counsel had offered the stipulation.

## Statements; Miranda

*Russell v. State, S20A0910 (9/8/20)*

Appellant was convicted of malice murder and other crimes. The evidence, very briefly stated, showed that appellant was living with his girlfriend and the girlfriend's 11-year-old son. The son found his mother's body in the mother's bedroom after appellant left the home. While the police were there, appellant returned and made spontaneous incriminating statements. He was arrested, placed in a GBI vehicle at the scene and Mirandized by Sgt. Hall and Agent Duttry (the "first interview"). Appellant made more incriminating statements, but about two hours into the interview, he invoked his right to counsel (Statement 1"). A short time thereafter, while awaiting transport to the city jail, appellant made spontaneous incriminating statements (Statement 2"). After he was transported to the city jail, he was re-Mirandized and interviewed

again (the “second interview”). He changed his story, but made incriminating statements. Again, about two hours into the interview, he invoked his right to counsel (“Statement 3”). Then, approximately three hours after the second interview ended, appellant was transported from the city jail to the county jail. During the drive, the officer and appellant engaged in a conversation about family and religion, and appellant spontaneously stated that he “killed her ... [and] murdered ... the only person who's ever loved [him] truly” (“Statement 4”).

Appellant contended that all his statements to law enforcement were involuntary because the statements were made while he was “clearly” under the influence of methamphetamine and that the introduction of those statements violated his due process rights. The Court stated that evidence of intoxication, standing alone, is not sufficient to render a statement involuntary. And here, the Court reviewed all the statements, most of which were recorded, and noted that during his custodial interviews, appellant told investigators that after assaulting the victim and before leaving the apartment, he had consumed the last of the methamphetamine in his possession by injecting it intravenously. Appellant left the apartment at least ten hours before he returned and was detained by law enforcement. The first interview occurred shortly thereafter, and the recordings of appellant's subsequent statements demonstrated that he was coherent and aware enough to invoke his right to counsel on two separate occasions. Appellant was talkative and although he sometimes skipped from topic to topic, his manner of speech was clear and understandable. He was responsive to the interviewers' questions, and when one of them said something appellant considered incorrect, he corrected the statement and pointed to factors that supported his version of events. At one point during the first interview, appellant withheld information, stating that it was “nothing I need to talk about.” And although appellant made some unusual statements regarding the victim during that interview, he later admitted in the second interview that he lied in that regard as part of a strategy to cover up his fault in her death. Thus, the Court concluded, even if appellant was under the influence of methamphetamine, the evidence supported the trial court's determination that he made his statements voluntarily with an understanding of his rights.

Appellant also argued that the statements he made after he first invoked his right to counsel (Statements 2, 3, and 4) were in violation of his rights under *Miranda*. The Court disagreed.

As to Statement 2, the Court noted that appellant and a GBI agent stood outside waiting for the arrival of an officer from the city police department to drive appellant to the police department. The Court found no evidence that the agent engaged in any interrogation of appellant, or its functional equivalent, during their brief time together. To the contrary, the agent testified that he did not ask appellant any questions, but appellant made unsolicited statements and asked to speak again with Sergeant Hall and Agent Duttry to let them know that he lied in the first interview and that he killed the victim on purpose. Although the full exchange between appellant and the agent was not recorded, the agent testified about the exchange, and the trial court evidently credited that testimony in denying the motion to suppress. Accordingly, because the evidence supported the trial court's finding that appellant's statement to the agent was spontaneous and voluntary, the trial court did not err in admitting Statement 2.

As to Statement 3, the Court noted that it was the product of a custodial interrogation of appellant in the absence of an attorney after he invoked his right to counsel. Therefore, the issue was whether the trial court properly concluded that the statement was admissible on the grounds that it resulted from a re-initiation of communications by appellant unprompted by improper police interrogation or its functional equivalent.

The Court found that the second interview took place over an hour after the first one ended. At the station, appellant was placed in an interview room alone for at least 11 minutes before Agent Duttry and another officer entered the room. When appellant began to say that he lied in the earlier interview, Agent Duttry stopped appellant and reminded him that he had earlier advised them that he did not want to say anything else without an attorney. Appellant replied that he was willing to talk without an attorney. Agent Duttry asked appellant to confirm that he had reached out to talk to them through another agent, and he confirmed that he had. Agent Duttry then re-read appellant his rights under *Miranda* from a waiver-of-rights form. In completing that form, both before and after reading appellant his rights, Agent Duttry asked questions seeking biographical information, including appellant's address, age, date of birth, and education level, and whether he could read and write. After appellant initialed and signed the waiver-of-rights form, Agent Duttry began the interrogation by asking appellant what he wanted to tell her.

Under these circumstances, the Court concluded that the second interview was not the result of any improper interrogation in violation of appellant's right to counsel or any coercion on the part of police. Instead, the record supported the trial court's determination that the interview resulted from appellant's voluntary re-initiation of communication with law enforcement with the express intent to talk about the murder. Moreover, considering the totality of the circumstances, including, but not limited to, the lack of any evidence of police coercion, appellant's clear and intentional re-initiation of communications with law enforcement, the re-reading of his rights under *Miranda*, and appellant's execution of the waiver-of-rights form, the Court further concluded that appellant voluntarily, knowingly, and intelligently waived his rights before the second interrogation began.

Finally, as to Statement 4, appellant argued that the trial court should have suppressed his incriminating statements to the officer because that statement was made after the officer asked questions about appellant's family. However, the officer testified that appellant was talking before the officer placed him in the car, continued talking while the officer radioed in his departure, and persisted in talking while the officer spoke on the phone with a supervisor about an unrelated matter. The Court found that the patrol car video recording supported the officer's testimony. When the officer finished his phone call, he told appellant that the phone conversation had been unrelated to appellant's case, and the two then engaged in a conversation about their families and religion. During that discussion, appellant turned the conversation to himself and spontaneously said that he had killed "the only person that ever loved him truly." Although the officer asked questions and engaged in social conversation with appellant before appellant made this statement, the topics discussed were prompted by appellant's own statements and unrelated to appellant's case. The Court found no evidence that the officer interrogated appellant or otherwise said anything or acted in any way that he should have known was reasonably likely to elicit an incriminating response. Accordingly, the Court concluded that the evidence supported the trial court's finding that appellant's statements in the patrol car were spontaneous and voluntary.

## **Crawford; Child Hearsay**

*Abernathy v. State, A20A1459 (8/19/20)*

Appellant was convicted of child molestation and enticing a child for indecent purposes. The victim was appellant's twelve year old stepdaughter. At trial, the victim testified that appellant woke her up and told her to come to bed with him; while under the bedsheets, he placed his arm over her and rolled her onto her back; and he then did something inappropriate that made her feel uncomfortable. The victim testified that after the incident she felt sad and needed to take a bath, and

appellant apologized and told her he would go to jail if she told anyone about it. Appellant's counsel cross-examined the victim, asking for further details of the incident, but she stated that it was too emotionally difficult for her to discuss such details. However, a trauma narrative written by the victim during therapy prior to trial was admitted without objection pursuant to the child hearsay statute, OCGA § 24-8-820. This trauma narrative gave a much more detailed account of the molestation.

Appellant argued that the admission of the trauma narrative violated his Confrontation Clause rights because (1) the child hearsay statute does not require that the child victim's statement bear indicia of reliability, and (2) the victim was not truly available for cross-examination. The Court noted that because appellant did not challenge the admission of the trauma narrative until his motion for new trial, his claim was only subject to review for plain error affecting his substantial rights.

The Court stated that in *Crawford v. Washington*, 541 U. S. 36 (124 SCt 1354, 158 LE2d 177) (2004), the United States Supreme Court overturned the "indicia of reliability" test as laid out in *Ohio v. Roberts*, 448 U. S. 56 (100 SCt 2531, 65 LE2d 597) (1980), and held that the Confrontation Clause bars the admission of out-of-court statements of an unavailable witness when (i) the statements are testimonial in nature, and (ii) the defendant does not have a prior opportunity to cross-examine the witness about the statements. Thus, the Court found, even assuming the victim's statements in the trauma narrative were testimonial, no Confrontation Clause violation occurred here because the Clause does not require that hearsay statements be reliable in order to be admissible.

Furthermore, the fact that the victim did not discuss the details of the incident at trial did not mean that she was unavailable or not subject to cross-examination because an unresponsive or evasive child witness does not render the child's out-of-court statements inadmissible under the Child Hearsay Statute or violate the Sixth Amendment confrontation rights of the defendant. So long as the witness is made available for confrontation and cross-examination, the defendant's rights are protected, even if the witness is uncommunicative or unresponsive. Thus, appellant failed to show any Confrontation Clause violation.

Nevertheless, appellant contended, his trial counsel was ineffective for failing to object to the admission of the trauma narrative as bolstering. The Court disagreed because such an objection would have been meritless. In fact, the Court stated, the Child Hearsay Statute actually contemplates testimony from both the child and those witnessing the child's later reaction, even if the hearsay may be "bolstering" and, any "bolstering" can be explored by a defendant in cross-examination.

## Simple Assault; Sufficiency of the Evidence

*In re T. P., A20A1167 (8/21/20)*

Appellant was adjudicated delinquent for simple assault. He contended that the evidence was insufficient to support his adjudication. The Court agreed.

The evidence showed that a school resource officer in a middle school was called to the gym because of an unruly student. Before he reached the gym, he encountered an assistant principal standing with appellant in the hallway. Appellant's fists were clenched, he was sweaty and breathing heavily, and he began cursing. The officer asked appellant to accompany him to his office so that they could talk. He put his hand on the small of appellant's back to direct him toward his office.

Appellant turned toward the officer, was “in [his] face,” and responded, “Fuck, no. I ain't going nowhere and you better not fucking touch me.” According to the officer, appellant looked as if he were ready to fight, but he never swung at the officer. The officer turned appellant around by his shoulder and took him to the office. The officer testified that when appellant turned toward him, appellant's “gestures caused [him] to fear that [he] may be able to receive physical or bodily injury based off his body language.”

OCGA § 16-5-20 (a) (2) provides that “[a] person commits the offense of simple assault when he or she ... [c]ommits an act which places another in reasonable apprehension of immediately receiving a violent injury.” The Court stated that to support a simple assault conviction or adjudication, there must be “a demonstration of violence.” But here, the only act the officer described, appellant's act of turning toward the officer when the officer placed his hand on appellant's back, was not a demonstration of violence, even though appellant was visibly angry and the Court noted, our courts never have held the kind of act committed by appellant to be an assault. Thus, a reasonable fact finder could not have found from the testimony at the adjudication hearing that appellant committed an act that placed the officer in reasonable apprehension of immediately receiving a violent injury.

Furthermore, the Court found, the officer's testimony was not sufficient to allow a reasonable fact finder to have found, beyond a reasonable doubt, that appellant's turning toward him caused him to apprehend immediately receiving a violent injury, as OCGA § 16-5-20 (a) (2) requires. To support an assault conviction, the injury that a victim apprehends from a defendant's act must be imminent and violent. The apprehension of future injury is not sufficient to convict a defendant of simple assault. Thus, the Court found, the officer's testimony that he apprehended that he may be able to receive physical or bodily injury demonstrated that the officer perceived the possibility of injury, not that he perceived that he would receive an imminent injury.

## **Sentencing; OCGA § 42-8-35.2 (a)**

*Benton v. State, A20A1142 (8/21/20)*

Appellant was convicted of possession of methamphetamine, possession of methamphetamine with intent to distribute, possession of marijuana (less than one ounce), and possession of a firearm by a convicted felon. He contended that his sentence exceeded the statutory maximum and should be vacated as void. Specifically, the statutory maximum sentence prescribed for possession of methamphetamine with intent to distribute is 30 years. The Court disagreed.

Pursuant to OCGA § 16-13-30 (d), an individual convicted of possession of methamphetamine with intent to distribute shall be punished by imprisonment for not less than five years nor more than 30 years, “[e]xcept as otherwise provided.” OCGA § 16-13-30 (d). OCGA § 42-8-35.2 (a) pertinently provides that “when imposing a sentence of imprisonment after a conviction of a violation of [OCGA § 16-13-30 (d), a court] shall impose a special term of probation of three years in addition to such term of imprisonment.” Thus, the plain language of OCGA § 42-8-35.2 requires that a term of special probation be served in addition to any term of imprisonment rendered under OCGA § 16-13-30 (d). Here, the trial court sentenced appellant to 30 years, with the first 20 years to be served in confinement and the remainder to be served on probation. As mandated by OCGA § 42-8-35.2, the trial court imposed a special term of probation of three years in addition to the thirty-year term of imprisonment expressly authorized by OCGA § 16-13-30 (d). Furthermore, the Court

noted, the State correctly pointed out in its brief that, “[t]he interpretation propounded by [appellant] would require that OCGA § 42-8-35.2 (a) be rendered meaningless. Accordingly, the Court held, the sentence imposed is not void.

## **Agreements between Victim and Defendant Not to Prosecute; “Equitable Immunity”**

*Evans v. State, A20A1021 (8/21/20)*

Appellant was convicted on stipulated facts at a bench trial of four counts of furnishing prohibited items to inmates, one count of bribery, and one count of violating his oath of office. The evidence showed that appellant was employed by the county department of public works and his job entailed supervising inmates of the county prison as they worked on a “mowing crew.” Based on allegations from inmates and an informant, appellant was investigated for providing contraband to prisoners on his detail or facilitating prisoners' receipt of contraband from others. When word of the investigation reached appellant's supervisor, he met with appellant and gave appellant the option of resigning or being fired. He also drafted a letter for appellant to sign which stated, “I hereby resign my position as a Detail Officer with Public Works. I offer my resignation for violation of State SOPs in lieu of termination and possible prosecution from the county.”

Appellant contended that fairness and equity require courts to enforce “criminal immunity agreements” where government employees forfeit rights in exchange for the promise to forego prosecution. Specifically, he relinquished not only his due process rights related to his termination, but also his Fifth Amendment privilege against self-incrimination. Thus, he argued, the Court should establish a new theory of immunity that should have barred his prosecution. The Court disagreed.

The Court stated that the decision concerning whether a defendant should be prosecuted is left to the sound discretion of the district attorney, who is charged with administering justice on behalf of the State. A court may enforce a prosecutor's agreement to forego prosecution, but a settlement agreement reached between a wrongdoer and a victim does not bar prosecution following an indictment. Indeed, not even a trial court may interfere with a prosecutor's discretion to pursue criminal prosecution. Thus, an employer — government or otherwise — does not have the authority to forego prosecution. Accordingly, the Court declined to create a new doctrine of “equitable immunity” and affirmed appellant's convictions.