Trial Advocacy & Writing

Spring 2015

Professor Melvin

Law 630

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SYLLABUS

TRIAL ADVOCACY & WRITING – Summer 2014

Professor John Melvin Tel.: 770.528.3067 w	Email: jmelvin@johnmarshall.edu Office Hours: 30 minutes before class or by appointment.
Dates: 01/13 - 04/17 Tuesday evenings **Time:** 06:15PM-09:30PM **Room:** *tba*	

COURSE MISSION:

To develop aggressive, professional and effective advocates who will persuade by establishing credibility and trust in the strength of their argument.

PREREQUISITE: Students **must** have taken and passed Evidence.

CLASS DESCRIPTION

This course has been specifically designed for law students. It focuses on the fundamentals of advocacy in the courtroom utilizing techniques taught at the National College of District Attorneys and Georgia's Basic Litigation Course for Prosecutors. The course combines presentations with workshops coordinated by veteran litigators.

This workshop will focus on proven techniques for opening statements, direct examinations, cross-examinations, and closing arguments. The course will draw on criminal case files to provide a wide range of experience and development for the students. This will be accomplished by utilizing a combination of lectures, simulated courtroom exercises, detailed critiques, and specific recommendations for improvement.

Addressing issues and strategies relevant to the aspiring trial advocate who is dedicated to honing his or her trial skills, the course presentations inspire and educate in critical areas including: persuasion, trial strategy, effective use of trial exhibits, demonstrative evidence and courtroom technology, with attention to the inherent ethical concerns in each area. The course will feature a combination of these presentations, demonstrations and workshop sessions. Workshops will include instruction on developing persuasive case theories, compelling trial themes and effective case characterizations and incorporating these methodologies into direct and cross-examination, objections, opening statements and closing arguments.

Students will learn how to construct and deliver effective opening statements, direct and cross-examinations, and closing arguments, all while consistently incorporating, via lecture and class participation and experience, the key concepts needed to prevail when actually trying cases. All student performances will be videotaped, and, in addition to "in-class" critiques from faculty, each student will receive a more detailed, written faculty critique of the performance of each stage of the trial presented. The critique will cover the concepts specific to the exercise the student performed (opening, direct, cross, or closing) and address tactical principles such as utilization of theory and theme, as well as common communication issues including use of voice and movement as tools of effective advocacy.

This course involves a combination of lecture, classroom discussion, quizzes, film, writing assignments, and the practice of trial skills in a simulated courtroom environment. Thus, you will be asked to take on the role of an attorney, witness, juror, judge, or even evaluator at varying times.

Students are expected to stay "in role" throughout the exercises, and to know their scripts from the case files. There will be an opportunity during the critique sessions for questions and comments. During the last three weeks of the course, each student will participate as co-counsel in a three-hour simulated trial. In addition, each student will participate in the other two mock trials, in a support role, such as a witness, or juror.

COURSE MATERIALS

Required:

- *Fundamental Trial Advocacy*, Second Ed., 2010, Charles H. Rose III
- *Learning Evidence: From the Federal Rules to the Courtroom*, Merritt & Simmons
- Federal Rules of Evidence (Print them off from Westlaw or Lexis)
- Two 3 Ring Notebooks with colored tabs, labels, and at least 4 dividers with pouches
- *Objections at Trial*, NITA Bright, Carlson, & Imwinkelreid

Recommended:

- *Trial Handbook for Georgia Lawyer's*, 2011-2013, Ronald Carlson
- *Evidentiary Foundations*, 8th Edition Edward Imwinkelreid

ATTENDANCE POLICY & CLASS PARTICIPATION

Attendance:

I will track your attendance by breaking the class period into halves. If you arrive in the classroom after I announce the beginning of class, I will mark you absent for the first half of class. If you arrive after the second half of class begins, I will mark you absent for the entire the class. Leaving class early will similarly affect your attendance. There are two aspects to this attendance policy.

First, attendance is mandated by Atlanta's John Marshall's Academic Code. Article Six, Section 601, Atlanta's John Marshall Law School Academic Code states that a student who is counted absent for more than twenty percent (20%) of the class hours in any course will automatically receive "W/F" as a grade for the course.

Second, missing class or being late for class could also affect your grade if it is on a day when we have a graded or pass/fail assignment.

Pass/Fail Assignments. There are no pass/fail assignments.

Graded Assignments. You will be required to evaluate your fellow students based upon their performance and whether they incorporated the reading materials. These evaluations will be graded.

For all other graded assignments, missing the assignment will result in a zero, and you will not receive any exception for being late for your performance. If you do not turn in an evaluation, you will receive a zero for that assignment.

Workshops

Final Mock Trial. You must complete your mock trial to receive credit for this course.

CASE FILES

State v. Johnson, is attached and we will use this throughout the semester. In addition, you may be assigned another NITA case file for your final trial.

CLASS EXERCISES & ASSIGNMENTS

Your class participation will include your role as advocate, witness, and evaluator. When not actively participating in an exercise, you are expected to give your full attention to your fellow classmates while they are performing and participating in the critiquing process. Learning a new skill requires observing as well as participating. For this reason, as a general rule, there will be limited use of laptops in the classroom.

MOCK TRIAL PARTICIPATION REQUIREMENT

At the end of the semester we will conduct three mock trials. You will have different roles for these trials. Each role will be graded.

Co-Counsel Role. Each student will be required to serve as a co-counsel in a three-hour trial. At a minimum, mock trial preparation will entail several privately scheduled meetings with witnesses, and the trial itself. The trial schedule will determine opponents. Opponents must conduct themselves under the ABA's Model Rules of Professional Conduct (that is, no improper colluding with your opponents to achieve a better grade). For your final trial, you are responsible for providing at least your witnesses. Unless excused in advance, if you do not provide a witness, I will penalize you on your mock trial grade. Thirty percent of your course grade will come from your performance as a co-counsel in the mock trial. Final mock trials will be graded primarily on proper execution of the trial techniques taught in the course. Significant weight will also be given to an assessment of how successfully the student has developed the trial team's "theme" and "theories of the case" and supported those throughout the presentation of the team's evidence.

Support Roles. In addition to participating as a co-counsel in one mock trial, you will also be required to participate in other exercises in a support role (for instance, as a witness, judge, or juror). You will receive Pass/Fail grades for your support role performances.

PROFESSOR/STUDENT MEETING & TRIAL NOTEBOOK

On the night of 04/01/2013, I will meet with each of you individually. You will show me your Trial Notebook. Your trial notebook will be a binder, with tabs, organizing your trial materials for your mock trial. You need to have a draft Opening/Closing (whichever one you are responsible for), and draft questions for voir dire and witnesses, as applicable. You will also need to have an exhibit list and your exhibits. We will schedule your meeting time so that co-counsels have their meetings back-to-back, so that I can spend some overlap time with both team members.

GRADING BREAKDOWN
Grades will be based as follows:

Assignment	Week	Value
Participation (50)		
Opening Statement Workshop	2	10
Direct Examination Workshop	5	10
Cross Examination Workshop	7	10
Closing Argument Examination Workshop	9	10
Drills	1-10	10
Team (50)		
		10
Motions Hearing	12	10
TRIAL	13/14	30
Total		100

LAPTOP COMPUTERS

Generally, no use of laptops while other students are performing. I will let you know when you can and cannot use laptops. You may use laptops anytime I am lecturing. You may only use your laptop for class related information. If you violate this rule, I reserve the right to prohibit your future use of a laptop in this course.

DRESS

Your normal school attire is appropriate for all classes with the exception of the mock trial when you are acting as a co-counsel. For that mock trial, students are required to wear "appropriate courtroom attire." Appropriate attire includes coats and ties for men and professional clothing for women, i.e. suits or business-style dresses.

Good luck in class this semester. I look forward to exploring the tenets of trial advocacy with you this year!

Trial Advocacy – Spring 2014
Course Schedule
Professor Melvin
Law 630

Class 1: Tuesday January 13th

Part 1: Lecture: Total Trial Concept: *Introduction to Trial Advocacy*
Chapters 1, 2 & 3
Part 2: Lectures: Opening Statements

Read before Class: Chapters 4 *Fundamental Trial Advocacy*
Chapters 2-5 *Learning Evidence*

Class 2: Tuesday, January 20th

Workshop ~ Opening Statements/Objections

Class 3: Tuesday January 27th

Part 1: Lecture: Direct examination
Part 2: Lecture: FRE 401, 403, and 404 – Cornerstones of Evidence
Part 3: Drills

Read before Class: Chapters 5, & 7 *Fundamental Trial Advocacy*
Chapters 14-17, 29 & 69 *Learning Evidence*

Class 4: Tuesday, February 3rd

Part 1: Introduction of Exhibits; Experts; FRE 702; 703; 901-903; 1001-1008
Part 2: Lecture: Hearsay FRE 801-807
Part 3: Drills

Read before Class: Chapters 13 & 16 *Fundamental Trial Advocacy*
Chapters 62-65 *Learning Evidence*

Class 5: Tuesday February 10th

Workshop ~ Direct Examination & Introduction of Exhibits Objections

Class 6: Tuesday, February 17th

Part 1: Lecture: FRE 806
Part 2: Lecture: Cross Examination/Impeachment Technique
Part 2: Drills
*****Begin preparation of Trial Notebook and Trial Memo*****
Read before Class: Chapters 6, 10-12 *Fundamental Trial Advocacy*
Chapters 17-22 *Learning Evidence*

Class 7: Tuesday, February 24th **Workshop ~ Cross Examination** (State v Johnson)

Read before Class:

Chapters 38-45 *Learning Evidence*

Class 8: Tuesday, March 4th

Part 1: Lecture: Hearsay Strategies

Part 2: Lecture: Closing Arguments

Read before Class: Chapters 46-55 *Learning Evidence*

Class 9: Tuesday, March 10th

Workshop ~ Closing Arguments

*****Trial Notebook Due at conclusion of class*****

March 16th-20th SPRING BREAK NO CLASSES

Class 10: Tuesday March 24th

Part 1: Lecture: Motions & Objections

Chapter 8, 9 & 17

Part 2: Lecture: Jury Selection

Chapter 15

Class 11: April 3rd t

Class 1: Motion & Trial Preparation

Class 2: Motion & Trial Preparation

Class 12: April 8th

Class 1: Motions Hearings (teams come to class ready to argue two motions)

Class 2: Trial Prep; Q & A

Trial Notebook Due this week

Class 13/14 April 10th

Final Trials

Class 14: April 17th

Final Trials

Case File

The State
v.
Samuel Johnson

JMLS
2014

INDICTMENT

Witnesses:

APD: Lt. Chris Rogers

Case No.: 012CR077
Fulton Superior Court
February Term, 2012

State of Georgia

Versus

Samuel Johnson

Offense (s):
1. Armed Robbery

True
BILL

Carl White
Carl White, Foreperson

Returned in open court by Grand Jury,
This 28th day of February, 2012.

Barbara Underwood
Barbara Underwood, Clerk

The defendants herein waive a copy of indictment, list of witnesses, formal arraignment and plead Not guilty.

This 4th day of March, 2012

Samuel Johnson
Defendant

John Doe
Attorney for Defendants

Dudley Straight
Prosecutor

IN THE SUPERIOR COURT OF FULTON
COUNTY STATE OF GEORGIA

THE GRAND JURORS selected, chosen and sworn for the County of Fulton, to wit:

1. **Carl White, Foreperson**
2. Helen Matthews
3. Sally Frank
4. Tim Swenson
5. Mrs. H. T. Turpin
6. Tina Epps
7. Cosmo Kramer
8. Mike Juniper
9. Larry Ferguson
10. Susan Nagel
11. Lora Colander
12. Bruce Harvey
13. Kip Stump
14. Jennifer Wyrick
15. Brad Pitt
16. Mike Mears
17. T. J. Whatley
18. Dabney Pope
19. Dianne Erickson
20. Matt Finklestein
21. Mark Henry
22. Star Shine

Count 1

In the name and behalf of the citizens of Georgia, charge and accuse Samuel Johnson with the offense of Armed Robbery in violation of O.C.G.A. § 16-8-41 in that the said accused, in the County of Fulton and State of Georgia, on February 8, 2012, with intent to commit a theft, did take money from the immediate presence of Morgan Bates by use of a pistol, an offensive weapon contrary to the laws of said State, the good order, peace and dignity thereof.

District Attorney
Special Presentment

STIPULATIONS

1. The Defendant must be played by a male. All other witnesses are gender neutral.

2. Detective A. T. Pharr died of a gunshot wound on April 10, 2012.

3. The State must call Chris Rogers and Morgan Bates.

4. The Defense must call Terry Harris and Samuel Johnson.

5. The gun used by Anthony Friday was taken in a burglary along with several other pistols on December 3, 2011.

6. Preliminary hearing transcripts and testimony of Det. Pharr are certified copies.

7. For purposes of security, only the plastic gun can be used to simulate the weapon. No reference may be made to not producing the actual gun.

8. The court on its own motion suppressed the crime scene picture of Anthony Friday as too inflammatory.

9. A Jackson-Denno hearing was held. The court found all oral and written statements by the Defendant are admissible.

10. All sworn statements have been signed.

11. All documents are original or certified copies.

12. Defendant waived his presence at the interview with Detective A.T. Pharr.

13. All notice and disclosure requirements have been met under the Georgia Rules of Evidence and Criminal Procedure.

14. No brief book or outside case law is allowed.

15. Georgia Rules of Evidence and Criminal Procedure apply.

16. The indictment of the Defendant for Burglary is a certified copy.

SWORN STATEMENT

Det. A. T. Pharr

April 1, 2012

Grady Hospital ICU

Present: A. Pascal for State; John Doe for Defense; Marge Barron, Court Reporter; Dr. Andy Jones, Grady Emergency

State: This interview is taken to preserve the testimony of Det. A. T. Pharr for trial against Samuel Johnson. Oath given.

State: Please state your name. Do you understand why you are doing this statement?

Pharr: Yes. I am preserving my statement because I believe I might be dying. My name is Detective A. T. Pharr. I am a robbery detective for the City of Atlanta. I have been a policeman for 15 years and a detective for 7. I've had serious problems with this gunshot wound I received to my stomach during a bank robbery on March 15, 2012. I understand what we are doing here today even though I am taking a lot of medication including pain killers.

State: I want you to recall the events at A1 Liquors on February 8, 2012 when you shot Anthony Friday. Please take your time.

Pharr: Yes, I was working a stake-out position at A1 Liquors because of all the recent hold-ups in the area. I was located in the small office which overlooks the store and cash register. This manager's office had a two-way mirror which allowed me to look out. I carried a police issued Winchester Model 1915 12-gauge pump shotgun loaded with buckshot.

Court Reporter: [Pause while witness is in pain and takes some water.]

Pharr: I don't remember the time, but it was a weeknight at closing when a dark sedan pulled up to the front door. The office and cash register sit sideways to the door. There are ads all over the front of the store except the door, so I had a limited view out the door. I waited but no one came in. Finally, I could see the passenger get out of the car and walk to the front of the car. The passenger turned to his left and was talking to whom I assume was the driver, but I couldn't see him. I do believe the driver had gotten out of the car and was standing to the side out of my view. It looked

like they were talking back and forth. It has been my experience in armed robberies that if one stays outside he acts as a lookout. That's what I think the driver was doing.

Dr. Jones: Let's take a break. I need to adjust the tube in his stomach.

[Break]

State: Please continue.

Pharr: The passenger came to the front door, opened it, and walked in. He had on a large overcoat. I had a bad feeling. It just didn't look right. The store was empty except for the manager. I stood up and took the safety off my shotgun. I was going to walk outside the office and confront the individual, but I didn't have time. The man walked up to the cash register, said something, then pulled what appeared to be a German luger pistol. I heard him demand money and threaten Morgan. Morgan opened the cash register and gave the robber money. He stepped back and raised his pistol. I yelled, "Police, Freeze!" He pointed the gun at me and I let him have it.

Court Reporter: [Doctor asked for a break. Patient upset.]

[Break]

State: Please continue.

Pharr: After I shot, I yelled for Morgan to go get a description of the get-away car. It was backing up, tires spinning. Morgan came back with a description. I don't remember it now, but I put a look-out for it over the radio. Later a young man was brought back to the store, but I couldn't ID him. I did later ID a car police had impounded on Confederate Avenue as the get-away car.

State: The defense attorney is going to ask you some questions. Take your time.

Defense: You were never able to identify the driver of the car, were you?

Pharr: No.

Defense: You have no information that the driver knew anything about the robbery.

Pharr: No, but he did flee the scene.

Defense: The stake-out squad was disbanded by order of the Mayor right after this incident.

State: I object to this question as being irrelevant. The witness can answer the question under protest.

Pharr: Yes, but the robbery rate went to zero.

Defense: In fact, you were disciplined by Internal Affairs for the shooting weren't you?

State: Objection. I instruct the witness not to answer this question.

Defense: Isn't it true that 4 people were murdered by the stake-out squad?

State: I object to relevancy and also to the form of question saying, "armed robbers were murdered."

Pharr: Listen, you pinhead, I shot this guy because he was going to kill Morgan. I shot him in self-defense.

Court Reporter: [Patient extremely upset.]

Dr. Jones: This man needs to rest; therefore, I am calling an end to this interview for his safety.

SWORN STATEMENT

Morgan Bates

2/10/12

I am employed at A1 Liquors as a manager. I have been there for four years. I work the evenings Monday through Friday. As a manager, I have to supervise employees who stock shelves, clean up, etc. I run the cash register. The store is located on Memorial Drive, City of Atlanta, Fulton County. It is a very high crime area. We do a very large volume of sales so there is always a lot of cash in the store. Therefore, our store has been held up several times. I, myself, have been robbed twice. So when the police started the stake-out squad to deal with all of these armed robberies in Atlanta, our store was a prime location. The stake-out squad had been in our location for about five months before the February 3rd shooting. They would not be in the store all of the time, but would rotate to different businesses in the neighborhood. They put notices on each business warning that it was a stake out location. They have been very successful in stopping armed robberies. The front of the store has a lot of advertisements so you cannot see out. The door is clear, but it has burglar bars on it. The cash register is to the right as you enter the front door facing down the aisles. We have security cameras, but they are always on the blink. Behind the cash register is a raised office for the managers to work from. There is a side door to the office that is accessible by three stairs. The owner put a tinted window in the office overlooking the store so he could see out

but no one could see in. Lt. Rogers showed me a diagram, and it is accurate as to where everyone was at the time of the shooting.

I came on duty at 3:00 PM on February 8, 2012. We closed the store at 11:00 PM on weekdays. It was a Wednesday. I had one employee working with me. Around 9:00 PM Det. Pharr came in carrying his shotgun to work the stake-out. It was cold that night. I have known Det. Pharr for several years because he is a robbery detective and has worked some of our previous robberies. He is very professional, all business, doesn't talk much. Close to 10:30 PM I let the other employee go. Every night at closing, I would balance the cash register, take all of the receipts, and drop them in the safe in the office. Around 10:45 a customer came in, bought some cognac, and left. Shortly afterward, a dark car pulled up at the door. The passenger got out with an overcoat on. I could see him through the front door. He stood at the front of the car looking in. I heard Det. Pharr say, "Watch out," or "Be careful," or something like that. I could not see the entire car through the door but there was obviously a driver with this guy. As the passenger came through the door, I thought I had seen him before in the store. In fact, I think he was in the store earlier that evening. As he opened the door, he looked to his left like he was looking at someone. There were no other customers in the store, and I was really nervous.

He didn't go down the aisles looking for anything but went right up to the counter. I thought he was just getting some cigarettes. He had his hands in his coat pocket. He stood there a few seconds then looked around the store and said, "Give me a pack of Kools." I turned then he said, "Never mind." I turned back around, and

he pulled out a funny looking gun. The pistol Lt. Rogers showed me looks like the gun. He said, “Give me all the money or I’ll kill you.” He had the gun pointed right at my face. I hit the cash register, grabbed all of the twenties, tens, and fives, and gave them to him. The guy then stepped back. I heard Det. Pharr yell, “Freeze Mother Fucker, police.” Then boom the shotgun blast blew out the window glass. The shotgun blast blew this guy up; money, blood, guts went flying everywhere. This guy was dead before he hit the floor. I mean he had a hole in him the size of a basketball. I was stunned. Then I realized that Det. Pharr was yelling at me to get a description of the get-away car. I ran out the door and saw a dark four door foreign car that was at the front door backing up with tires spinning. I thought the driver had a gun because his arm came up over the dashboard and was pointed at me, but I can’t be sure. The car then spun around and I saw that the tag had been covered. I ran back inside and told Det. Pharr who called radio.

If Det. Pharr had not been there, that guy would have killed me. He saved my life. Later, police brought a man back to the store, but I couldn’t identify him. I rode in a police car to a place out on Confederate Avenue where I did identify the car that fled the scene.

/s Morgan Bates

PRELIMINARY HEARING

Judge Harvey Moskowitz

2/23/12

State: Introduce yourself to the court.

Rogers: I am Lt. Chris Rogers, City of Atlanta Police Department. I am the morning watch commander for Zone 3, 11 PM until 7 AM. Zone 3 covers the Southeast Quadrant of Atlanta.

State: Give the court your training.

Rogers: I've been a policeman for 12 years. I spent 3 years in the Army as a Military Policeman. I have completed the Police Academy, Special Weapons and Tactics School, Advanced Crime Scene Investigations, and Advanced Homicide Investigations. I was a Homicide Detective for 4 years before being promoted to Watch Commander.

State: What does a Watch Commander do?

Rogers: Supervise the patrol units under his command for that particular shift.

State: I call your attention back to February 8, 2012. Were you working that evening?

Rogers: Yes.

State: Tell the court what happened.

Rogers: I had started the shift by going over to Fire Station # 10 which is on Boulevard at I-20. I wanted to talk to the Battalion chief Skip Everett about a possible arsonist in our area. I backed my patrol car into the parking space facing Boulevard. I went inside to talk to Skip when I got a BOLO (be on the look-out). The vehicle was wanted in an armed robbery at A1 Liquors on Memorial Drive. The store was less than a mile from my location. I raced back to my patrol car. As I got to my car, I saw a dark car crossing the bridge over I-20 proceeding Southbound on Boulevard at a high rate of speed. When it passed me, I saw the damage on the right rear quarter panel which was part of the look-out. I then hit my blue lights and gave chase. The car ran the red light at Boulevard and Bern Street almost colliding with a car that was pulling out. When it reached the intersection where Confederate Avenue dead-ends into Boulevard at Grant Park, the car slammed on brakes skidding sideways into the

intersection. At that point in my headlights, I saw an arm come out the driver's side window and a black object, which appeared to be a gun, was thrown out. The gun bounced across the street and against the curb. The car then shot down Confederate Avenue with me in pursuit. It ran the stop sign at Ormewood and Confederate Avenue and continued Southbound at a high rate of speed. I called Units 301 and 303 to set up a roadblock on Confederate Avenue at GSP (Georgia State Patrol) Headquarters. As the car entered the curve at Edie and Confederate Avenue it almost lost control, running up on the curb. I later learned the driver, Samuel Johnson, lived across the street on Confederate Court.

At this point there was a straight shot up the hill to GSP Headquarters. When the driver topped the hill, he saw the roadblock, slammed on brakes, shot to his left on Alloway Place. I was familiar with this area and knew there was no exit so we had him trapped. The subject got to the top of the hill and turned into the driveway of the Atlanta Burns Cottage. I had worked an off-duty job for the Burns Club. It is a bunch of old guys who celebrate the Scottish poet Robert Burns, dress in kilts, and drink Scotch whiskey.

When the subject stopped the car, he bolted and ran around to the back of the Cottage. I ordered Units 301 and 303 up through the woods from Confederate Avenue to intercept him. The subject raced to the back, and I saw him duck behind the bandstand where they play bagpipes. I drew my weapon and ordered him out with his hands up. He came out shouting, "Don't shoot. I'm not armed." I put him on the ground and handcuffed him. He started yelling, "That stupid bastard screwed things up!" I advised him of his Miranda warnings and put him in the back of my patrol car. We then searched his car and area for weapons and contraband but found none. I then received a call from Internal Affairs since they were investigating the armed robbery. Apparently, Pokey Pharr had shot another armed robber. They told me to bring the suspect, Samuel Johnson, back to A1 Liquors to see if he could be identified.

State: I show you several photos. What are these?

Rogers: These are all different photos of the defendant's car. I checked the serial number since there was no tag on the car. It was registered to the defendant. You can see the Burns Cottage in the background.

State: I show you this photo. What is it?

Rogers: This is the bandstand in back of the Burns Cottage where the defendant was hiding.

State: Continue.

Rogers: I instructed Units 301 and 303 to go back to Boulevard and Confederate to recover the object the defendant threw out. I heard Unit 301 say over the radio that they "didn't find anything." A passer-by must have picked the gun up. At that point, the Defendant asked what they were looking for and I said "the gun you threw out." He denied having thrown anything and said I was mistaken. Then he started saying that he didn't know his cousin was going to rob the store and asked if his cousin was dead. I then said, "Well if you didn't know, why did I have to chase you all over South Atlanta?" He sat there for awhile and said nothing. He hadn't figured out what his response was going to be because he changed his story once he got down to the police station.

When we got back to A1 Liquors, Johnson got upset, said he knew his rights, and that I was doing an illegal show-up. He tried to hide in the backseat. I had to get him out of the back so they could see him. However, the cashier and Det. Pharr were unable to identify the Defendant. They both said the driver did not go into the store, though Det. Pharr said the driver got out of the car. The Defendant was taken to Zone 3 to see if he would give a statement. I took Bates and Det. Pharr back to the car. They both identified it as the get-away car.

State: Did you do any investigation linking the Defendant to the deceased, Anthony Friday?

Rogers: Yes. After discovering that they were cousins, I searched our records and found an open indictment. The Defendant and Anthony Friday were co-defendants in a burglary that took place December 3, 2011 in the Midtown area. I checked with the investigating officer. The subjects were stopped at a roadblock the same day as the burglary, and the stolen items were found in the Defendant's car. At that time, the Defendant's car had a tag on it because it was recorded on the impound records. I decided to then check out the gun Anthony Friday used.

State: I show you what has been marked as State's Exhibit #1. What is it?

Rogers: This is the gun Friday had. It is a German Walther P38 pistol. It is very unusual because it has WWII Luftwaffe markings on it. I checked the serial number. It was taken in a burglary along with several other handguns on December 3, 2011, several blocks from 738 Myrtle Street, which is the address of the burglary that the Defendant and Friday are charged with. I then charged the Defendant with Armed Robbery as Party to the Crime.

Court: Cross-examination.

Defense: Neither Bates or Pharr could identify my client, Samuel Johnson.

Rogers: That is correct.

Defense: My client denied knowing that his cousin was going to rob the store.

Rogers: Yes.

Defense: You cannot be positive what you saw being thrown from the car.

Rogers: Well, it looked like a pistol not a bag, but it was dark.

Defense: Are you aware that my client had applied to get a new tag?

Rogers: He said he had, but a search by the Department of Motor Vehicles could not find it.

Defense: You would agree with me that DMV in the State is notorious for losing records.

Rogers: Yes, I would have to agree with that.

Defense: No further questions.

PRELIMINARY HEARING

Judge Harvey Moskowitz

2/23/12

Court: Do you have any witnesses for the defendant?

Defense: Yes, Your Honor, we call the defendant's cousin, Terry Harris. Oath given.

Defense: Will you state your name and occupation?

Harris: Yes, my name is Terry Harris, and I am a student at Atlanta Area Tech studying computer programming.

Defense: How are you related to Samuel Johnson?

Harris: He is my cousin. Our mothers are sisters. I have known Sam all my life. We grew up together in Atlanta.

Defense: Do you know Anthony Friday?

Harris: Yes. He is another cousin. His mother is a sister to my mother. I only knew him when he moved to Atlanta from Baltimore about two years ago. He has been nothing but trouble since he got here. He is 4 years older than Sam so he was always bossing him around. He was a real jerk, always knew everything, and didn't give a damn about anybody.

Defense: I call your attention to Wednesday, February 8, 2012, the day Anthony was shot.

Harris: Okay.

Defense: Let's begin with the afternoon. What were you doing?

Harris: I was in school. When I got home about 5:00, Sam was there talking to my mother. We live on Ormewood Avenue and Sam lives on Confederate Court which is about half of a mile away. Sam lives in an apartment with his mother and younger sister. Sam's dad was killed by a DUI driver back in 2005. It has been real hard on the family.

We sat around and talked. Sam suggested we go to the Varsity and get some hot dogs. I got in his car which was an old beat-up Lexus. Sam worked part-time for Snatch 'Em Wrecker Service. He bought the car through them. When we left, Sam said he was going to pick up Anthony. We got into a big fight about Ant. That's what we called Anthony, Ant. I told him Ant was a bad influence. He'd already gotten him in trouble by being arrested for burglary. Ant knew that I didn't like him. Sam's problem was that he felt sorry for him. Sam said everybody just ignored him. I said there was a reason for that because Ant was a slug. He didn't have a job and would end up in prison.

Sam is a kindhearted person. He goes to church regularly and is always helping people. He works one night a week at St. Luke's soup kitchen. I really think Ant took advantage of him. Well, Sam ignored me and picked up Ant over in Grant Park. He'd been hanging out in the park all day. Ant got in the back of Sam's car with some beer and started talking all that trash about how he was going to make easy money and get himself a big ass car. Naturally, he didn't have a car. That's why he always called on Sam.

Defense: Did you go to the Varsity and what did you do later that night?

Harris: Yes, we ate at the Varsity then Ant wanted to go to some club. I said, "No, take me home." We got back to my house. I didn't want Sam to go out with Ant so I talked them into staying at my house and watching TV.

Around 11:00 PM Ant asked Sam to run him over to the liquor store to get some beer, then drop him by his house. They left together. The next day I heard Ant was dead and Sam was arrested for armed robbery. This is crazy. Sam didn't have anything to do with the robbery.

Defense: I show you State's Exhibit #1. Have you ever seen this gun before?

Harris: No. Never. Ant didn't show any gun, or talk about robbing or anything like that.

Court: Cross-examination by State.

State: You are aware that Sam was on probation for drugs, specifically marijuana.

Harris: Yes, I knew he was doing his probation, drug counseling, and community service. He knew he had made a mistake and wanted to go straight.

State: Did you see or smell any marijuana in Sam's car the night of the robbery?

Harris: Absolutely not. Sam knows he could have his probation revoked. He would never do that. There were no drugs in the car.

State: I show you a certified copy of an indictment of Sam's burglary charge. He is charged as a co-defendant with Anthony Friday. Are you aware of this charge?

Harris: Yes. I made Sam's bond. Sam had nothing to do with it. Anthony had stolen the goods and Sam had just given him a ride. Sam told me Ant was always asking for a ride from Sam. Sam also told me he had nothing to do with any burglary.

State: Did you notice whether Sam's car had a tag on it?

Harris: Well yeah, I assume it did. It always has.

State: So Sam never told you that the tag had been stolen?

Harris: No.

State: How was Ant dressed that night?

Harris: Let me think. I believe he had on a sweater and blue jeans. It was cold that night.

State: Did you ever see a big overcoat?

Harris: No.

State: Are you aware Anthony Friday served time in Maryland for robbery?

Harris: No I didn't but it doesn't surprise me. I heard he was a really bad dude in Maryland.

State: No further questions.

Court: Any other witnesses for the defense?

Defense: No, Your Honor.

Court: I find probable cause to bind this case over to the Grand Jury on a charge of armed robbery.

SWORN STATEMENT

Samuel Johnson

2/9/12

City of Atlanta Police Department

The defendant has been given his Miranda warnings, declines to consult an attorney, and voluntarily gives this statement. Statement was given to Lt. Chris Rogers.

My name is Samuel Johnson. I freely give this statement without an attorney because I have nothing to hide. I swear it is the truth.

I am 23 years old. I finished high school and 2 years of Junior College at Atlanta Area Tech. I live with my mother and little sister, Tina, at 75 Confederate Court Apt. 3. My father is dead. I work part-time at Snatch 'Em Wrecker Service and also as a waiter at Manuel's Tavern. Jobs are really hard to find in this market. I guess now I'll be fired from both of these jobs.

In 2011 I was charged with possession with intent to distribute marijuana. I was caught with 3 ounces. Since it was my first offense I was allowed to plead guilty to simple possession and got 3 years probation under the First Offender Act. I was with the wrong crowd. I was just plain stupid.

I have known my cousin, Anthony Friday, since he moved to Atlanta from Baltimore. We called him Ant. I felt bad for him because he was always getting into trouble. I tried to get him a job, but he just wouldn't work. My mother and cousin Terry didn't like him. As to the burglary charge in December 2011, I was just trying

to help him. The night before he had asked me to pick him up at 11:30 PM at Mary Macs on Ponce de Leon. He didn't have a car so I always carried him around, but that night, on December 3rd, we were stopped at a roadblock. That's when he said he had burglarized a house, and he tried to stuff a sack under his seat when the police saw it. They got us out of the car and found the stuff which had been taken from an apartment. We were both charged with burglary. Ant said he would plead and take the rap because it was his fault.

Last night, February 8, 2012, I was at my cousin Terry's house. He/she lives over in Ormewood Park close to me. I asked my cousin to go to the Varsity with me. I drive an old Lexus. The tag got stolen in January. I was in the process of applying to get a new tag. I have sent in my paperwork on it. Ant had called me earlier and said he had plans. He wanted me pick him up at Grant Park. Terry wasn't happy because he/she hated Ant for getting me into trouble in the burglary case. We ate at the Varsity and then Ant wanted to go to a movie. We finally ended up at Terry's place and played cards. Around 10:00, Ant wanted to go home so I said I would take him. When we got in the car, he said, "Let's get some beer at A1 liquor and smoke some weed."

Well, I was stupid. I knew I was on probation, but Ant was insistent that we do something. He had an overcoat on and pulled from his pocket a dark blue Crown Royal whiskey bag that had some pot in it. He put it on the seat between us. He told me to drive to A1 Liquors to get some beer. Then we were going to his place.

A1 Liquors is on Memorial Drive. I pulled into the parking lot right up to the front door. The lot was empty. Ant said he would be right back, got out, and ran inside. I never got out of the car. I kept the car running to keep the heater on because it was cold. I drive a 1998 Lexus four door. It is real used, more than 150,000 miles on it. I had put a notice on the car about my tag. I was not trying to hide my tag.

I couldn't see what was going on because of all the beer ads on the windows. I heard a loud boom. I was shocked. I knew it sounded like a gun. Then all of a sudden this guy came running out of the store, pointing a gun at me. Well, I panicked. Here I was on probation with a bag of marijuana on the front seat so I took off. I went down Boulevard because I was going home to tell my mother what happened. Then the police car started chasing me and I really got scared. When I got to Confederate Avenue and Boulevard, I threw out the Crown Royal bag. There was no gun, I swear.

I admit to running from the police. At that point I didn't know what else Ant had put in the car so I didn't stop. I know I shouldn't have run. I had nothing to do with the armed robbery. I have never seen this gun they showed me. I didn't know Ant had a gun. Ant never said anything about robbing the store as God is my witness.

/s Samuel Johnson

INDICTMENT

Witnesses:

APD: Dana Fleming

Case No.: 012CR0285
Fulton Superior Court
January Term, 2012

State of Georgia

Versus

Anthony Friday and Samuel Johnson

Offense (s):
1. Burglary

True BILL

Carl White
Carl White, Foreperson

Returned in open court by Grand Jury,
This 5th day of January, 2012.

Barbara Underwood
Barbara Underwood, Clerk

The defendants herein waive a copy of indictment, list of witnesses, formal arraignment and plead Not guilty.

This 18th day of January, 2012

Anthony Friday and Samuel Johnson
Defendant

Justin Looseit
Attorney for Defendants

Dudley Straight
Prosecutor

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

THE GRAND JURORS selected, chosen and sworn for the County of Fulton, to wit:

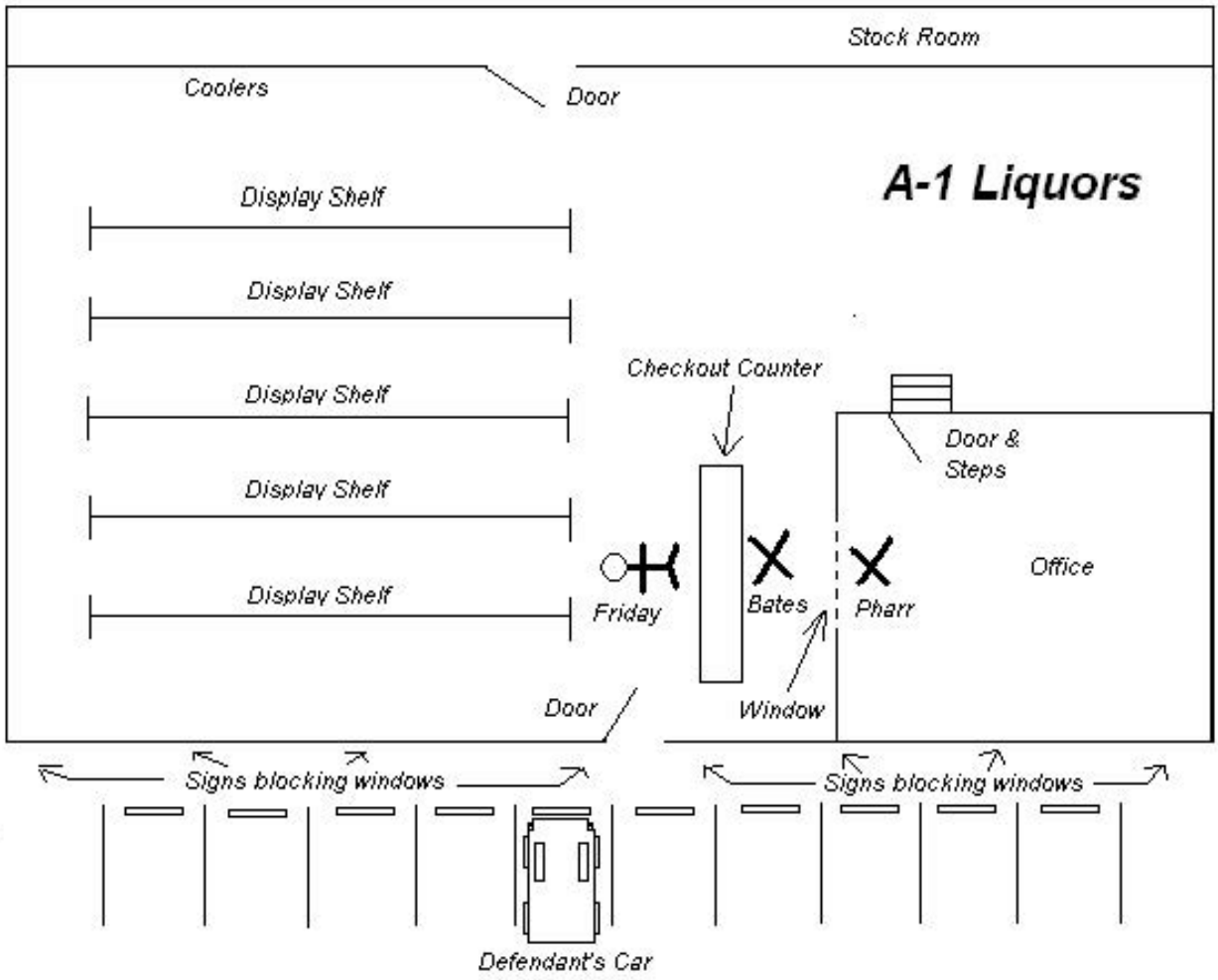
1. Carl White, Foreperson
2. Helen Matthews
3. Sally Frank
4. Tim Swenson
5. Mrs. H. T. Turpin
6. Tina Epps
7. Cosmo Kramer
8. Mike Juniper
9. Larry Ferguson
10. Susan Nagel
11. Lora Colander
12. Bruce Harvey
13. Kip Stump
14. Jennifer Wyrick
15. Brad Pitt
16. Mike Mears
17. T. J. Whatley
18. Dabney Pope
19. Dianne Erickson
20. Matt Finklestein
21. Mark Henry
22. Star Shine

Count 1

In the name and behalf of the citizens of Georgia, charge and accuse Anthony Friday and Samuel Johnson with the offense of Burglary in violation of O.C.G.A. § 16-7-1 in that the said accused, in the County of Fulton and State of Georgia, on December 3, 2011, did then and there unlawfully, without authority enter the dwelling house of Matthew Jones at 738 Myrtle St. Apartment 1 City of Atlanta with intent to commit a theft therein contrary to the laws of said State, the good order, peace and dignity thereof.

District Attorney
Special Presentment


LEXUS
TAG Lost


Stock Room
Coolers
Door
A-1 Liquors
Display Shelf
Display Shelf
Display Shelf
Display Shelf
Display Shelf
Checkout Counter
Door &
Steps
Office
Friday
Bates
Pharr
Door
Window
Signs blocking windows
Signs blocking windows
Defendant's Car

STATE OF GEORGIA	:	
	:	**CASE NUMBER: 11CR077**
VS	:	
	:	
SAMUEL JOHNSON	:	
	:	
	:	

JURY CHARGES

Indictment and Plea; Not Evidence and Plea; Not Evidence

I caution you that the fact that this accused has been indicted by the grand jury is no evidence of [his] guilt. You should not consider the indictment as evidence or implication of guilt. Neither is the plea of not guilty to be considered as evidence.

Presumption of Innocence; Burden of Proof; Reasonable Doubt

This defendant is presumed to be innocent until proven guilty. The defendant enters upon the trial of the case with a presumption of innocence in ***[his]*** favor. This presumption remains with the defendant until it is overcome by the state with evidence which is sufficient to convince you beyond a reasonable doubt that the defendant is guilty of the offense charged.

No person shall be convicted of any crime unless and until each element of the crime is proven beyond a reasonable doubt.

The burden of proof rests upon the state to prove every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt.

There is no burden of proof upon the defendant whatever, and the burden never shifts to the defendant to prove innocence. When a defense … is raised by the evidence, the burden is on the state to negate or disprove it beyond a reasonable doubt.

However, the state is not required to prove the guilt of the accused beyond all doubt or to a mathematical certainty. A reasonable doubt means just what it says. A reasonable doubt is a doubt of a fair-minded, impartial juror, honestly seeking the truth. A reasonable doubt is a doubt based upon common sense and reason. It does not mean a vague or arbitrary doubt, but is a doubt for which a reason can be given, arising from a consideration of the evidence, a lack of evidence, a conflict in the evidence.

After giving consideration to all the facts and circumstances of this case, if your minds are wavering, unsettled or unsatisfied, then that is a doubt of the law, and you should

acquit the defendant. But, if that doubt does not exist in your minds as to the guilt of the accused, then you would be authorized to convict the defendant.

If the state fails to prove the defendant's guilt beyond a reasonable doubt, it would be your duty to acquit the defendant.

Credibility of Witnesses

The jury must determine the credibility of the witnesses. In deciding this, you may consider all of the facts and circumstances of the case, including the witnesses' manner of testifying, [their intelligence], their means and opportunity of knowing the facts about which they testify, the nature of the facts about which they testify, the probability or improbability of their testimony, their interest or lack of interest in the outcome of the case, and their personal credibility as you observe it.

Jury; Judges of Law and Facts

Members of the jury, it is my duty and responsibility to determine the law that applies to this case and to instruct you on that law. You are bound by these instructions. It is your responsibility to determine the facts of the case from all the evidence presented. Then you must apply the law I give you in the charge to the facts as you find them to be.
Ga. Const. 1983, art. I, sec. 1, para. XI (a); *State v. Freeman,* 264 Ga. 276 (1994).

Definition of Crime

This defendant is charged with a crime against the laws of this state. 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***). **O.C.G.A. § 16-2-1.**

Intent

Intent is an essential element of any crime and must be proved by the State, beyond a reasonable doubt.

Intent may be shown in many ways, provided you, the jury, believe that it existed from the proven facts before you. It may be inferred from the proven circumstances or by acts and conduct, or it may be, in your discretion, inferred when it is the natural and necessary consequence of the act. Whether or not you draw such an inference is a matter solely within your discretion. ***Griffin v. State,* 230 Ga. 449, 452, 453 (1973); *Sandstrom v. Montana,* 61 L.Ed.2d 39 (1978).**

(***Use the following charge with caution in cases involving "specific intent."***)

Criminal intent does not mean an intention to violate the law or to violate a penal statute, but means simply to intend to commit the act which is prohibited by a statute. ***Howard v. State,*** **222 Ga. 525 (1966);** ***Kennedy v. State,*** **46 Ga.App. 42 (1932);** ***Balark v. State,*** **81 Ga.App. 649 (1950)**.

No Presumption of Criminal Intent

This defendant will not be presumed to have acted with criminal intent, but you may find such intention, or the absence of it, upon a consideration of words, conduct, demeanor, motive, and other circumstances connected with the act for which the accused is being prosecuted. **O.C.G.A. § 16-2-6**.

Evidence; Generally

Your oath requires that you will decide this case based on the evidence. Evidence is the means by which any fact that is put in issue is established or disproved. Evidence includes all of the testimony of the witnesses (or the equivalent, such as depositions) and any exhibits admitted during the trial, (stipulations of the attorneys, that is, any facts to which the attorneys have agreed with approval by the court) (matters of which the court has taken judicial notice). Evidence does not include the indictment, the plea of not guilty, opening or closing remarks of the attorneys, or questions asked by the attorneys.

Direct and Circumstantial Evidence

Evidence may be either direct or circumstantial or both.

Direct evidence is that which may be seen or heard or otherwise directly sensed, such as by smell or taste or touch. It may be brought into court in the form of exhibits or the testimony of direct witnesses to such matters. It is evidence that points immediately to the issue in question.

Old **O.C.G.A. § 24-1-1(3)**. *Note:* ***Roberson v. State, 214 App. 208, 212*** *criticizes suggestion that exhibits are direct evidence, but the above is okay.*

When direct evidence, by inference, points to an obvious, likely, or reasonable conclusion--even though that conclusion was not directly seen, heard, smelled, tasted, or touched--that is said to be circumstantial (or indirect) evidence. Circumstantial evidence is the proof of facts or circumstances, by direct evidence, from which you may infer other related or connected facts that are reasonable and justified in light of your experience. It is evidence that only tends to establish a conclusion in question by its consistency with such conclusion or elimination of other conclusions. Sometimes circumstantial evidence may point to more than one conclusion.

To authorize a conviction (on circumstantial evidence), the proved facts must not only be consistent with the theory of guilt but also exclude every other reasonable theory other than the guilt of the accused.

The law does not require a higher or greater degree of certainty on the part of the jury to return a verdict based upon circumstantial evidence than upon direct evidence.

Whether dependent upon direct evidence or circumstantial evidence or both, the true test is whether there is sufficient evidence or whether the evidence is sufficiently convincing to satisfy you beyond a reasonable doubt. If not, you must acquit; if so, you may convict.

There is no rule that either circumstantial or direct evidence is stronger that the other if conflicting. The comparative weight of circumstantial evidence and direct evidence on any given issue is a question of fact for the jury to decide.

Grave Suspicion

Facts and circumstances, which merely place upon the defendant a grave suspicion of the crime charged, or which merely raise a speculation or conjecture of the defendant's guilt, are not sufficient to authorize a conviction of the defendant.

Witness, Impeached

A. To impeach a witness is to show that the witness is unworthy of belief. A witness may be impeached by disproving the facts to which the witness testified (**O.C.G.A. § 24-6-621**);

   AND

B. The credibility of a witness may be attacked by disproving the facts to which the witness testified.

Witness, Attacked

In determining the credibility of witnesses and any testimony by them in court, you may consider, where applicable, evidence offered to attack the credibility or believability of any such witness (charge only those that apply). This would include evidence of:

- Character for untruthfulness. Shown by specific instances of conduct of the witness brought out on cross examination of that witness.

- Bias toward a party. Specific instances of conduct of the witness that may relate to the witness's bias toward a party. **O.C.G.A. § 24-6-608(b)**.

Limiting Instructions

Sometimes evidence is admitted for a limited purpose. Such evidence may be considered by the jury for the sole issue or purpose for which the evidence is limited and not for any other purpose.

(Note: "[A]though a trial judge is not required in the absence of a request to give a limiting instruction when … evidence [or related act] is admitted, it would be better for the trial judge to do so." *State v. Belt,* 269 Ga. 763 (1998). Charge should be given prior to admission of such evidence and repeated in the final charge. *Chisholm v. State,* 231 Ga.App. 835 (1998).
***Note*: NEW code section requires the judge to give limiting instructions, when applicable, ON REQUEST. Probably better to give, if applicable, whether requested or not.**

EXAMPLES OF WHEN GIVEN: Similar Transactions; Convictions or "Bad Acts" to attack credibility; felony for possession of firearm offense. **O.C.G.A. § 24-1-105**.

Witness, Supported

(Evidence and charge authorized only where a witness has been attacked.)

In determining the credibility of any witness whose credibility has been attacked as I have described above and any testimony by him or her in court, you may consider, where applicable, evidence offered to support the credibility or believability of any such witness. *(Charge only those that apply.)* This would include:

- Character for truthfulness. "Truthful conduct" *(cross-examination only)*. Specific instances of conduct of the witness (in question), brought out on cross-examination of (that) (another) witness, that may relate to (that) witness's (in question's) character for truthfulness; **O.C.G.A. § 24-6-608(b)(1) and (2)**.

Prior Statements

You may determine whether there was evidence that a witness testified falsely about an important fact during the course of the trial as opposed to some other time before this trial. In doing so, you may make a determination whether the misstatement was because of an innocent lapse in memory or an intentional attempt to deceive. You should consider all the facts and circumstances of any prior statements.

(Adapted from 11th Cir. PJI 6.1; **O.C.G.A. § 24-6-613)**.

Parties to Crime (Defined)

Every party to a crime may be charged with and convicted of commission of the crime. A person is a party to a crime only if that person:

a. Directly commits the crime; or
b. Intentionally helps in the commission of the crime; or
c. Intentionally advises, encourages, hires, counsels, or procures another to commit the crime; or
d. Intentionally causes some other person to commit the crime under such circumstances that the other person is not guilty of any crime either in fact or because of legal incapacity.

O.C.G.A. § 16-2-20.

Principal, Failure to Prosecute; Other Involved Persons

Any party to a crime who did not directly commit the crime may be prosecuted for commission of the crime upon proof that the crime was committed and that the person was a party to it, even though the person alleged to have directly committed the crime has not been prosecuted or convicted, has been convicted of a different crime or degree of crime, is not amenable to justice, or has been acquitted. **O.C.G.A. § 16-2-21**.

Robbery, Armed

A person commits armed robbery when, with intent to commit theft, that person takes property of another from the person or the immediate presence of another by use of an offensive weapon or by any replica, article, or device having the appearance of such a weapon.

Unanimous Verdict

Whatever your verdict is, it must be unanimous, that is, agreed by all. The verdict must be signed by one of your members as foreperson, dated, and returned to be published in open court.

Responsibility for Sentencing

(Note: Do not give this charge in death penalty or life without parole cases.)

You are only concerned with the guilt or innocence of the defendant. You are not to concern yourselves with punishment. ***Wilson v. State,* 233 Ga. 479 (1975)**.

Deliberations

One of your first duties in the jury room will be to select one of your number to act as foreperson, who will preside over your deliberations and who will sign the verdict to which all twelve of you freely and voluntarily agree.

You should start your deliberations with an open mind. Consult with one another and consider each other's views. Each of you must decide this case for yourself, but you should do so only after a discussion and consideration of the case with your fellow jurors. Do not hesitate to change an opinion if convinced that it is wrong. However, you should never surrender an honest opinion in order to be congenial or to reach a verdict solely because of the opinions of the other jurors.

Court Has No Interest in Case

By no ruling or comment which the court has made during the progress of the trial has the court intended to express any opinion upon the facts of this case, upon the credibility of the witnesses, upon the evidence, or upon the guilt or innocence of the defendant.

SAMPLE
TRIAL OUTLINE

State v. Renaldo Phillips

Det. P.L. Bailey	○ Name, occupation ○ Original Responding detective ○ Date: 8-17-2002 ○ Venue: Highland Club Apts (141 Habitat Circle, DEKALB) ○ What was found at scene ○ case went unsolved for a few years ○ break in the case	
A. Lipkins	○ Name, occupation ○ responded to crime scene on 8-17-2002 ○ collected: ○ (3) 22 cal shell casings ○ (1) live 22 cal hollowpoint ○ (1) live 9mm ○ pulled latent prints off the car ○ where on the car the prints were taken from ○ what happened with those lifts? ○ took pictures of the scene ○ diagram of the scene ○	
Off. K. Hunter	○ Name, occupation ○ how long in id ○ duties as a deputy ○ is part of your job rolling prints of inmates ○ what=s rolling parts ○ Did you have a chance to do that with a person named Renaldo Phillips? ○ When? ○ Once you roll them, are they kept on file? ○ Thank you! ○ rolled prints of Phillips ○ recognize card? ○ TENDER	
Dep. Stacey Spears	○ Name, occupation ○ how long in id ○ duties as a deputy ○ is part of your job rolling prints of inmates ○ what=s rolling parts ○ Did you have a chance to do that with a person named Renaldo Phillips? ○ When? ○ Once you roll them, are they kept on file? ○ Thank you! ○ rolled prints of Phillips ○ recognize card? ○ TENDER	

Torrie Passmore	○ Name, occupation ○ latent print examiner ○ determined match between both defendants and the prints recovered from the car FingerPrint Expert Qualify as fingerprint expert ○ **Qualify** ○ name ○ occupation ○ occupation 2001 ○ employer back then ○ what position did you hold ○ what were your official duties ○ how long have been taking fingerprints ○ what specialized education and training have you received to become a fingerprint examiner ○ approximately how many fingerprints have you examined ○ are you a member of any professional organizations ○ have you received any certifications in the field of fingerprints ○ were tested for profecicency ○ how did you do on those/that test ○ who issued that certification? ○ have you attended any recent seminars on fingerprint examination ○ what seminars have you attended ○ what type of technical equipment is used in your work as a fp examiner ○ have you had occasion to identify persons by comparing latent fingerprints or palmprints with their own inked fingerprints or palm prints ○ how many times ○ have you had occasion to qualify as an expert in fingerprint and palm print analysis regarding identification of persons based on fingerprint and palm print comparisons ○ how many times ○ Move to qualify --- ○ finger print class ○ What exactly leaves a print? ○ What is the difference between a Apartial@ and a Atrue identifiable print@ ○ How long can prints last? ○ How many prints were lifted? ○ What is an Avis system? ○ Of the prints lifted, how many were of use? ○ How many identifiers did the one print have? *10* ○ What were those identifiers? ○ 1 bifurcation ○ 2 ending ridge (rt stop) ○	

	○ Please explain the smudge marks (if any) ○ fingerprint report (e # ____) ○ Did Fingerprint comparison fom the Red Dog Beer Bottle found in Panhandel Park, checked by Nancy Jenkins (positive identification)(adte identified 11/16/99) ○ with prints taken from Δ at book-in	
Dr Carol Terry Medical Examiner	○ Name, occupation ○ Expert questions ○ Cause of death ○ what kind of bullet killed the victim ○ State your name? ○ What is your occupation? ○ How long have you been so employed? ○ Were you so employed on _____? ○ Could you relate to the Court and the Jury your educational background? ○ Are you a duly licensed physician and surgeon? ○ In what states? ○ How long have you been licensed to practice your profession? ○ Were you so licensed on _____? ○ Are you still engaged in the practice of your profession? ○ Were did you receive your medical training? ○ Will you please tell us what your duties are as Chief medical Examiner of Gwinnett County? ○ Is the function of Medical Examiner similar to that of Coroner in some states? ○ Does the work include the performance of autopsies? ○ During your experience as Medical Examiner of Gwinnett County, about how many autopsies have you performed? ○ Do you specialize in any branch or field of Medicine? ○ Would you tell us exactly what pathology is? ○ Are you a member of any specialized medical or scientific groups or associations? ○ Will you please tell us what the American Board of pathology is? ○ What is the object of this Board? ○ What are the special requirements before certification as a diplomate by the American Board of Pathology is granted? ○ Must an applicant take special examinations given by the the Board before his cetification as a in pathology is granted? ○ You mentioned forensic pathology. Will you please explain what that term means? ○ So certification as a diplomate by the American Board of pathology is over and above your license to practice medicine? ○ Is certification by the American Board of pathology on a national basis? ○ Have you testified before in the Courts of Georgia as an expert in Pathology? ○ About how many times?	

	○ During your ____ years of experience in the office of Medical Examiner, have you had an occasion to observe many cases in which the cause of death was blunt force trauma?	
Det. J.E. Smith	○ Name, occupation ○ received a call from a woman that id=d herself as AShalonda Brown@ ○ she gave particulars about this case: ○ pants of victim were off ○ time, location of incident ○ multiple people involved ○ she id=d her boyfriend, Phillips and Gordon as having committed the murder ○ saw Phillips burning the credit cards the next day ○ caller id showed the number as 678-598-3423 ○ forwarded the case to Major Felony ○ Det Sims assumed lead	

Det. L.A. Sims	○ Name, occupation
	○ tried to reach AShalonda@ but could not
	○ 1-25-06 spoke to Roderick Gordon asked him to come in
	○ meanwhile found out Shalonda Brown@ was really Kolonda Smith
	  ○ Kolonda denied she made the call but gave a detailed statement
	  ○ said she was awakened at 4 am in August 2002 when Phillips and Gordon came into the bedroom where she was sleeping
	  ○ they told her they had robbed a man.
	  ○ As he was approaching his car Phillips approached him and pointed his gun at him and demanded money
	  ○ told him to take off his clothes which the victim did
	  ○ when the victim slammed the door of his car Gordon started shooting
	  ○ Phillips said he struck the man in the head with his pistol
	  ○ next day, she saw Phillips burn credit cards with the name Bah on them
	  ○ few days after that, she saw Phillips throw away some red, white, blue and yellow nylon Tommy Hilfiger shorts which she believed belonged to the victim
	  ○ Gordon told her the next dy that the guns were buried in his mama's back yard on Richard Allen Drive
	
	○ 2-3-2006, went to Gordon=s house asked him to come to the station to make a statement.
	  ○ Gordon agreed and said in August 2002he and a white female went to some apartments
	  ○ when they got near the mailboxes Phillips jumps out and ran up to the car and shot a dark skinned black man
	  ○ >drove Phillips back to Phillip=s house	

	○ believes the gun Phillips used was a 9mm ○ claims not to have known ○ Finger prints on victim's car ○	
Al Pack Evid tech - retired	○ Name, occupation ○ receiving tech on the shell casings	
Sgt Germano	○ Name, occupation ○ took casing to GBI	

IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

THE STATE OF GEORGIA	**INDICTMENT NO.: 10-9-3593**
v.	**Judge Bodiford**
Stephan Todd Smith	

TRIAL BRIEF PERTAINING TO ANTICIPATED EVIDENTIARY AND PROCEDURAL ISSUES

COMES NOW the State of Georgia and files the foregoing brief and states as follows:

INTRODUCTION

The State foresees numerous motions and objections from the Defense in areas in which the Georgia law is well settled. Those will be dealt with via the applicable precedent below, and in the following areas.

1. *The State's Opening Statement*
2. *Discovery Compliance: Access Versus Service*
3. *Effect of Open File Policy*
4. *The Witness List Rule: Witnesses Included in Discovery But Not on List*
5. *Creation of Witness Statements Not Required*
6. *Service of Unanticipated Rebuttal or Responsive Evidence*
7. *Specifics on Authenticating Witnesses Not Required*
8. *Requirements on Defense When Alleging Discovery Violations*
9. *Brady Claims: Defense Obligations*
10. *Discovery Responsibilities: Criminal Defendants*
11. *The Order of Final Argument*
12. *The State's Final Argument*
13. *Jury Selection and Instructions*
14. *Failing to Address, Much Less Rebut, the Applicable Authority*

ANTICIPATED LEGAL ISSUES AND STATE'S CITATION OF AUTHORITY

1. The State's Opening Statement

The State believes that the defense might posit objections during its initial remarks to the jury. An exploration of Georgia's appellate rulings in this regard is appropriate.

- Counsel for the State may refer to "the applicable law" during opening statement. *Kinsman v. State*, 259 Ga. 89, 92 (1989).

- Prosecutors can describe the trial process, including the fact that the defense may or may not introduce evidence, as long as there is no comment on the defendant's failure to testify. *Worthy v. State*, 237 Ga. App. 565, 565-7 (1999).

- Prosecutors can address the defendant's behavior after arrest, as long as there is no comment on the defendant's failure to testify. *Wilkins v. State*, 246 Ga. App. 667, 668-9 (2000). (mention of the defendant's failure to consent to giving a blood sample).

- A prosecutor may, in opening statement, characterize the case in terms of, "Who the jury will believe." *Havron v. State*, 234 Ga. App. 413, 414-415 (1998).

- Use of colloquial, colorful language and visual aids is permitted in the State's opening statement. *Teems v. State*, 256 Ga. 675, 676 (1987).

- A prosecutor's flights of oratory and figurative speech in opening statements and closing arguments are not reversible error. *Harris v. State*, 279 Ga. 522, 525 (2005) (unobjected to reference to the defendant as "totally evil" not reversible error on appeal).

- In opening statement, the prosecutor was allowed to use a visual aid showing the participants in the crimes and the State's witnesses expected to be called at trial. *Highfield v. State*, 246 Ga. 478, 482 (1980); *Teems v. State*, 256 Ga. 675, 676 (1987).

- The State's displaying of an exhibit during opening "is a permissible part of the opening statement, as its purpose is to help the jury understand and to remember the evidence." *McGee v. State*, 272 Ga. 363, 364 (2000).

- Displaying defendant's booking photograph on a PowerPoint presentation did not improperly inject character evidence into the case. *Phillips v. State*, 2010 Ga. LEXIS 562 (2010).

- No error in State's reference's to "murder victim" during direct testimony because the evidence of an unlawful killing was clear. *Appling v. State*, 281 Ga. 590, 642 S.E.2d 37 (2007).

- Indicating that refusing to allow visual aids in opening statement may constitute reversible error. *Lewyn v. Morris*, 135 Ga. App. 289, 289-90 (1975).

2. Discovery Compliance: *Access Versus Service*

The Georgia law of criminal discovery generally requires access to the State's file and, importantly, ***not*** service of physical copies.[1] A survey of the Georgia authority on the issue is instructive.

A. General Rule

- *Taylor v. State*, 272 Ga. 562, 564-5, 532 S.E.2d 669 (2000) ("Unlike other discovery statutes, O.C.G.A. § 17-16-7 does not contain the express language requiring the party in possession, control or custody of the discoverable statement to allow the item to be photocopied… n.2, Likewise, O.C.G.A. § 17-16-7 does not require the State to furnish copies of the statements to the defense.").

- *Lawson v. State*, 224 Ga. App. 645, 647-8, 481 S.E.2d 856 (1997) ("We conclude that this language requires only that the State make a defendant's statements available for inspection, copying, or photographing, not that such statements be served upon the defendant... We reach the same conclusion with respect to the victim's statement… As for the scientific test for the presence of cocaine…we conclude that it likewise does not require service upon the defendant, but only making the reports of such tests available for inspection and copying.").

B. Defendant Statements

- *Guild v. State*, 234 Ga. App. 862, 867-8, n.3, 508 S.E.2d 231 (1998) ("In passing, we note that O.C.G.A. § 17-16-4 (a) (1) requires only that the State make a defendant's statements available for inspection, copying, or photographing, not that such statements be served upon the defendant.") (emphasis original).

C. Scientific Reports

- *Lopez v. State*, 259 Ga. App. 720, 725, 578 S.E.2d 304 (2003) ("O.C.G.A. § 17-16-4 (a) (4) does not require the State to serve a defendant with copies of scientific reports, but only to make such reports available for inspection and copying.").

D. Photographic Evidence

- *McSears v. State*, 226 Ga. App. 90, 91-2, 485 S.E.2d 589 (1997) ("The plain language of the statute does not require the State to take the initiative and 'furnish' the defense with copies of photographs.").

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[1] *United States v. Jordan*, 316 F.3d 1215, 1249 (11th Cir. 2003) ("On the other hand, the government need not produce the materials unless there is a request by the defendant.[CIT] ***And even if there is a request, the government is not obligated to make copies of the items***.")(emphasis added).

E. Prosecutor Work Product

- *Stinski v. State*, 286 Ga. 839, 691 S.E.2d 854 (2010) (in the denying defense claims that discovery procedures require production of work product, the Georgia Supreme Court held that summaries made by trial counsel, as well as work performed by an investigator under counsel's instruction and supervision constitute work product and are not subject to disclosure; prosecutor notes and records must be disclosed only if they are exculpatory within the meaning of *Brady*).

F. Grand Jury Proceedings

- *Ruffin v. State*, 283 Ga. 87, 88, 656 SE2d 140 (2008) ("Grand jury proceedings are confidential and thus appellant was not entitled to a transcript of those proceedings.").

3. Effect of Open File Policy

The State has maintained and provided written notice of an "open file policy" with the Defense in terms of all non-privileged and non-work product materials. That policy has salient implications as set forth in the case law below.

- *Adams v. State*, 271 Ga. 485, 521 S.E.2d 575 (1999) (prosecutor's open file policy satisfies State's duty to disclose exculpatory/*Brady* materials).

- *Carter v. State*, 285 Ga. 394, 677 S.E.2d 71 (2009) (no error in denying defense continuance request where State maintained an open file policy).

- *Mosely v. State*, 217 Ga. App. 507, 508, 458 S.E.2d 165 (1995) ("Because the prosecution had an 'open file policy' in this case, the existence of the informant was known or constructively known to [the Defendant] because that information appeared in the State's file.").

- *Lawson v. State*, 224 Ga. App. 645, 647-8, 481 S.E.2d 856 (1997) ("Because the prosecution had an 'open file policy' in this case, the existence of the [information] was known or constructively known to [the Defendant] because that information appeared in the State's file.").

- *Roberts v. State*, 244 Ga. App. 330, 333, 534 S.E.2d 526 (2000) ("The trial court noted that the State had an open file policy, that [the Defendant] could have examined the form any time before trial…").

- *Mathis v. State*, 265 Ga. App. 408, 409, 593 S.E.2d 944, (2004) ("the State had an open file policy under which [the defendant] could have inspected the statement at any time").

4. The Witness List Rule: *Witnesses Included in Discovery but Not on List*

The State is not required to provide a comprehensive witness list in cases, like this one, in which witnesses are identified in the discovery materials.

- *Leger v. State*, 291 Ga. 584, 732 S.E.2d 53 (2012) ("[w]hen the identity and involvement of a witness are otherwise disclosed to defendant in discovery provided to him by the State, the purpose of the witness list rule is served and the court may allow the State to call the witness even though he or she was not listed on the State's formal witness list.").

- *Green v. State*, 298 Ga. App. 17, 679 S.E.2d 348 (2009) ("The witness list rule is designed to prevent a defendant from being surprised at trial by a witness that the defendant has not had an opportunity to interview. But, when a witness['s] name is contained in the indictment, a defendant cannot validly contend that he had been surprised or unable to interview the witness in question through lack of knowledge of such witness.")

- *Ellis v. State*, 282 Ga. App. 17, 637 S.E.2d 729 *(2006) (no violation of "witness list rule" where witnesses' names appeared in produced investigative reports)*

- *Arnold v. State*, 253 Ga. App. 307, 560 S.E.2d 33 (2002) ("As noted by the trial court, the State did not conceal Phipps' name from the defense; his participation in the case was referenced in several documents produced to Arnold, such as the warrant that listed him as a witness. The State also included Phipps' narrative report in its discovery package, and Phipps' testimony was limited to the substance of that report….Under these circumstances, the trial court did not err in admitting Phipps' testimony.").

- *McLarty v. State*, 238 Ga. App. 27, 29, 516 S.E.2d 818 (1999) ("When the identity and involvement of a witness are otherwise disclosed to defendant in discovery provided to him by the State, the purpose of the witness list rule is served and the court may allow the State to call the witness even though he or she was not listed on the State's formal witness list.").

A. Opportunity to Interview Cures Failure to Indentify

Where the State demonstrates "good cause" and the defense is afforded an opportunity to interview, even witnesses not identified by the State may be called at trial in the State's case-in-chief.

- *Leger v. State*, 2012 Ga. LEXIS 735 (2012) ("It is usually a sufficient remedy for the defense to be afforded an opportunity to interview the witness.").

- *Childs v. State*, S10A0497 (GA Supreme Court, 2010) ("We also have held that an interview of the witness in question is an appropriate remedy for the failure to identify the witness before trial, explaining that "this remedy avoids the harsh sanction provided in OCGA § 17-16-6 of excluding evidence not properly disclosed.").

- *Puga-Cerantes v. State, 281 Ga. 78, 635 S.E.2d 118 (2006) (testimony of witness not on list allowed where state established witness fled on eve of trial and defense was allowed to conduct interview).*

- *Rose v. State*, 275 Ga. 214, 217, 563 S.E.2d 865 (2002) ("Here, the State established good cause for its failure to include officer Hall's name on its witness list, and the defense was not surprised because the identity and involvement of the unlisted witness were made known in discovery. In addition, the defense failed to accept the offer to interview the witness. Accordingly, there was no error in permitting the unlisted witness to testify to those facts contained in the report.").

B. Indictment Provides Notice on Co-Defendants

Under Georgia law, there is no requirement on the State to provide specific notice to the defense that a codefendant may, ultimately, be a witness in the case.

- *Mize v. State*, 269 Ga. 646, 653, 501 S.E.2d 219 (1998) ("The witness list rule is designed to prevent a defendant from being surprised at trial by a witness that the defendant has not had an opportunity to interview.") (allowing co-indictee to testify, although her name did not appear on the State's witness list).

5. Creation of Witness Statements Not Required

Consistent with the rule regarding witness lists, where witness statements have not been previously reduced to writing, the State is not required to create them for the defense.

- *Henley v. State*, 285 Ga. 500, 678 S.E.2d 884 (2009) ("The defendant's claim under OCGA § 17-16-7 is meritless. It is well established that the statute does not apply to oral witness statements not recorded or memorialized in any way because they are not, in the words of the statute, 'in the possession, custody, or control of the state or prosecution.'.") *accord Thompson v. State*, 291 Ga. App. 355, 662 S.E.2d 135 (2008) (pertaining to a different obligation when the oral statement is that of the criminal defendant)

6. Service of Unanticipated Rebuttal or Responsive Evidence

While rebuttal evidence generally does fall within the State's obligations under Georgia's criminal discovery laws, where a defense takes turns that were not or could not have been anticipated by the State, rebuttal and other evidence is allowed to be introduced without pretrial notice. This rule has been applied to expert witness testimony and evidence as well.

- *Gabriel v. State*, 280 Ga. 237, 239, 626 S.E.2d 491 (2006) (State allowed to call previously unidentified witness to authenticate handwriting on documents after a defense objection made the matter an issue: "At no time did [the defendant] request a continuance to investigate the matter, nor did he avail himself of the court's invitation to voir dire or

cross-examine the witness. Under the circumstances, we find no abuse of the court's discretion in allowing the witness to testify.").

- *Roberts v. State*, 244 Ga. App. 330, 333, 534 S.E.2d 526 (2000) ("The trial court noted that the State had an open file policy, that Roberts could have examined the form any time before trial, and that the State probably did not intend to introduce the form until [the defendant] testified.").

- *Hodges v. State*, 260 Ga. App. 483, 486, 580 S.E.2d 614 (2003) *overruled on other grounds Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007) ("Rebuttal testimony should not be excluded merely because the state could have introduced it during its main case….It is the importance of the evidence to the state's main case and whether the withholding was intended or designed to deny the defendant an opportunity to prepare his defense in relation to that evidence which will determine if reversible error has occurred….The court found convincing the prosecutor's testimony that he had not anticipated that the victim would reveal inconsistent recollections or that Hodges would present multiple defense theories. He testified that it was not until after these circumstances unfolded that he realized that an expert on battered women syndrome would be useful.").

7. Specifics on Authenticating Witnesses Not Required

Pretrial identification of a specific witness whose sole purpose is to satisfy the technical legal requirements of authentication of evidence is not required by Georgia law. Georgia courts have allowed "unannounced" witnesses to testify for these purposes.

- *Clark v. State*, 138 Ga. App. 266, 268, 226 S.E.2d 89 (1976) ("Since the defendant had been put on notice that the bank records, to which he had or could have obtained access, were to be introduced, no harm resulted to the defendant from merely substituting the testimony of the true custodian of the records, which was identical to what the designated witness would have given and the sole purpose of which was to satisfy the technical legal requirement of authentication of such evidence.").

- *McKeever v. State*, 196 Ga. App. 91, 93-4, 395 S.E.2d 368 (1990) ("In the circumstances of the instant case it would seem that permitting the unannounced witness to testify briefly as to the authenticity of the bill -- in oral amplification, as it were, of the written document -- would not constitute error. Moreover, there is ample precedent in Georgia law for permitting testimony in such circumstances as obtain here….").

8. Requirements on Defense When Alleging Discovery Violations

Georgia law requires that defendants in criminal cases request a continuance in order to cure purported violations of discovery violations by the State. In fact, failing to request a

continuance by the defense can constitute a waiver of the issue.[2] Absent the defense meeting a heavy burden, exclusion of the evidence in question is not authorized.

A. Objection Waived Absent Continuance Request

Criminal defendants are required to request a continuance to cure an alleged discovery violation. If they do not, the objection is waived.

- *Moss v. State*, 275 Ga. 96, 101-2, 561 S.E.2d 382 (2002) ("Assuming that the State failed to comply with the applicable discovery statutes, [the defendants'] failure to request a continuance to cure any prejudice which may have resulted from the State's failure to comply with the requirements of O.C.G.A. § 17-16-1 et seq. waived their right to assert error on appeal stemming from the State's alleged failure to comply with discovery statutes.").

- *Spencer v. State*, 296 Ga. App. 828, 676 S.E.2d 274 (2009) (by not requesting a continuance, the defendant waived his right to complain about the State's failure to disclose his in-custody offer to bribe the victim).

- *Brown v. State, 281 Ga. App. 557, 636 S.E.2d 717 (2006) (*"a defendant is obliged to request a continuance to cure any prejudice which may have resulted from the [s]tate's failure to comply with the requirements of the reciprocal discovery act. Having announced ready for trial, [the defendant] cannot now argue that the trial court abused its discretion in failing to order the extreme remedy of exclusion of the evidence.").

B. Defense Must Demonstrate Both Bad Faith ***and*** Prejudice

In order to exclude evidence on the basis of an alleged violation of the discovery rules by the State requires the defense to satisfy the heavy burden of showing: (1) bad faith by the State; and (2) prejudice, i.e., that the outcome of the trial would have been different were it not for the violation.

- "Exclusion of evidence 'is a particularly harsh sanction and should be imposed only where there is a showing of prejudice to the defense and bad faith by the State.'" *Leger v. State*, 291 Ga. 584, 732 S.E.2d 53 (2012) ("the severe sanction of exclusion of evidence applies only where there has been a showing of bad faith by the State *and* prejudice to the defense.") (emphasis original).

- *Childs v. State*, 287 Ga. 488; 696 S.E.2d 670 (2010) ("Indeed, under § 17-16-6, "the severe sanction of exclusion of evidence applies only where there has been a showing of bad faith by the State and prejudice to the defense.").

[2] For a case repeatedly focusing upon whether the defense requested a continuance, *see generally Leger v. State*, 291 Ga. 584, 732 S.E.2d 53 (2012).

- *Brown v. State, 281 Ga. App. 557, 636 S.E.2d 717 (2006) (excluding State's evidence due to discovery violation requires a showing of bad faith).*

- *Cockrell v. State, 281 Ga. 536, 640 S.E.2d 262 (2007) (discovery statute did not require exclusion of DNA testing of bloody knife and tee-shirt received three days into trial where no prejudice to the defendant).*

- *Ferguson v. State, 280 Ga. 893, 635 S.E.2d 144 (2006) (the defense has t*he burden to show that a reasonable probability exists that the outcome of the trial would have been different had undisclosed evidence been turned over; mere speculation of a different result is insufficient).

- *State v. Jones, 283 Ga. App. 539, 642 S.E.2d 183 (2007) (trial court reversed for excluding State's evidence where there was no specific finding of bad faith, notwithstanding the fact that the judge's pretrial order required disclosure in advance of what is directed by the discovery statute).*

- *Thompson v. State*, 291 Ga. App. 355, 662 S.E.2d 135 (2008) ("Exclusion of evidence improperly withheld is proper 'only when there has been a showing of prejudice to the defense and bad faith by the State'.").

C. Evidence Must Have Been Relied Upon by the State and Inaccessible to the Defense

Even where the defense can demonstrate bad faith on the part of the State, in order to result in exclusion of proof at trial, the defense must show that the evidence was: (1) relied upon by the State at trial; (2) in the possession and control of the State; and (3) not equally available to both sides.

- *Castillo v. State, 281 Ga. 579, 642 S.E.2d 8 (2007) ("*Inasmuch as the scientific report that was not made available to trial counsel was not introduced into evidence by the State in its case-in-chief or in rebuttal, the State did not violate the statute by failing to disclose it to [the defense].").

- *Ellis v. State, 289 Ga. App. 452, 657 S.E.2d 562 (2008)* ("Thus, given the fact that [defendant] did not request an in camera inspection of [victim's] DFCS file until his appellate counsel did so in his second amended motion for new trial, the State was not obligated to produce the file and did not violate his due process rights under *Brady* or Georgia's reciprocal discovery act by not providing the file earlier.").

- *Gonzales v. State, 286 Ga. App. 821, 650 S.E.2d 401 (2007)* (discovery statute does not compel production or exclusion of a public record that is accessible to both sides).

- *Hills v. State*, 291 Ga. App. 873, 663 S.E.2d 265 (2008) (holding that source codes for the Intoxilyzer 5000 are not discoverable under the maxim that the State "is only required to produce written scientific reports in the possession of the prosecution").

- *Stetz v. State*, 301 Ga. App. 458; 687 S.E.2d 839 (2009) (The only discoverable information from an intoxilyzer test under O.C.G.A. § 40-6-392 (a) (4) is the computer printout of the test result).

- *Milner v. State*, 281 Ga. 612, 641 S.E.2d 517 (2007) (No *Brady* violation for failure to produce a knife not used by the defendant in the shooting at issue).

9. Brady Claims: Defense Obligations

Even when it comes to alleged "*Brady* violations," as opposed to those falling within the realm of the criminal discovery statutes, Georgia law sets a high threshold for criminal defendants to successfully articulate a claim.

- *Callahan v. State*, 280 Ga. App. 323, 634 S.E.2d 102 (2006) (concerning timing of disclosure of immunity agreement with testifying co-defendant: "*Brady* is not violated when the *Brady* material is available to defendants during trial").

- *Daniels v. State*, 296 Ga. App. 795; 676 S.E.2d 13 (2009) ("There is no general constitutional right to discovery in a criminal case and *Brady* did not create one. *Brady* is not violated when the *Brady* material is available to the defendant during trial. . . Furthermore, *Brady* does not compel the state to disclose inculpatory evidence.").

- *Freeman v. State*, 284 Ga. 830; 672 S.E.2d 644 (2009) (four part test to establish a Brady violation requires the defendant to show: (1) State possessed evidence favorable to the defendant; (2) the defendant did not possess the evidence and could not obtain it himself with reasonable diligence; (3) the prosecution suppressed the favorable evidence; and (4) if the evidence had been disclosed to the defense, a reasonable probability exists that the outcome of the proceeding would have been different).

- *Milner v. State, 281 Ga. 612, 641 S.E.2d 517 (2007) (No Brady violation for failure to produce a knife not used by the defendant in the shooting at issue).*

10. Discovery Responsibilities: Criminal Defendants

Georgia courts note that criminal defendants who avail themselves of the statutory benefits, must themselves comply with its requirements. If not, defense evidence is excludable.

- *Acey v. State*, 281 Ga. App. 197, 635 S.E.2d 814 (2006) (defense's service of reciprocal discovery on the day of trial authorized the court to exclude defense witnesses).

- *State v. Charbonneau, 281 Ga. 46, 635 S.E.2d 759 (2006) (affirming trial court's exclusion of alibi evidence where defendant failed to comply with statutory alibi requirements).*

11. The Order of Final Argument

The State may elect to "waive" making a preliminary closing statement and only "go last." Should the State choose to exercise this option, it is anticipated that the Defense may posit that the State is *somehow required* to: (1) make an initial, "substantive" final argument; and (2) restrict its subsequent, concluding argument to a rebuttal, all akin to the format established by Federal Rule of Criminal Procedure 29.1.

Such an assertion would be in contravention O.C.G.A. § 17-8-71 and the case law that has interpreted it, since its enactment in 2005. *Lewis v. State*, 2008 Ga. LEXIS 199 (2008); *English v. State*, 282 Ga. App. 552, 639 S.E.2d 551 *(2006); Warren v. State, 281 Ga. App. 490, 636 S.E.2d 671 (2006).*

In addition, a like claim by the Defense would ignore the operative legislative history and applicable rules of statutory construction. Just one year before the enactment of O.C.G.A. § 17-8-71, the Georgia General Assembly had before it a measure that *specifically* tracked the language of Federal Rule of Criminal Procedure 29.1. Although Senate Bill 414 passed the Georgia Senate in 2004, it failed to do so in the State House of Representatives. This, accordingly, demonstrates that the General Assembly expressly rejected the Federal format, in favor of O.C.G.A. § 17-8-71, which passed in the next, immediately subsequent, legislative session. Furthermore, the doctrines of *"expressio unius est exclusio alterius"* and "*expressum facit cessare tacitum*," underscore that the Generally Assembly intended a different configuration in Georgia than exists federally. *See generally Hammock v. State* 277 Ga. 612; 592 S.E.2d 415 (2004) (referencing the doctrines of *"expressio unius est exclusio alterius"* and "*expressum facit cessare tacitum.*").

12. The State's Final Argument

The State believes that objections during its final argument might be made. The Georgia case law on the accepted parameters of closing argument is instructive.

- Asking jurors to serve the greater community interest and to have an impact on crime permissible. *Nelson v. State*, 278 Ga. App. 548 (2006).

- State entitled to refer to the defense and its tactics as a "fraud." *Appling v. State, 281 Ga. 590, 642 S.E.2d 37* (2007).

- State allowed to argue that "the defendants were guilty because they did not offer an alibi witness, physical evidence, or scientific evidence to disprove their involvement in the crime." *Brown v. State*, 267 Ga. App. 642 (2004).

- Prosecutor allowed to inquire, "Where is the evidence of innocence?" *Perry v. State, 232 Ga. App. 484 (1998).*

- Reference to the defendant's demeanor during the trial. *Johnson v. State*, 256 Ga. 588, 591 (1987).

- Referring to the defendant as a name, such as "murderer", when it is supported by the evidence. *McClain v. State* 267 Ga. 378, 383-4 (1996).

- "Sending a message" arguments. *Thomas v. State*, 268 Ga. 135, 140 (1997); *Green v. State*, 244 Ga. App. 697, 698 (2000).

- Convicting for the safety of the community, stressing the need for enforcement of the laws and/or impressing on the jury its responsibility in that regard. *Philmore v. State*, 263 Ga. 67, 69 (1993), *Shaw v. State*, 265 Ga. App. 451, 454 (2004).

- Where the prosecutor's comments are not directed at the defendant's decision not to testify but are directed at defense counsel's failure to rebut or explain the State's evidence, the comments are permissible. *Ellison v. State*, 265 Ga. App. 446, 448 (2004).

- *Argument referencing defense's sole witness neither burden shifting nor requiring a mistrial. Scott v. State, 2006 Ga. LEXIS 965 (2006) (*"in a murder case, if you are going to put something up ... what are you going to put up?")

- The failure to rebut the evidence of guilt. *Johnson v. State*, 271 Ga. 375, 383 (1999) (prosecutor's argument to "make them [the defense] explain" allowed).

- References to shortcomings or gaps in the defendant's statement. *Alexander v. State*, 263 Ga. 474, 476-7 (1990); *Sweeney v. State*, 233 Ga. App. 862, 867 (1998). .

- Replaying of a video tape previously introduced into evidence is permissible. *Brannan v. State*, 275 Ga. 70, 82 (2002).

- The State is entitled to point out statements made in the defendant's opening that were ultimately not supported by the evidence. *Salters v. State*, 244 Ga. App. 219, 222 (2000).

- *No error in arguing* "you can protect the children right now;" "the buck stops here;" "only you can make it stop," and "with your verdict, you really can send a message." *Hunter v. State, 2006 Ga. App. LEXIS 1391 (2006).*

13. Jury Selection and Instructions

The State anticipates that, in certain areas, the Defense may object during voir dire to questions and jury charges designed to insure that jurors will, in fact, abide by their oaths under O.C.G.A. § 15-12-132 (*voir dire*), O.C.G.A. § 15-12-138 (panel) *and, in particular,* O.C.G.A. § 15-12-139, *to give a true verdict according to the evidence.* As such, the State's will inquire during *voir dire* and request jury charges designed to preclude jury nullification and to negate "the CSI effect."

Bearing in mind that the State, as well as the defendant, possesses a right to a fair trial[3], and that the prosecution has a responsibility to ensure that *both sides* in a criminal case receive a fair trial[4], the State will explore the following areas in *voir dire* and in jury charges. Both will ensure a fair trial for *both sides* in this case.

A. Juror Nullification.

Noting language of a juror oath that is ***nearly identical*** to that of O.C.G.A. § 15-12-139, the Florida Supreme Court unequivocally supported the use of Florida Standard Criminal Jury Instruction 3.13, which is, in essence, an "anti-nullification/jury pardon" charge: "By definition, jury pardons violate the oath jurors must take before trial, as well as the instructions the trial court gives them. In Florida, all jurors must swear to 'truly try the issues between the State ... and the defendant and render a true verdict *according to the law and the evidence'*." *Sanders v. State*, 946 So. 2d 953, 957-59 (Fla. 2006) (emphasis and omission original).[5]

The Eleventh Circuit Court of Appeals has held that a juror's refusal to apply the law from the court "is in dereliction of the jury's sworn duty," and that "that defense counsel may not argue jury nullification during closing argument." *United States v. Hall*, 188 Fed. Appx. 922 (2006).[6] Georgia appellate cases hold similarly: "[I]t nonetheless is true that if the

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[3] Georgia statutory speedy trial demand precedent is clear in this regard: "Contrary to the view of some, our legal system is not simply an elaborate game of 'Gotcha!' This Court does not endorse acquittal by ambush on the part of a defendant any more than it does trial by ambush on the part of the State. Nor do we condone induced error. The object of all legal investigation is the truth, and procedural rules are in place to further such goal in an orderly fashion." *Price v. State*, 245 Ga. App. 128, 134 (2000) *cert. denied at* 2000 Ga. LEXIS 831 (Ga. Oct. 27, 2000); *Jones v. State*, 276 Ga. 171, (2003) *cert. denied at* 2002 Ga. LEXIS 594 (Ga. June 27, 2002). Cases requiring the State to consent to a waiver of jury trial reflect this. *See, e.g., Zigan v. State*, 281 Ga. 415, 417 (2006) ("Although appellants' waiver of the right to trial by jury appears adequate, the refusal of the prosecution to consent left the trial court with no choice but to deny the demand."); *State v. Henderson*, 283 Ga. App. 111, 112 (2006) ("As our Supreme Court recently made clear, a defendant has no unilateral right to have his criminal case decided by a bench trial without the acquiescence of the State."). Similarly, cross-examination rights have been even-handedly applied to the State as well the criminal defendant. *Richardson v. State*, 305 Ga. App. 363, 366 (2010) ("The State, like any other party, has the right to conduct a thorough and sifting cross-examination and to pursue the specifics of a topic the defendant introduced."). *See also* Rosenthal, Lawrence, Policing and Equal Protection, 21 Yale L. & Pol'y Rev. 53, 53-7, 62-78 (2003) (emphasis added) (arguing that the Equal Protection Clause ensures a right of citizens to "security against lawbreakers": "The guarantee of equal protection is not only a constraint on the manner in which the government imposes obligations or distributes its largesse; ***it also contains an affirmative command with respect to the manner in which the government protects people from crime***.").

[4] *See Berger v. U.S.*, 295 U.S. 78, 88 (1935); *State v. Brown*, 269 Ga. App. 875 (2004).

[5] *See also Pope v. Wainwright*, 496 So. 2d 798, 805 (Fla. 1986) (The comment 'no one has a right to violate the rules we all share' was read as part of Florida Standard Jury Instruction 2.09 [*now 3.1*]. Taken in context, this statement was nothing more than an admonition to the jury to follow the instructions as given; the comment in no way could reasonably have been taken as a comment on the defendant's guilt.").

[6] *See also United States v. Moran*, 271 F.3d 1286 (2001) (affirming conviction where nullification charge given and where juror excused after having violated it); *United States v. Funches*, 135 F.3d 1405 (1998) ("Because the

evidence proves the defendant guilty beyond a reasonable doubt, it is the jury's duty to convict." *Watkins v. State*, 265 Ga. App. 54 (2004); *Nel v. State*, 252 Ga. App. 761 (2001).

The State intends of inquiring of the jury panel during *voir dire* as to whether they will be willing to apply the law of the State of Georgia to this case, even if they disagree with it or it conflicts with a deeply held personal belief. In addition, the State will submit a jury charge akin to that of the State of Florida's Standard Criminal Jury Instruction 3.13.[7] Both of these steps are to insure that the jury will abide by their oaths and render a true verdict on the evidence and the law of this State.

B. CSI Effect.

Courts and social commentators have noted that modern media have elevated, sometimes unrealistically, the expectations of what scientific techniques can and should be part of a legal investigation and presentation at trial.[8] In the United States District Court for the Middle District of Georgia, a jury instruction is used that admonishes the jurors that they should not expect either party to the case to satisfy the depictions of scientific evidence of fictional television programs such as CSI.[9]

Reflecting the same concerns addressed by the Middle District of Georgia jury charge, numerous jurisdictions have allowed *voir dire* questioning and jury argument over these same issues.[10] In this regard, the Eleventh Circuit Court of Appeals held:

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jury enjoys no right to nullify criminal laws, and the defendant enjoys a right to neither a nullification instruction nor a nullification argument to the jury, the potential for nullification is no basis for admitting otherwise irrelevant evidence.").

[7] In pertinent part, Florida's Standard Criminal Jury Instruction 3.13 states: "If you become aware of any violation of these instructions or any other instruction I have given in this case, you must tell me by giving a note to the bailiff. In closing, let me remind you that it is important that you follow the law spelled out in these instructions in deciding your verdict. There are no other laws that apply to this case. Even if you do not like the laws that must be applied, you must use them. For two centuries we have lived by the constitution and the law. No juror has the right to violate rules we all share."

[8] *See State v. Cooke*, 914 A.2d 1078 (Del. Super. Ct. 2007) (noting the need for "defensive prosecution" in a post-CSI world).

[9] The instruction reads as follows: "In considering the evidence presented, you are not authorized to hold either the Government or the Defense to a higher standard of proof based upon what you have seen on popular crime-solving television shows such as CSI. The investigations portrayed in those shows are fictional dramatizations, created for entertainment purposes. You are therefore instructed that you may not consider what you see on such shows in evaluating the evidence in this case."

[10] *See United States v. Jefferson*, 2011 U.S. App. LEXIS 14405 (5th Cir. 2011) (prosecutor allowed to inquire about CSI effect in voir dire); *United States v. Farhane*, 634 F.3d 127 (2nd Cir. 2011) (CSI watching a nonpretextual basis to strike prospective jurors); *People v. Smith*, 2007 Mich. App. LEXIS 2706 (Mich. Ct. App. Dec. 4, 2007) ("Viewing in context the prosecutor's remarks during voir dire that real life is not akin to CSI television shows and that he was not trying to "pull the wool" over the juror's eyes, *Watson*, *supra* at 586, it is clear that the prosecutor was merely attempting to ensure that the jury not hold the prosecution to a higher burden of proof than was required. The remarks were entirely proper and did not prejudice the jurors against

"Additionally, the district court did not err by questioning jurors about whether they would be able to separate television shows from the facts of the case and stating that there may not be 'CSI' evidence presented to them." *United States v. Harrington*, 204 Fed. Appx. 784 (11th Cir. 2006). Similarly, the Fifth Circuit Court of Appeals has noted: "In this age of the supposed 'CSI effect,' explaining to the jury why the Government had little in the way of physical or scientific evidence was arguably critical to the Government's case." *United States v. Fields*, 483 F.3d 313, 355 (5th Cir. 2007).

Commentators have noted that the CSI Effect is just as likely to adversely impact criminal defendants as it is the prosecution: "But it would be unwise to turn a blind eye to the impact that the CSI Effect could have on the defense. With the mass media's discovery of chimeras, ***it seems just as likely that the CSI Effect could impact the defense as much as the prosecution***."[11]

Accordingly, in order to preserve fairness to both parties, the State, in this case will request a jury charge, patterned after that of the United States District Court for the Middle District of Georgia, at the trial of this case. This charge will insure that unrealistic, fictionalized accounts from the media and elsewhere in terms of what scientific techniques exist will not be considered in rendering a verdict in this case.

14. Failing to Address, Much Less Rebut, the Applicable Authority

Rule 3.1(b) of the Georgia Rules of Professional Conduct admonishes that, in the representation of a client, a lawyer shall not "knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law." Consistent with this requirement, Georgia Rule of Professional Conduct 3.3(a)(3) mandates that a lawyer shall not knowingly "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."

The Defense in this case may refuse to contend with the applicable case law. Should such a refusal come after the controlling authority was placed before it, *vis-à-vis* this memorandum of law, the willful disregard of unchallenged authority--*and asserting objections notwithstanding*--would potently entitle the State to argue, among other factors, that the defense is willfully engaging in deceptive conduct.[12] *See Appling v. State*, 281 Ga.

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defendant."); *Goff v. State*, 14 So. 3d 625 (Miss. 2009) (prosecutor commenting on CSI voir dire questions during final argument allowed); *Cole v. State*, 194 S.W.3d 538 (Tex. App. Houston 1st Dist. 2006) (prosecutor commenting on CSI voir dire questions during final argument allowed); *Commonwealth v. Vuthy Seng*, 456 Mass. 490, 924 N.E.2d 285 (2010) (CSI jury charge not indorsed but allowed where defense raised CSI issues at trial).

[11] Arcabascio, Catherine, *Chimeras: Double the DNA-Double the Fun for Crime Scene Investigators, Prosecutors, and Defense Attorneys?*, 40 Akron L. Rev. 435, 462 (2007).

[12] In the context of ineffective assistance of counsel claims, this type of collusion has recently been harshly criticized in our appellate courts. *See McMichael v. State*, 305 Ga. App. 876, 700 S.E.2d 879 (2010); *Carrie v.*

590, 642 S.E.2d 37 (2007) (unanimously authorizing the State to use the word "fraud" to describe the conduct of the defense during the State's final argument).

CONCLUSION

The State has provided the foregoing in an effort to avert the potential for legally unsupported and unsustainable objections and, thus, eliminate the unnecessary expenditure of time and effort for the Court and counsel that they would entail.

Respectfully submitted this 18th day of September, 2013.

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John Melvin
Deputy Chief Assistant District Attorney
Cobb Judicial Circuit
GBN#: 501705

CERTIFICATE OF SERVICE

I hereby certify that I have served the within and foregoing *TRIAL BRIEF PERTAINING TO ANTICIPATED EVIDENTIARY AND PROCEDURAL ISSUES* upon the defendants and the attorney of record for Defendant by U.S. and Electronic Mail as set forth below this day, January 9, 2015.

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Respectfully submitted this 18th day of September, 2013.

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John Melvin
Deputy Chief Assistant District Attorney
Cobb Judicial Circuit
GBN#: xxxxxx

State, 298 Ga. App. 55, 679 S.E.2d 30 (2009); *Nejad v. State*, 296 Ga. App. 163, 674 S.E.2d 60 (2009) (Smith, P.J., concurring). *rev'd on other grounds at* 286 Ga. 695, 690 S.E.2d 846 (2010).

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	*	
VS.	*	**INDICTMENT NO.: 05CR3581**
Derico Dameron	*	

TRIAL BRIEF ON MOTION TO SUPPRESS

This brief is submitted in accordance with the Court's directive.

FACTS

The salient fats are as follows and will be more fully developed at the hearing: March 3, 2005 Officer Bates of the DeKalb county police department pulled over the defendant for aggressive driving and speeding. When Bates initially approached the car, Defendant acted nervous, and only rolled down his window Aa half inch to an inch@ despite requests to roll it down further. Immediately, Bates smelled the odor of raw marijuana which he recognized based on his training and experience. Bates then checked the status of Defendant's license. It came back as Acanceled@. As such, the officer arrested him. An impound inventory revealed the presence of .98 pounds of marijuana. A certified document from the DMV indicates that Defendant was not served with the notice of cancellation.

STANDARD OF REVIEW

An officer who conducts a search without a warrant must show that the search was conducted pursuant to an exception to the Fourth Amendment warrant requirement. See Mincey v. Arizona, 437 U. S. 385, 390-391 (1978); McDonald v. United States, 335 U. S. 451, 456 (1948). Indeed, O.C.G. A. section 17-5-30 specifically places the burden on the state to establish the validity of a warrantless search; the state must do so by a preponderance of the evidence. State v. Slaughter, 252 Ga. 435 (1984); U.S. v. Matlock, 415 U.S. 164, 177, n.14 (1974). The court may deny a motion to suppress evidence pursuant to O.C.G.A. section 17-5-30 if it finds that the factual testimony offered on behalf of the State is more probably true than false. Id.

ARGUMENT

Officer Bates had probable cause to perform a warrantless search Defendant's car the moment he smelled marijuana. However, even if this Court decides otherwise, the marijuana was lawfully seized because the stop, arrest, and subsequent inventory were all valid.

1. Officer had probable cause to search as soon as he smelled the odor of raw marijuana.

In the case at bar, the officer smelled raw marijuana as he approached Defendant's car. In an analogous case, an officer approached an apartment and knocked on the door. While standing there, those officers noticed an overwhelming odor of marijuana - which was being grown inside. That Court noted:

> Being where he had a right to be, [the officer] based on his experience and training, encountered the strong smell of marijuana coming from the apartment, *giving him probable cause to believe a crime was being committed there*.
>
> Hodge v. State, 257 Ga. App. 203, 204 (2002)(emphasis added) *citing* Bigby v. State, 250 Ga. App. 529 (1) (552 S.E.2d 129) (2001).

Automobiles are subjected to similar but unique review as it relates to the smell of marijuana emanating from them. Specifically,

> [w]here a law enforcement officer has probable cause to believe that a vehicle (as opposed to a particular container within the vehicle), while in transit, contains contraband; i.e., where the objective facts known to the officer would justify issuance of a search warrant authorizing that a vehicle be searched, the "automobile exception," to the warrant requirement of the Fourth Amendment applies, and a warrantless search of the entire vehicle is not unconstitutional, including all containers and packages that may contain such contraband. United States v. Ross, 456 U. S. 798, 821-822 (102 S. Ct. 2157, 72 LE2d 572) (1982).

Autry v. State, 277 Ga. App. 305, 307 (2006). As such, a search would have been valid at this point.

Other cases on this issue are noteworthy. The Court of Appeals approved of the Aplain smell@ doctrine of *raw or unburned* marijuana by utilizing it in satisfying the third prong of the Aplain view@ doctrine. Specifically, the Court noted....

> As explicated in *Coolidge v. New Hampshire*, 403 U.S. 443, 468, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (II) (C) (1971), the plain view doctrine requires the existence of three criteria: (1) there must be a prior valid intrusion onto a person's property before the evidence is observed and seized; (2) discovery of the evidence must be inadvertent; and (3) it must be apparent that the item

> seized is evidence or contraband. All three factors are present in this case. *Having encountered the "plain smell" of marijuana while in a place he validly entered, [the officer] was entitled to seize the contraband*

State v Silva 263 Ga. App. 371, 373 (2003)(emphasis added) *affirmed* Silva v. State, 278 Ga. 506 (2004); *accord* King v. State, 267 Ga. App. 546, 548-549 (600 SE2d 647) (2004) .

As such, the Court expressly recognizes that the odor of raw or unburned marijuana is an indicator of the presence of marijuana - as opposed to the line of cases which distinguish *burning* and *burnt*.

Likewise, in State v Estrado, officers stopped a car because of a BOLO. As the officers approached they smelled raw marijuana. The Court noted that by itself, the Bolo info was not sufficient to support a search of the car but that smell of the raw marijuana provided probable cause that illegal drugs were present. They stated:

> It has often been held that probable cause to search an automobile exists when the facts and circumstances before the officer are such as would lead a reasonably discreet and prudent man to believe that the vehicle contains contraband. In determining whether there was reasonable cause to believe that the vehicle contained contraband [Courts] look to the totality of the circumstances including, but not limited to, information obtained by law enforcement agents conducting a common investigation." ... In the present case, on one of the days specified by the informant, law enforcement officers observed two vehicles exactly fitting the description given the officers traveling together on one of the roads specified by the informant. Upon stopping the vehicles the officer smelled the strong odor of marijuana coming from one of them. Even though the information received from the informant was not detailed enough to authorize the issuance of a search warrant before appellees' detainment, *the additional corroborative evidence outlined above provided probable cause to believe that illegal drugs were in one of the cars*.

State v Estrado, 170 Ga App 889, 890-891 (1984) *citing* Pittman v. State, 162 Ga. App. 51 (1) (289 SE2d 531).

Similarly, in Adrug dog@ cases, the Court has determined that

> [t]he use of the dogs' enhanced olfactory sense to sniff for the presence of drugs in the airspace surrounding the package did not constitute a search within the meaning of the Fourth Amendment. Bothwell v. State, 250 Ga. 573, 579 (6) (300 S.E.2d 126) (1983) (citing United States v. Goldstein, supra); State v. Foster, 209 Ga. App. 143, 146 (433 S.E.2d 109) (1993). It [is] a non-invasive "plain smell," not a search within the meaning of the Fourth Amendment.

Carter v. State, 222 Ga. App. 345, 347 (1996).

Indeed, drug dogs are often used because they have an enhanced sense of smell. It defies logic to say that the same reasoning can not be applied to humans when the odor is so overwhelming that it can be identified by the human nose.

2. The arrest and subsequent inventory were valid.

Defendant is not contesting the stop in this case. Instead, he argues that the officer should have issued a citation because he had not been served with a notice of cancellation. This argument must fail.

O.C.G.A.' 40-5-20(a) provides

> No person, except those expressly exempted in this chapter, shall drive any motor vehicle upon a highway in this state unless such person has a valid driver's license under this chapter for the type or class of vehicle being driven. Any person who is a resident of this state for 30 days shall obtain a Georgia driver's license before operating a motor vehicle in this state.@

Accordingly, it is a crime to drive without a license. However, there are times when an arrest is not appropriate. O.C.G.A. 40-5-121 provides in pertinent part:

> The charge of driving with a suspended or disqualified license shall not be made where the suspension is a result of a failure to respond under Code Section 40-5-56 or an insurance cancellation unless the arresting officer has verified a service date and such date is placed on the uniform citation. If the suspension or disqualification is verified and the driver possesses a driver's license, the license shall be confiscated and mailed to the department. If the suspension or disqualification is not verified, the arresting officer shall serve the driver and attach the driver's license, if available, to the copy of service and send it to the department.

Contrary to Defendant's assertion, the plain language of the statute *only* requires the officer to verify service when the suspension or cancellation is due to either a failure to respond or an insurance cancellation. Otherwise, the officer is not required to verify service. As noted in A[t]he current statute requires such verification only where the license suspension is the result of a failure to respond to a citation (O.C.G.A. '' 40-5-56) or an insurance cancellation. See O.C.G.A. '' 40-5-121 (b) (1) (1989).@ State v. Carter, 196 Ga. App. 226, 228 (1990) *citing* State v. Brooks, 194 Ga. App. 465, 466, n. 1 (390 S.E.2d 673) (1990). As such,

> [t]he legality of the warrantless arrest depended on whether or not at the time of the arrest the officer had probable cause to believe that an offense had been committed. The cause need not have risen to the level of proving guilt at trial.... The factfinder's later finding of a failure of the State's evidence at trial would not retroactively vitiate the arrest if the arrest was supported by probable cause at the time.

Carter, *supra* at 228 *citing* Davis v. State, 172 Ga. App. 193, 194 (1) (322 S.E.2d 497) (1984); Bradford v. State, 149 Ga. App. 839 (256 S.E.2d 84) (1979). In other words, Defendant's Aalleged non-receipt of notice of license [cancellation], if not proved otherwise by the State, may have made conviction unsustainable, but would not have affected the legality of his arrest on the charge.@ Id.

Thus, the undisputed evidence will be that the stop Defendant=s car was clearly authorized based upon reasonable suspicion of criminal activity, to wit: speeding. "Once the stop was effected, [Defendant] was subject to custodial arrest for operating a motor vehicle without a valid driver's license, see O.C.G.A.'' 40-5-20 (a) and 40-5-120 ([6]). . . ." Wilder v. State, 192 Ga. App. 891 (386 S.E.2d 685) (1989). *See also* Coley v. State, 177 Ga. App. 669 (1) (341 S.E.2d 9) (1986).

Contrary to Defendant's assertion, the fact that the officer arrested the defendant for an offense other than the one which he stopped him for is of no consequence.

> The mere fact that appellee was never issued a traffic citation for following too closely is of no consequence. If an officer stops a vehicle in the good faith belief that a traffic violation has been committed, his ultimate failure to issue a traffic citation will not preclude the traffic offense from evincing the reasonable suspicion which served to justify his initial stop of the vehicle.

State v. Chambers, 194 Ga. App. 609, 611 (1990) *rev'd on other grounds*; See also McConnell v. State, 188 Ga. App. 653 (1) (374 S.E.2d 111) (1988).

Once arrested, an impound inventory is authorized. AImpoundment of a vehicle is valid when, following an arrest which is supported by probable cause, there is some necessity for the police to take charge of the property.=@ State v. Haddock, 235 Ga. App. 726, 728 (2006) *citing* South Dakota v. Opperman, 428 U.S. 364 (96 S. Ct. 3092, 49 L. Ed. 2d 1000) (1976).

In the case at bar, the defendant was alone and there was no one to release the car too. As such, impound of the vehicle was authorized. Whisnant v. State, 185 Ga. App. 51, 53 (2) (363 S.E.2d 341) (1987).

Accordingly, Defendant's *Motion to Suppress* should be Denied.

Respectfully submitted,

John Melvin
Deputy Chief Assistant District Attorney
Cobb Judicial Circuit

CERTIFICATE OF SERVICE

I have this date furnished defendant's counsel in the above styled case with the attached motion via U.S. Mail and e-mail

This the 30th day of June, 20__

_____

John Melvin, Bar No. xxxxxx
Deputy Chief Assistant District Attorney
Cobb Judicial Circuit

DIRECT EXAMINATION

Most trials are won based upon the strength of your own case and not the weaknesses of your opponent's case. Consequently, direct examinations must be clear, and they must effectively present the facts, theme and theory of your case. Thus, a witness should not just tell the jury what happened, but must show them what happened. However, a prosecutor should never lose site of the fact that the direct examination of a witness must be used to put forth the evidence necessary to meet the elements of the client's claims and defenses while keeping in mind that the witness is being judged upon their credibility. A witness' credibility is based upon his or her background, ability to relay the facts and performance. Perhaps this is what makes direct examination one of the most difficult aspects of trial preparation.

Remember, anyone can ask questions. *Your job* is to use the direct persuasively and in a manner that establishes the foundation for your jury argument. If you want to be a persuasive trial advocate, you must make the facts of your story come alive. Direct examination is the place to fluently communicate the theme of your case and establish the credibility of your witnesses

What are the purposes of direct examination?

The purpose of direct examination is to introduce the undisputed facts. Direct examination is also opportunity to put forth the State or the client's version of the disputed facts. It is also an opportunity to lay the foundation for the introduction of exhibits. Moreover, it is an opportunity to reflect upon the credibility of the witness.

You can use direct examination to present evidence in a form that is (1) legally sufficient to meet the burden of proof, (2) understood and remembered, (3) convincing, (4) able to withstand cross-examination, and (5) anticipatory and contradictory of evidence that the opposition will present. Think of direct examination as your opportunity to construct persuasive arguments. The questions that your ask will subtly convey your argument. Conversely, use the arguments that you want to make at the end of the case to guide you in planning and preparing the questions you will ask on direct.

B. Elements

What approach should you take?

Your questions on direct examination must let the witness recreate an event. The story must be clear. You must tell the story in a way that will hold the jury's attention. How can you do this? Here are a few suggestions:

Visualize your case and the story you want to tell. You, as producer, director, and moderator, will use the fact witnesses on direct to paint a series of word pictures of

scenes that you want the jurors to visualize. One key to a successful direct is being able to tell you story in a way that enables the jurors to see, in their minds, each relevant prior occurrence that tells your story. Many people, including some jurors, are what we call "visual thinkers." Words prompt most of us visualize an image of a thing or event. We don't visualize the words that describe that image, e.g., you don't visualize the words "purple giraffe." We visualize the thing that the words describe, e.g., a giraffe that is purple. The purple giraffe I visualize will differ from the one you visualize, but you would recognize mine, and I would recognize yours. As the description of the purple giraffe got more explicit, each of our mind's pictures of a purple giraffe would morph into the one being described by words. The mind picture fleshes out as the word description gets more specific. With enough descriptive explanation, each of our mind pictures of the purple giraffe would look quite similar. So it is with the story of your case. The more detailed and similar the word picture you elicit on direct, the more similar the common visualization that your jurors will share.

You are not limited to painting word pictures of your story. You can and should involve the jurors by supplementing your witness' word pictures with tangible exhibits. For example, if you have a photo of the item, that photo will be worth a thousand descriptive words. Instead of the leaving it to the jurors to conjure up their own images, you show them an image of the thing, e.g., the real purple giraffe.

Think about how you want to tell your story. With your direct examination, you decide what parts of the story to tell, how to tell them, and when to tell them. In making these decisions, you decide what scenes you want the jurors to carry in their memory banks.You must organize each of the discrete scenes of the story. By your questions of witnesses on direct, you decide how to structure the story and what its substance will be. Make each important scene of your story a vivid memory for your jurors. Remember that you know much more about your case than the jury ever will. When the case starts, you are painting on blank canvas. Before it ends, you want all the pictures painted. If you leave parts blank or blurry, the jury will fill them in. Don't assume that the jurors will fill those blank or blurry spots the way you desire. Don't assume anything. If there is a cardinal rule in creating and organizing your story on direct, it is this: *Look at the case through your juror's eyes.*

Introduce your case story in opening statement. Before direct begins, the jurors typically get a bird's eye peek at the skeletal outline of your story of the case in your opening statement. By the time your direct begins, you will have told them about the testimony they will hear and, perhaps, shown them some of the exhibits they will see. You will have revealed the skeletal plot of the story of your case and introduced at least a partial list of the characters. Your jurors certainly have an idea about what you say happened or didn't happen. Though you may not have gotten specific, you should have used your opening to introduce rough sketches of key scenes.

Consider the nature of your audience who will hear the direct examination. You are presenting your case to a relatively small group, e.g., 6 to 12 persons. The atmosphere is almost that of an inquisitive conversation, though it is only two-sided in the sense that the

jurors (the third party to the conversation) listen silently as you and your witness verbally reconstruct events. The conversation you have with the witness is solely for the benefit of the silent listeners on your jury.

The story you tell on direct will often be a different one, in time and space, from the story the defense will tell. This is particularly true when for defenders who are relying on a so-called "confession and avoidance" defense. In this situation, the defense may be saying, "The prosecution's story is true, as far as it goes, but there is more to this story...." In effect, the defense admits the presence of the elements of the crime but seeks to justify e.g., the defendant intentionally killed in self-defense, or excuse, e.g., the defendant intentionally killed but was insane at the time of the killing, the otherwise criminal conduct.

All direct leads to jury argument. Trial is argument. Let your direct contain the necessary details to give you the substance for your jury argument. Use the direct to provide your jurors with the information they will need to decide the case in your favor. You want to be the 13th juror in the case, *giving the jurors the useful and favorable information they would seek if allowed to question the witness*.

What are the legal requirements for a direct examination?

Competency of your witness - The first legal requirement is that your witness must be *competent* to testify. O.C.G.A. § 24-6-601 *et seq*. To qualify as competent, a witness must have: (1) Understanding of the nature and obligation of the oath or affirmation to tell the truth, (2) Perception (knowledge) of the the relevant event, (3) Recollection (memory) of the relevant event, and (4) Ability to communicate with the fact-finders (the jury or judge in a bench trial) in the common language of the court, i.e., English. There are instances when the competency of a witness may not be apparent. For example, if you call an infant or a mentally infirm person who may not understand the obligation of an oath to tell the truth, you should prepare the witness for a voir dire inquiry into competency. The voir dire inquiry may be posed to the witness either by yourself, the judge, and/or opposing counsel. If your witness does not speak English, the witness will only be competent to testify in the company of an interpreter who can translate the witness' words into the language of the court.

Since one of the legal requirements for testimony from lay witnesses is personal knowledge, you should ensure that the context of your questioning reveals to the court and the jury that your witness is testifying to facts within that witness' personal knowledge.

Relevance of your witness' testimony - The second legal requirement for your direct examination is that your witness' testimony must be relevant. O.C.G.A. § 24-4-401 *et seq*. Relevant evidence is evidence that has any tendency, however slight, to make the

existence of a fact of consequence to the case more or less probable than it would be without it. Always remember that, even when the witness' direct examination testimony is relevant, the probative value of the witness' evidence must not be substantially outweighed by its *unfairly* prejudicial influence (affect) or by considerations of undue delay or needless presentation of cumulative evidence.

Authenticity of matters of evidence to show that the item in question is what its proponent claims it is - The third requirement for your direct examination is that matters of evidence must be authenticated. O.C.G.A. § 24-9-901 *et seq*. You authenticate an item of evidence by making a prima facie showing that it is genuine. Authentication or identification of the matter in question can be done in number of ways, e.g., by testimony from a witness with knowledge, by voice and handwriting identification, etc. The proponent has the burden of making a prima facie showing that the matter is authentic, i.e., that a reasonable person could believe that the item is genuine. If this showing is made, then the issue of identification or authenticity is left to the jury, the issue then becoming one of weight and not admissibility.

Proper evidentiary foundation or predicate for the admissibility of the evidence - Certain items of evidence require special foundations to establish admissibility. For example, if your evidence is hearsay and, thus, presumptively inadmissible, you will be required to establish its admissibility under one of the hearsay exceptions e.g., present sense impression; excited utterance; statement of then existing mental, emotional, or physical condition; statements for purposes of medical diagnosis or treatment; recorded recollection; record of regularly conducted activity (business records); public records; former testimony; dying declaration; etc. O.C.G.A. § 24-8-803 *et seq*.

To properly prepare and conduct a direct examination, you must understand the application of the rules of evidence. That means you have to know the rules, but, more importantly, you have to know how to conform to the rules and play within their confines. You cannot even suit up for the game of trial advocacy without knowing the Georgia Rules of Evidence.

For example, if you don't understand what hearsay is, you won't have the foggiest notion of when you are asking your witness to testify to inadmissible hearsay. If the defense knows the rules and objects to the hearsay, you'll be caught flat-footed. Even if you know what hearsay is, you must know all of the exceptions to the general rule of inadmissibility of hearsay. If you don't, you won't be able to craft your questions to conform to a particular exception to the rule against hearsay.

How do you plan and prepare your questions for direct examination?

I urge you to plan and prepare your direct to support your jury argument. In every case that you face, think about what your jury argument will be for each fact that you will ask the jury to find from the evidence. If the evidence is circumstantial and susceptible of differing conclusions, ask yourself what premise you and your opponent will ask the jurors to draw from the same circumstantial evidence. Your argument is the connection

between the evidence and the fact that you want the jury to find from that evidence. Direct examination is typically the place where you will prove your factual version of the case. You can use the direct of one witness to buttress the credibility of or authenticate the testimony of one or more of your other witnesses. Direct will also teach and educate the jury, particularly when you use expert witnesses.

Consider some factors that you should think about in *planning* your direct:

1. Know what to include. Go through the facts and determine what facts are needed to establish the theory of the case**.**

- ***Background questions***: In most cases, prior to any questioning on substantive matters, you will ask your witness some introductory background questions that acquaint the jurors with who the witness is. The goal is to introduce your witness in a way that makes him or her seem credible and trustworthy. Remember that the credibility of each of your witnesses is part of your case. As the maxim goes, "If you can't trust the messenger, you can't trust the message." It's nice if your witness shares some of the same characteristics as the jurors who will judge his credibility.

  How do you establish your witness' background? Have the witness tell the jury a bit about himself. You begin with the witness' name. Instead of saying, "State your name, spelling your last name, please," you might say, "Would you introduce yourself to the jury, sir?" or "Tell us your name, please." Some of the additional biographical background information can include the witness' occupation, length of employment, length of residence in the county, age (a sensitive subject to some mature adults), education (no sense proving a lack of it), marital status, spouse's occupation, children, and age of children. At some point, background questions, e.g., the make and model of the witness' car, won't be legally relevant. If you try to introduce too much background to bolster or accredit the witness, the opposition will object that it is not relevant and/or is improper character evidence. After introducing a bit of background, you may want to ask your witness if he knows why he has been called to testify. If you've prepared him properly, you're safe in asking him to explain why he has been called.

- ***Facts:*** After establishing your fact witness' background, you will turn to the relevant event about which the witness has knowledge gained by perception. In most cases you will present the witness' testimony in chronological order. This means guiding your witness through a description of the events in the order in which they transpired. The direct examination may focus on a relevant occasion; the direct examination may establish what happened prior to the event in question, what happened during the event, and/or what happened after the event. In some cases the fact witness may be asked how he came to be in court and whether there has been contact with the parties.

- ***Exhibits***: When displaying documents or other items during direct examination, you may find it useful to use an overhead projector, platform video or evidence camera (Document Camera), or flat panel video monitor/projector, computer and PowerPoint slide that will allow all the jurors to see the item simultaneously. With a laser pointer, the witness can "tell and show" matters of importance in the featured item. Having the witness step down off the witness stand and demonstrate with or without exhibits can spice the action.

- ***Outline.*** I suggest that you *outline* your direct examination questions first. Then, when you are happy with the dramatic order, *write out* each question and each anticipated answer. Your questions should be written in the lingo of the ear, not the eye. In other words, write your questions in plain natural spoken English. Place your written questions of direct examination of each witness in a section of your trial notebook. You are not wedded to your preformed questions. *Listen to your witness' answers*. I can't emphasis this enough. You will miss key testimony which needs to be followed up on if your eyes and attention are buried in your next question.

  Don't let your "write out" questions control. Be willing to depart from them, particularly when the witness gives an answer that demands a follow-up. *Caution*: At trial, keep your eyes out of your trial notebook while putting a question to your witness and while your witness is answering the question. Don't feel that you have to ask your questions verbatim as they appear in your trial notebook. Let the words be natural. If you need to consult your trial notebook for guidance in asking a question, look down at the notebook silently. Never read the question. Look up at the witness, and ask the question. Continue looking at your witness while the witness answers. Listen to the answer. Don't dive back into your notebook while the witness is answering. Remember, the jury's focus is supposed to be on your witness. If you don't pay attention to your own witness' answer, why should the jurors feel obliged to do so?

- ***Utilize open-ended questions for the important parts of the story***. It's important to recognize the importance of *open-ended questions that tell your story*: Think about whether it is best to use an open-ended or close-ended (leading) question. *Open-ended* (non-leading) questions permit your witness to give an open, descriptive answer. They often begin with *who*, *what*, *when*, *where*, *why*, or *how*. Close-ended (leading) questions restrict the witness' answer and suggest the appropriate answer and are generally objectionable.

  In certain situations, courts will allow you to ask close-ended, leading questions on direct because leading questions are necessary to develop the witness' testimony. Leading questions on direct may be allowed by the judge, for example, to establish an evidentiary foundation, to suggest a new topic with transitional phrases, to refresh the witness' recollection, to establish preliminary matters, to establish inconsequential or undisputed facts, to question those with limited capacity, e.g., a forgetful witness, a child witness, or a mentally disabled witness,

and to question an adverse party, one identified with an adverse party, or a hostile witness.

Use open-ended questions when you want the juror's to focus on your witness. One of the most important things to recognize in direct-examination is the difference between open-ended and closed-ended questions. *Open-ended* questions encourage your witnesses to testify in their own words. If they are credible folks, this technique will make them seem more believable than if you questioned them with leading (close-ended) questions. Sometimes you need to use a closed-ended question, as when the witness has forgotten to talk about a very specific and important matter or when you are skirting around sensitive matters and trying to avoid opening the door to certain subjects. In short, you should know the difference between open-ended and close-ended questions, know how to use open questions where appropriate in direct, and always try to use open questions to balance any necessary closed questions.

- ***Learn how to ask open-ended, non-leading questions***. You will have to train yourself to get into the habit of asking open-ended, non-leading questions during key parts of your direct. It's not normal. Why? Because, if you have learned your case, you already know all the answers. You are anxious to have the jurors know all the answers, so anxious that you literally want to tell them yourself by leading and testifying for your witness. If you have trouble forming open-ended (non-leading) questions, try writing out the answers you would want to receive from your witness; then write the questions that would call for the desired answer. If you do this a few times, it becomes much clearer how you can tell your story through your witness. There's another forensic device that may assist you in forming non-leading questions. Try to begin each key question with a *who*, *what*, *where*, *when*, *why*, and *how*. These six short words are the key components to your story. I've always liked the way the great poet and writer Rudyard Kipling put it:

> *I kept six honest serving men.*
> *They taught me all I knew.*
> *Their names were what and why and when*
> *and how and where and who.*

2. Know what to exclude. As you construct your questions for direct, think about what you *don't* want to ask. Exclude any facts that are not true. Exclude clutter, any facts that are improvable, implausible, or impeachment opportunities. Also exclude statements which open the witness up to contradiction by the witness's prior statements.

3. Use topical organization. Organize using chronology or series of events in direct examination. Ask yourself, "What topics do I plan to cover in the direct examination of the witness?" In most cases you will start with the general background and then proceed

to the the specific point that you want to make. It may help you as you plan your direct to think of each topic (unit) as an inverted triangle in which your inquiries of the witness start with the general and move down to the specific.

- ***Sequence (order) of witnesses***: Ask yourself, "What sequence (order) of witnesses will I follow?" You must plan the order in which your witnesses will testify. Although witnesses are often called in chronological order, i.e., from the beginning of the story to the end, there are other alternatives. Topical use of witnesses is one alternative; in this variation, you use witnesses to present topics, e.g., discovery of the body, cause of death, DNA evidence, prior relationships between the accused and the victim, the killing, etc., in the order you deem most persuasive. Prosecutors sometimes open their case with a witness, e.g., the detective in charge, who gives the jury a bird's-eye view of the prosecution's case. Should you construct your presentation to use your best witness(es) first, in the middle, or should you save the best witness for last? As story presenter, director, and presenter, it's your choice where to use your power witness(es).

  Many considerations can factor into your choices of witness sequence. You may want to separate repetitive witnesses to avoid boredom. You may even consider the time of day in deciding when to call a key witness. Be aware that juror attention is typically on the wane shortly before and after lunch. In cases involving expert witnesses, you may choose to call lay witnesses before you call your expert because you want to have the lay witnesses' factual testimony in front of the jury when you call upon your expert to draw conclusions from such facts. You also have to be mindful of the witness schedules themselves. A witness who needs to pick up her child from daycare is going to start to panic around 3pm.

- ***Make your witness' personal knowledge clear***. Your non-expert witness must speak from *personal knowledge*. Your lay witness can give lay opinion rationally based on the witness' personal perceptions, e.g., identification of a person based on having seen him. But a lay witness is not allowed to draw conclusions that call for technical, scientific, or other specialized knowledge.You must know when you are asking your witness for admissible lay opinion rather than inadmissible expert opinion.

- *Build evidentiary bridges.* Weave you story together by having your witnesses identify and refer to one another during direct. Building a bridge from one witness to another is a good way of introducing the players and their roles to your jury. It also smoothes the segue from one witness to another.

4. Do not interrupt the action. Never interrupt the dramatic flow of the story by attempting to fill in minor details.

5. Give details separate attention. If details of the actor are important, organize the direct examination to give attention to them.

- ***Make repetition persuasive***. When repetition is obvious to the jurors, you wind up with the inelegant "Same horse, different saddle" effect. Repetition must be artful. To artfully use the forensic device of persuasive repetition, learn to *loop* your witness' favorable answers into later questions. You can do this by incorporating a favorable factual assertion in a prior answer into your next question. Learning to loop will help you avoid obvious repetition of the kind that makes jurors roll their eyes. When you loop, you undercut the opponent's opportunity to object that the question has been "asked and answered."

- ***Stretch the important parts***. To dramatize a key point in direct, learn how to "*stretch-out*" your questions. You do this by breaking the factual point you want to into several questions rather than a single cursory inquiry. You will find that this technique will result in a fuller description of the fact. It's analogous to using several detailed brush strokes to paint your fact, rather than a single broad stroke.

6. Do not scatter circumstantial evidence. It is more effective to present all related circumstantial evidence at a single point in the direct examination rather than scatter it throughout the testimony.

7. Use defensive direct examination. In order to minimize negative impact of embarrassing or harmful facts on cross examination, it may be best to address it during direct examination. Ask yourself, "How can I structure my direct to *deflate the probable cross-examination* of my witness?" Your direct must anticipate the probable cross-examination that will be conducted by opposing counsel and counter any opposition exhibits that are contradictory or inconsistent with the story of the case.

8. Affirmation before Refutation. It is best to use your witness to offer affirmative evidence prior to offering testimony to refute other testimony or evidence.

9. Get to the point. The best way organization is to explain where the testimony is going and then get there.

- ***Clarity.*** To make your questions clear, add *only one new fact* to each question. Compound questions invite objections. So do questions that are vague and ambiguous.

- ***Have your foundations ready***. Be prepared to *authenticate* and *lay foundations* for any exhibits that you are going to introduce through your witnesses. Your goal is to have a smooth introduction of your tangible exhibits and a persuasive "tell and show" as you use the exhibits to add punch to your story.

10. Employ transitions and signposts. Use *transitions* and *signposts* to alert the jurors when you are moving from one unit of direct examination to another or simply to signal the subject of your upcoming questioning. A transition occurs when your questioning moves from one subject to the next . It's easier for the jurors to follow the direct examination if you periodically let them know where you are going with it. Use *transitional phrases* to herald a change from one topic to another, e.g., "Let's move from (*indicate the unit/subject you are leaving*) to (*indicate the unit/subject you are entering*)." Use *signposts* to announce a topic, e.g., "I'm going to ask you about (*indicate the subject*)."

11. End with a clincher. End the direct examination with a single fact that captures the trial theme or theory. The clincher must be admissible, reasonably dramatic, simple, memorable, and stated with certainty.

12. Ignore all other eleven elements when necessary. These rules are not always consistent with each other. If when drafting the direct examination, you find that you need to ignore one or more of these elements, do so. Only use those elements which advance your theory and theme.

How do you deal with direct examination of a hostile witness, adverse party, or a person identified with an adverse party?

A hostile witness can be as unpredictable as a wild stallion. If you don't rein him in, he can do more damage than good. A witness will be considered as hostile if s/he is associated with the opposition or if s/he is openly hostile (prejudiced) against you or biased in favor of the other side. Asking "why" and "how" questions invites trouble. So, how do you get a lasso over a hostile witness on direct examination? Get permission from the court to lead the witness, i.e., ask closed-ended, leading questions. The rules of evidence indicate that when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. In a criminal case, the key determination for the judge is whether the witness is hostile or is identified with the adverse party. If so, you have a right to lead the witness on direct.

To raise the issue of hostility, go to sidebar before calling the witness and ask the court for permission to lead the witness on the ground that the witness is hostile to your position. Explain why you consider the witness hostile. The judge may accept your representation and grant your request. If not, you will need to make a showing of hostility. Do this by voir dire questioning out of the presence of the jury. You may be able to prove hostility by calling the witness and securing admissions of hostile feelings. You may need to show witness hostility with extrinsic third party evidence. You may have to wait until the witness acts up on direct, e.g., openly evades questions or refuses to cooperate, to obtain a court ruling allowing you to treat the witness as a hostile witness.

The fact that the witness is distant or reluctant won't necessarily make him appear sufficiently hostile in the court's opinion to allow you to lead. If you are in a situation

where you have to call a witness who doesn't want to have to come to court, consider him as hostile in your planning, irrespective of whether the court will declare the witness as hostile.

How do you prepare your witness for direct and cross-examination?

It is disastrous on direct examination of a friendly or neutral witness for the examiner to appear to be putting words in the witness' mouth. The way to avoid this potential disaster is to prepare your witness in advance of testimony so you and the witness each know what the other will say. If you do this, you can avoid the disaster of having to testify for your witness simply by asking non-leading questions. Preparation is the key to effective direct examination. Consider the following advice as you prepare your witness for direct and cross-examination:

As a general rule, you can assume that a friendly witness wants to help you on direct examination. A neutral witness simply wants to be accurate. A hostile witness wants to wound you.

Be extremely wary of putting a witness on the stand if you haven't interviewed him or her. You don't want to find yourself in the position of trying to throttle your own overly talkative witness. When you try to put a lid on the verbiage of your own witness in front of the jury by interrupting the witness' answer, you will appear disingenuous and manipulative. Plus, it's kind of embarrassing when the court sustains opposing counsel's objection to you cutting off your own witness' answers!

If possible, prepare the witness in your office. Greet the witness in your reception area and escort the witness to your office or conference room. Offer the witness refreshment. Get it yourself; don't ask someone else to do it.

It is your choice whether to prepare the witnesses in groups or individually, and in one or several interviews.

Make certain that your witness knows his role in the telling of the story or reconstructing of the event. Explain to the witness where s/he fits in your overall case. Tell the witness why you are calling him.

Familiarize your witness with an outline of the questions you will ask him on direct, and brief him on the anticipated cross-examination. The idea is to let the witness know what questions he can expect. Most lay witnesses will be testifying to their observations and perceptions. If the witness is called to venture opinion or reputation testimony concerning character of the defendant, alleged victim or another witness, the character witness needs to know exactly what you are going to be asking. If you are going to put the client on to testify in his own behalf, make clear how you are going to deal with the client's denial of

the allegation, e.g., will you have the client deny the allegation at the very outset of the direct before any background questions are asked.

Determine what answers your witness will give both to your direct and to the opposition's cross. This typically takes the form of a rehearsal in which you conduct a mock interrogation of the witness. If you are rehearsing with your client, you may want to get another colleague to conduct the mock cross-examination. It may be helpful to videotape the mock interrogation.

Find out if your witness has prior experience testifying in court. To calm any pretrial jitters, you may want to take your inexperienced witness to the courtroom before trial begins.

Advise your witness that it is best to listen to each question on direct and cross and take one or two seconds before answering. Tell the witness that he may answer if the question is clear and you do not lodge an objection. Let the witness know that if he does not understand the question he should say "I'm not sure what you're asking" or "I don't understand the question."

The place to deal with possible memory lapses is always in the pretrial preparation process; however, if you are dealing with an essential witness who suffers with a fragile memory, you can tell the witness "If for some reason your mind goes blank or if you freeze up, it's perfectly acceptable to say 'I'm sorry, I'm having a little trouble remembering.' " Tell the forgetful witness that if s/he runs into a memory problem, you may try to refresh his memory about the matter of inquiry

One way or another, you need to provide a laundry list of advice to your inexperienced witnesses as to how to handle direct and cross. You may provide a written letter or booklet explaining what witnesses should know about testifying at the courthouse.

Let the witness know that you are going to do everything possible to make the witness' appearance as easy and convenient at possible.

For further information on witnesses and what you might say by way of advice to your witness before s/he testifies, you may want to check the pretrial preparation page.

What are the steps in refreshing a forgetful witness' recollection with a document while witness is on the stand?

If you have properly prepared your witness for testimony, it is highly improbable that you will need to *refresh the witness' recollection*. Still, some witnesses are so stressed that they have a mental block or a blank mind. Included below is a list of the sort of questions you can ask your forgetful witness to refresh the witness' memory when you have a document, e.g., the witness' statement that contains information that will jolt the forgetful witness' memory. Of course, you can refresh a witness' memory with anything, e.g. a phone book, a letter from someone else, etc.; for the purpose of refreshing or reviving a

witness' recollection, it does not matter that the document you use would not be admissible in evidence. [The cross-examiner is also allowed to refresh a witness' recollection, but inconsistencies in an opposition witness' testimony are customarily used to impeach the witness.]

Q: Did you ever make any notes (or give a written statement) when this was fresh on your mind?
A: Yes, I made some notes at the time (or a signed statement to your investigator).

Q: [Mark the notes or statement and tender them to the opposition for inspection.] Let me show you this document, marked for identification as Defense 1, and ask you to tell me if you recognize it.
A: Yes, I do.

Q: Without telling me what it says, would you tell us what it is?
A: It's my notes (or written statement) of what happened.

Q: Take a moment to look at it. Now, after looking at your notes (or written statement), has your memory been refreshed about (*indicate the inquiry, e,g., what happened with regard to the event in question*).
A: Yes.

Q: Do you remember what happened well enough to put this document aside and testify from your own memory about (*indicate the event*).
A: Yes [Take the document back. If your opponent is skilled, s/he will be sure to require you to take the document back before the witness tries to testify from memory, unless s/he wants to sandbag the witness by taking the document away during cross-examination and questioning the witness to show that his memory was not really refreshed.]

Q: What do you remember about (*indicate the event*)?

What can do when you have tried unsuccessfully to refresh the witness' recollection and the witness still has lack of present recall (memory)? Prior recollection recorded - an exception to the hearsay rule.

On very rare occasions, your witness may be faced with a witness who is so forgetful that you fail in refreshing her recollection. If your witness does not have sufficient memory (recollection) to answer your question fully after you have tried and failed to refresh the witness' present recollection (memory), you may wish to try to establish the admissibility of your witness' prior out of court assertions of fact in the form of a memorandum or record of recollection made or adopted by the witness. This record or memorandum of prior recollection comes into evidence as a recognized exception to the hearsay rule. The assertions of fact in the recorded recollection are admitted as probative evidence of the truth of the matters asserted in the recorded recollection.

If you face a situation that permits introduction of a recorded recollection, your witness has ceased to be a witness to the fact in question and serves only as a foundational witness who authenticates the recorded recollection. Here are some sample predicate or foundational questions you might ask your forgetful witness to introduce his prior statement:

Q: Did you at one time know what happened with regard to (*indicate the event in terms of the time, place, and people involved*).

Q: Do you now have present sufficient memory (recollection) to allow you to testify accurately and completely about (indicate the event). [Have the memorandum marked for identification as a court exhibit. Remember, the recorded recollection can't be physically introduced into the hands of the jury. If admissible as an exhibit, it can only be *read* into evidence to the jury.]

Q: I'm showing you what has been marked for identification as Defendant's Exhibit No.__. I'll ask you to read it silently to yourself. When you've finished reading it, please let me know.

Q: Do you recognize the contents of Exhibit No. __?

Q: Without telling me what it says, will you tell us what the exhibit is?

Q: Who made it?

Q: When?

Q: Where?

Q: [Attempt to refresh the witness' recollection.] After looking at Exhibit No. __, has your memory been refreshed about what happened at (*indicate the time, place, location, and act, event, or condition*)?
A: No. [The foundational answer is "no." If the witness says "yes, " s/he is competent to testify as a fact witness because s/he has present recollection; you don't need to introduce the record of prior recollection of a witness who has full present recollection, and the rules don't allow you to do so. If the witness says "no," indicating a lack of present recollection after you have tried to refresh her recollection, the witness is not competent to testify to the fact because s/he has no present personal knowledge of the fact at issue. If the witness answers "no," you may now proceed to try to establish the other legs of the predicate for introduction of a recorded recollection as an exception to the hearsay rule.]

Q: Do you now remember what happened well enough to allow you to put this document aside and testify from your memory about (*indicate the act, event or condition*)?
A: No. [Again, the answer has to be "no," indicating that the witness has insufficient present recollection to enable the witness to testify fully and accurately about the matter.]

Q: Did you make (or adopt) Exhibit No. __?

Q: At the time this Exhibit No. __ was made (or adopted) , did you have knowledge of (*indicate the act, event, or condition*)?
A: Yes. [The foundational answer must be "yes."]

Q: When you made (or adopted) Exhibit No. __ , was (*indicate the act, event, or condition*) fresh on your mind?
A: Yes [The foundational answer must be "yes."]

Q: Does Exhibit No. __ correctly reflect your knowledge of (*indicate the act, event, or condition*) when you made (or adopted) it?
A: Yes [The foundational answer must be "yes."]

Q: [Offer the contents of the exhibit as evidence] Your Honor, the defense offers the contents of Defense Exhibit No. __ in evidence.
The Court: The contents of Defense Exhibit No. __ are received. The item of recorded recollection itself will not become an exhibit, but you may read it or have it read to the jury.

Q: (To the witness) Is Defense Exhibit No.__ a statement concerning (*indicate the act, event, or condition you wish to prove or disprove*)?
A: Yes.

Q: [Have the witness or other person , read to the jury what the document says about the act, event, or condition at issue. Note: You can't actually introduce the tangible item into evidence, it violates the continuing witness theory if it serves to replace the witnesses' testimony, but its contents can be read into evidence. If opposing counsel offers the actual tangible item of recorded recollection into evidence and the court receives it, the actual item of recorded recollection can go to the jury.] Would you read this record (or memorandum) of your recollection to the jury, please?.

C. REDIRECT EXAMINATION - Plugging the Holes

Purpose of redirect: What can you accomplish with redirect examination? You can try to show the jury that your witness got it right on direct; that your witness didn't make a mistake regarding his observations or misstate the facts; that your witness didn't draw illogical inferences; that there are additional facts that support the accuracy of the witness' testimony that was questioned on cross; that what might appear to be inconsistencies in your witness' testimony can be explained; that new adverse subjects raised on cross-examination can be reconciled with the witness' testimony on direct; and that new favorable facts raised on cross-examination actually corroborate and confirm your witness' testimony on direct.

Avoid opening door to recross: If you conduct a redirect, make every effort to avoid establishing a basis for recross. This means not opening up new areas of inquiry. The best way to do this is by conducting a complete direct.

Avoid leading on redirect: Even the best lawyers sometimes lead on redirect. Every rookie does it. A skilled opponent may object, "Counsel is putting words in his witness' mouth. We object to the leading question." Learn to let your witness do the explaining on redirect. This is the way to repair damage done by cross-examination.

Brevity**:** Keep your redirect short.

Still sticks to original story on direct: Give your witness the opportunity on redirect to say "No" to the question: "Is there anything you would say to change or add to the substance of what you told us on direct examination?"

D. ONE FINAL THOUGHT – PROTECT THE RECORD!!!!!!

APPROACH POINT CROSS EXAMINATION

ARGUMENT TO JURY	HEADING	
	THEME FOR THESE QUESTIONS	
FACT POINTS		SOURCE/ EXHIBIT

Page ____ of ____

APPROACH POINT CROSS EXAMINATION

ARGUMENT TO JURY	HEADING	
	THEME FOR THESE QUESTIONS	
FACT POINTS		SOURCE/ EXHIBIT

Page ____ of ____