

MINUTES OF THE JUDICIARY COMMITTEE
January 6, 1983

The meeting of the House Judiciary Committee was called to order by Chairman Brown. All members were present except Rep. Kennerly, who was excused. Brenda Desmond, Legislative Council, was present.

HOUSE BILL 10

REP. CURTISS, sponsor, stated this bill's purpose is to provide that the training coordinator for county attorneys may act as special counsel to a county and that the county would be required to pay for the special counsel's services. EXHIBIT A.

W. G. GILBERT, III, Beaverhead County Attorney, was a proponent of the bill. GILBERT stated most county attorneys work part-time in this capacity; because of that they have interests in other areas. This bill deals with the problem of handling criminal prosecutions of people who are related to county commissioners. Since the commissioners approve budgets and other matters of the county attorneys, it can be a difficult situation when the county attorney must prosecute relatives of the commissioners. It interferes with the working relationship of the county commissioners and the county attorney.

GILBERT further stated it would be easier if the county attorney could refer the case to another attorney for prosecution. The bill would give the county attorney the opportunity to avoid a difficult situation.

MARC RACICOT, Training Coordinator for the County Attorneys, was also a proponent. He stated he has been involved with situations involving criminal investigations of county commissioners. It does not happen very often. In one instance, however, commissioners in Deer Lodge County were being investigated but had received advice from the county attorney concerning their activities. This created a possible conflict of interest for the county attorney.

RACICOT also stated there is no specific authorization to have any other state agency or county attorney to come in and do the work and be paid for it.

JOHN MAYNARD, Assistant Attorney General, stated his office is in favor of the bill.

ALEC HANSEN, Montana League of Cities and Towns, stated he was also in favor of the bill. HANSEN requested, however, that the committee amend the bill to include city attorneys

on page 1, section 1, line 16; and on part 4, line 2. HANSEN felt the County Attorney Training Coordinator's training and information services should also be made available to the city attorneys.

There were no further proponents.

There were no opponents.

REP. JAN BROWN asked if there would be more work for the County Attorney Training Coordinator providing training for city attorneys were added to his duties. RACICOT replied there may be some extra expenses involved. Attorneys are now required to attend three training sessions a year. There has been plenty of room in the past for additional attorneys to attend the sessions. There would be an increase in mailing and production costs.

REP. EUDAILY asked if the bill's title would have to be amended if the city attorneys were added to the bill. HANSEN replied he was just concerned that city attorneys be allowed to obtain available training. RACICOT felt the title would have to be amended.

REP. SEIFERT asked if county attorneys can call in outsiders to prosecute cases if there is a conflict of interest. RACICOT replied yes.

REP. ADDY asked if a similar problem exists when an accused is related to the county attorney. GILBERT replied the issue of the bill is payment for a special prosecutor's services where one may not be able to obtain the consent of the commissioners. A county attorney can excuse himself from a case if a member of his family is involved.

RACICOT stated the bill does not mandate that the county attorney call only the Attorney General's office for a special prosecution.

REP. SPAETH referred to section 3 of the bill concerning the reasonable fee involved. RACICOT replied the current fiscal year fee is \$30.00 per hour.

There were no further questions on House Bill 10.

HOUSE BILL 13


REP. CURTISS, sponsor, stated this bill would require the training coordinator for county attorneys to prepare and

distribute a checklist of legal errors or objections that could be raised in a capital criminal case. EXHIBIT B. REP. CURTISS also referred to Montana v. Mike Welling, EXHIBIT C.

MARC RACICOT, Training Coordinator for the County Attorneys, was in favor of the bill. RACICOT stated the bill will assist the process rather than hurt it. A sample checklist was given to the committee. EXHIBIT D.

Because the law changes continually, it is easy to make mistakes the course of a criminal trial. The checklist will enable attorneys throughout Montana to have up-to-date research available to them that they can use. RACICOT felt this bill will help attorneys keep up with the workload.

There were no further proponents.

There were no opponents. 

REP. EUDAILY asked if there would be a penalty if an attorney did not use the checklist. RACICOT replied the use of the checklist would not be mandatory. Failure to use the checklist would not be grounds for a reversal of the case. It would be expected, however, for the attorneys to use this checklist for their own benefit.

REP. DAILY asked if the checklist was used and an error did occur, could the case be thrown out of court. RACICOT replied if the state failed in this manner, probably no. If the defendant's attorney failed, there could be a possibility of a mistrial, due to the error.

There were no further questions.

The hearing of House Bill 13 ended.

EXECUTIVE SESSION

HOUSE BILL 13

REP. EUDAILY moved House Bill 13 DO PASS. REP. ADDY seconded the motion.

A roll call vote was taken. All members of the committee voted the bill DO PASS except REP. KENNERLY, who was absent.

HOUSE BILL 10

REP. ADDY moved House Bill 10 DO PASS. REP. SEIFERT seconded the motion.

REP. DAILY moved the bill be amended as follows: page 1, section 1, line 16 after "attorney" insert ", city attorney," and section 4, line 2, after "attorney" insert ", city attorney". REP. DAILY also moved that the bill's title be amended to reflect the change.

REP. RAMIREZ stated he was against the amendment because he felt it was not within the bill's purpose. The burden of payment would be on the county attorneys.

REP. CURTISS was also against the amendment stating she was not contacted about the amendment prior to presenting the bill to the committee.

REP. HANNAH asked if the amendment would reflect self-governing cities such as Butte and Billings which are not run by a mayor. CHAIRMAN BROWN asked witness RACICOT to respond. RACICOT stated that some laws that apply to cities under a mayor system do not apply to cities under the self-governing system. He believed that virtually all the hearings go to the county attorney.

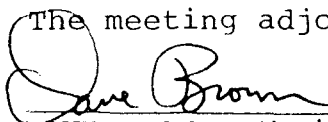
A roll call vote was taken on the amendment. Representatives D. BROWN, ADDY, DAILY, FARRIS and VELEBER voted in favor of the motion. Representatives BERGENE, J. BROWN, CURTISS, DARKO, EUDAILY, HANNAH, IVERSON, JENSEN, KEYSER, RAMIREZ, SCHYE, SEIFERT and SPAETH voted against the motion. The amendment failed 13 to 5. REP. KENNERLY did not vote.

A roll call vote was taken on the original motion of DO PASS. All representatives voted in favor of the motion except REP. KENNERLY, who was absent.

CHAIRMAN BROWN informed the committee of a list of committee bills the Task Force on Corrections developed. The bills need sponsors. CHAIRMAN BROWN encouraged the committee members to review the list to see if they would consider either sponsoring one of the bills or to have a committee bill.

The next meeting is scheduled for Monday, January 10, 1983. Bills to be heard are House Bill 53, House Bill 61 and House Bill 71.

The meeting adjourned at 8:52 a.m.


DAVE BROWN, Chairman


Maureen Richardson, Secretary

STANDING COMMITTEE REPORT

January 6, 19 83

MR. **SPEAKER**

We, your committee on **HOUSE JUDICIARY**

having had under consideration **HOUSE** Bill No. **13**

First

reading copy **White**
Color

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING THE TRAINING
COORDINATOR FOR COUNTY ATTORNEYS TO PREPARE AND DISTRIBUTE A
CHECKLIST OF LEGAL ERRORS OR OBJECTIONS."

Respectfully report as follows: That **HOUSE** Bill No. **13**

DO PASS

STANDING COMMITTEE REPORT

January 6, 1983

MR. SPEAKER

We, your committee on HOUSE JUDICIARY

having had under consideration HOUSE Bill No. 10

First TRAINING COST (white)
Color

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT THE TRAINING COORDINATOR FOR COUNTY ATTORNEYS MAY ACT AS SPECIAL COUNSEL TO A COUNTY; REQUIRING THE COUNTY TO PAY FOR THESE SPECIAL COUNSEL SERVICES; AMENDING SECTION 44-4-103, MCA."

Respectfully report as follows: That HOUSE Bill No. 10

DO PASS

	Date: 1/6 No: HB 13 Do Pass	Date: 1/6 No: HB 10 Amendment	Date: 1/6 No: HB 10 Do Pass	Date: No:	Date No:	Date: No:
BROWN, Dave	Yes	Yes	Yes			
ADDY, Kelly	Yes	Yes	Yes			
BERGENE, Toni	Yes	No	Yes			
BROWN, Jan	Yes	No	Yes			
CURTISS, Aubyn	Yes	No	Yes			
DAILY, Fritz	Yes	Yes	Yes			
DARKO, Paula	Yes	No	Yes			
EUDAILY, Ralph	Yes	No	Yes			
FARRIS, Carol	Yes	Yes	Yes			
HANNAH, Tom	Yes	No	Yes			
IVERSON, Dennis	Yes	No	Yes			
JENSEN, James	Yes	No	Yes			
KENNERLY, Roland	-	-	-			
KEYSER, Kerry	Yes	No	Yes			
RAMIREZ, Jack	Yes	No	Yes			
SCHYE, Ted	Yes	No	Yes			
SEIFERT, Carl	Yes	No	Yes			
SPAETH, Gary	Yes	No	Yes			
VELEBER, Dennis	Yes	Yes	Yes			
18 - 0			5 - 13	18 - 0		

HOUSE BILL 10

EXHIBIT H
HB 10 1/6/83

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE - FOR THE RECORD I AM
AUBYN CURITSS, DISTRICT 20 REPRESENTATIVE.

MR. CHAIRMAN, THE PUBLIC IN RECENT YEARS HAS BECOME INCREASINGLY
CRITICAL OF MONTANA'S COURTS AND THE ENTIRE JUSTICE SYSTEM. MOST
OF THAT CRITICISM STEMS FROM FRUSTRATION OVER COSTS OF PROSECUTING
INDIVIDUAL CASES TIME AFTER TIME AND ^{a system} WHICH PERMITS APPEAL AFTER
APPEAL TO BE BROUGHT WITHOUT ANY FINAL DISPOSITION BEING MADE.

TOO OFTEN WE HEAR THAT TIME AND THE SYSTEM AID ONLY OFFENDERS WHILE
THE PUBLIC CONTINUES TO BE VICTIMIZED.

PASSAGE OF SJR30 AND HJR 2 PROMPTED THE 47TH LEGISLATURE TO
ESTABLISH AN INTERIM JOINT SUBCOMMITTEE ON JUDICIARY TO STUDY
FACTORS RESPONSIBLE FOR DELAYS AND INEFFICIENCY IN THE CRIMINAL
JUSTICE SYSTEM AND REPORT ITS FINDINGS TO THIS LEGISLATIVE BODY.

THE TWO BILLS SUBMITTED FOR YOUR CONSIDERATION TODAY ARE DISCUSSED
IN THE INTERIM REPORTS WHICH HAVE BEEN PLACED ON YOUR DESKS.

HOUSE BILL 10 PROVIDES THAT THE TRAINING COORDINATOR FOR COUNTY
ATTORNEYS MAY ACT AS SPECIAL COUNSEL TO COUNTIES UPON REQUEST OF
THE GOVERNING BODIES. IN RARE INSTANCES WHERE A MEMBER OF THE
GOVERNING BODY OR HIS RELATIVE IS INVOLVED, THE COORDINATOR MAY,
WITH THE CONSENT OF THE ATTORNEY GENERAL, ACT AS SPECIAL COUNSEL
UPON REQUEST OF THE COUNTY ATTORNEY.

SOME MONTANA COUNTIES WITH SMALLER POPULATIONS AND LIMITED RESOURCES
ARE OFTEN TIMES CONFRONTED WITH THE NECESSITY OF PROSECUTING COMPLEX
CASES WHICH THEY HAVE NEITHER THE PERSONNEL OR CAPABILITY TO
DO ADEQUATELY.

HOUSE BILL 10 PROVIDES STATUTORILY FOR A FUNCTION THAT THE TRAINING COORDINATOR IS ALREADY PERFORMING AND EXTENDS THE OPTION OF REQUESTING A SPECIAL PROSECUTOR TO THE COUNTY PROSECUTOR AS WELL AS THE GOVERNING BODY.

GIVEN THE REINFORCEMENT AND RESOURCES OF THE COORDINATOR'S OFFICE, COUNTY PROSECUTORS WOULD HAVE AVAILABLE TO THEM DATA AND EXPERTISE TO ENABLE THEM TO DO THEIR JOBS MORE EFFICIENTLY AND EXPEDITIOUSLY. BETTER, MORE COMPREHENSIVE CASE PREPARATION ELIMINATES MUCH POTENTIAL FOR ERROR WHICH RESULTS IN SUBSEQUENT APPEALS. ANY STRENGTHENING OF THE SYSTEM CAN NOT ONLY SAVE DOLLARS, BUT ALSO HELP RESTORE PUBLIC CONFIDENCE.

I URGE THE COMMITTEE TO ACT FAVORABLY ON THIS BILL.

HOUSE BILL 13

MR. CHAIRMAN, MEMBERS OF THE JUDICIARY COMMITTEE:

FOR THE RECORD, I AM AUBYN CURTISS, DISTRICT 20 REPRESENTATIVE.

MR. CHAIRMAN, HOUSE BILL 13 AGAIN RELATES TO THE FUNCTIONS PERFORMED BY THE TRAINING COORDINATOR FOR COUNTY ATTORNEYS WITHIN THE DEPARTMENT OF JUSTICE. HOUSE BILL 13, LIKE THE PRECEDING BILL, IS INTRODUCED AND RECOMMENDED BY THE INTERIM SUBCOMMITTEE ON THE JUDICIARY AS A WAY TO PROMOTE MORE EFFICIENCY AND ^{TO} ALLEVIATE ~~THE~~ ~~AN~~ ERROR IN CASE PREPARATION.

IT WOULD REQUIRE THE TRAINING COORDINATOR FOR COUNTY ATTORNEYS TO PREPARE A CHECK LIST OF LEGAL ERRORS OR OBJECTIONS WHICH COULD BE RAISED IN DEFENSE TO ANY CRIMINAL CHARGE WHICH COULD BE BROUGHT IN THE DISTRICT COURTS FOR WHICH THE DEFENDANT MAY BE SENTENCED TO DEATH, IT WOULD APPLY ONLY TO CAPITAL CASES, MUCH LIKE THE CHECK LIST SYSTEM USED IN THE GEORGIA UNIFIED REVIEW PROCEDURE.

THE CHECK LIST MUST BE DISTRIBUTED BY THE TRAINING COORDINATOR TO "DISTRICT COURTS AND COUNTY ATTORNEYS AND ALL LAWYERS REGULARLY APPEARING ON BEHALF OF CRIMINAL DEFENDANTS".

SUB-SECTION 3, PAGE 1, LINE 21-23, HAS BEEN INCLUDED TO MAKE SURE THAT THE FAILURE OF THE TRAINING COORDINATOR TO PREPARE OR DISTRIBUTE THE CHECKLIST, OR FAILURE OF OTHERS TO USE THE CHECKLIST WOULD NOT SERVE AS A BASIS FOR LEGAL ERROR OR BASIS FOR APPEAL OF THE DISTRICT COURT DECISION.

THE CHECKLIST SYSTEM IS PRESENTED AS A TIME-
SAVING TOOL TO PREVENT
ERROR AND SUBSEQUENT DELAY WHICH MUST BE CORRECTED BY THE SUPREME
COURT, AND ^{its use} ^{should} ULTIMATELY SAVE TIME AND LESSEN CASE LOADS.

AN EXAMPLE OF AN ERROR CREATING DELAY WHICH MIGHT HAVE BEEN
PREVENTED BY THE USE OF THE CHECKLIST IS THE RECENT CASE OF
MONTANA V. MIKE WELLING:

MR. CHAIRMAN, I WILL ENDEAVOR TO ANSWER ANY QUESTIONS.

Exhibit
C

B 13

case of State of Montana v. Mike Welling, Mont. _____, P.2d _____, 39 St. Rep. 1215 (decided, July 8, 1982). In the Welling case, the defendant was convicted of burglary in the Glacier County District Court, Honorable R. D. McPhillips presiding, and the defendant appealed his conviction to the Supreme Court. On appeal, the Supreme Court held that not only had the county attorney failed to give three days notice of his intention to seek sentencing of Mr. Welling as a persistent felony offender, as that notice is required by Section 46-18-503, MCA, but in addition to the error committed by the county attorney, the district court judge had failed to explain to the defendant his reasons for imposing a stiffer (13-year) sentence upon the defendant than the defendant would have received under a plea bargain agreement offered by the state (5-year sentence). Such an explanation of the reason for a stiffer sentence is required by State v. Baldwin, Mont. _____, 629 P.2d 222, 38 St. Rep. 882 (1981). In order to rectify both of these errors, the Supreme Court remanded the case to the district trial for resentencing. Thus, both the county attorney and the district court judge made errors of law which could have been cured by the distribution and use of a checklist citing the requirement for three days' notice contained in 46-18-503 and the requirement for the sentencing explanation contained in the Baldwin case. Instead, additional time was required by the Supreme Court both to review the errors made by the county attorney and the district judge, and additional time was again required by the district court to resentence the defendant in accordance with the Supreme Court's opinion.

A brief explanation of the problem in Welling and a request that the Committee's counsel explain the problem to the Committee should suffice.

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CHECKLIST

Categories of Some Possible Errors

I. Pre-Trial

Some possible errors arising or complained of prior to trial

A. Arrest

Ga. Code Title 27, Chs. 1 and 2

1. With warrant, Ga. Code § 27-102 et seq.
2. Without warrant, Ga. Code § 27-207 et seq.
3. Without warrant, in home
 - a) Payton v. New York, — U. S. —, 100 S. Ct. 1371, 63 L. Ed. 2d 639, 27 Cr. L. 3033 (1980)
4. Juvenile Proceedings and Procedures
 - a) Ga. Code § 24A-101, et seq.
 - b) Transfer, Code § 24A-2501. *Lewis v. State*, 246 Ga. 101

B. Search and Seizure

Ga. Code § 27-301, et seq.

1. With warrant
 - a) Sufficiency of particularity of description
 - b) Sufficiency of probable cause
 - c) Warrant procedure

- 1) In obtainment of warrant
- 2) In execution of warrant
2. Without warrant
 - a) Person
 - 1) Incident to arrest
 - 2) Stop and frisk
Terry v. Ohio, 392 U. S. 1
 - 3) Probable cause
 - 4) Consent
 - b) Vehicle
 - 1) Probable cause
Chambers v. Maroney, 399 U. S. 42
Underhill v. State, 129 Ga. App. 65
 - 2) Momentary detention based upon specific and articulable suspicion and seizure from plain view
Anderson v. State, 123 Ga. App. 57
 - 3) Incident to arrest
 - a) Impoundment
 - b) Seizure from plain view
Harris v. United States, 390 U. S. 234
 - c) Premises
 - 1) Incident to arrest
Chimel v. Calif., 395 U. S. 752
 - 2) Probable cause (exigent circumstances)
Warden v. Hayden, 387 U. S. 294
Hall v. State, 135 Ga. App. 690, 691 (3)
Clare v. State, 135 Ga. App. 281, 284
3. Electronic surveillance
 - a) With warrant
 - 1) Compliance with Federal statute U. S. C. 18-2516, et seq.
 - 2) Compliance with Georgia statute Ga. Code § 26-3004
 - b) Without warrant
 - 1) Federal criteria
U. S. C. 18-2511 (2) (c) (d) etc.
 - 2) Georgia criteria
Ga. Code § 26-3006
4. Motion to Suppress
 - a) Ga. Code § 27-313
 - b) File before trial if ground known
Thomas v. State, 118 Ga. App. 359
- C. Identification
Stovall v. Denno, 388 U. S. 293
Neil v. Biggers, 409 U. S. 188
 1. Encounter of witness and suspect
 2. Lineup
 3. Photographic display
- D. Confessions and Admissions

1. Miranda Warnings
 - Miranda v. Arizona, 384 U. S. 436
 - a) Applicability of Miranda
 - b) Compliance with Miranda (where applicable)
2. Georgia Standard
 - Ga. Code § 38-411
3. By co-conspirators
 - a) Ga. Code §§ 38-306, 38-414
 - b) Bruton v. United States, 391 U. S. 123
4. Juvenile Procedure
 - a) Ga. Code § 24A-1402; applied in *Crawford v. State*, 240 Ga. 321, 325
 - b) Totality of circumstances test — *Riley v. State*, 237 Ga. 124, 128
- E. Bail
 - Ga. Code § 27-901, et seq.
 - Ga. Code § 27-1402
- F. Representation by Counsel
 1. Rights of indigents
 - a) Gideon v. Wainwright, 372 U. S. 335
 - b) Ga. Code § 27-3201, et seq.
 2. Effective assistance of counsel
 - Young v. State*, 239 Ga. 53, 60
- G. Grand Jury Proceedings
 1. Challenge to array of Grand Jury
 2. Should be filed before indictment returned, unless ground unknown
 - Blevins v. State*, 220 Ga. 720 (3)
 - Paul v. State*, 144 Ga. App. 106
 - Thomas v. State*, 239 Ga. 734
- H. Demurrers, Motions to Quash and Special Pleas
 1. Ga. Code §§ 27-1501, 27-1601
 - Bramblett v. State*, 239 Ga. 336
 2. Must be made before pleading to merits
 - Burns v. State*, 191 Ga. 60
 - Thomasson v. State*, 22 Ga. 499 (1)
 3. Motion in arrest of judgment after trial must go to real merits of offense charged
 - Ga. Code § 27-1601; *Colwell v. State*, 17 Ga. App. 750 (1)
- I. Arraignment
 1. Notices and Demands
 - a) Ga. Code § 27-1401. Notice of arraignment
 - b) Ga. Code § 27-1403. Copy of indictment and list of witnesses
 2. Competency of Plea
 - Kercheval v. United States*, 274 U. S. 220
 - Boykin v. Ala.*, 395 U. S. 238
 3. Entering and Withdrawal of Plea
 - a) Ga. Code § 27-1401, § 27-1404, et seq.

- b) *Fair v. State*, 245 Ga. 868; *State v. Germany*, 246 Ga. 455

J. Competency of Defendant

- 1. Motion for mental examination
- 2. Special plea of insanity
 - a) Ga. Code §§ 27-1502, 27-1504
- 3. General plea of insanity
 - a) Ga. Code § 27-1503; § 26-702, et seq.

K. Other Pleas in Bar

- 1. Double jeopardy
 - a) U. S. Constitution, Amendments 5 and 14. *Benton v. Md.*, 395 U. S. 784
 - b) Ga. Constitution, Article I, Section I, Paragraph XV (Ga. Code § 2-115)
 - c) Plea to be made in writing prior to arraignment.
Holmes v. State, 120 Ga. App. 281
- 2. Statute of limitations
Ga. Code § 26-502
- 3. Denial of Speedy Trial
 - a) Demand, Ga. Code §§ 27-1901.1, 27-1901.2
 - b) U. S. Constitution, Amendments 6 and 14
Barker v. Wingo, 407 U. S. 514
Hall v. State, 131 Ga. App. 786, 787

L. Discovery

- 1. Brady Motion
 - a) *Brady v. Md.*, 373 U. S. 83
 - b) *Williams v. Dutton*, 400 F. 2d 797
 - c) *United States v. Agurs*, 427 U. S. 97
 - d) *Wilson v. State*, 246 Ga. 62 (1)
- 2. Ga. Code §§ 27-1302, 27-1303
 - a) § 27-1302. Discovery of statement by defendant
 - b) Must be demanded in writing within a reasonable time prior to trial.
 - c) 27-1303. Discovery of scientific reports
 - d) Must be demanded in writing at arraignment or within a reasonable time prior to trial. After arraignment, what is reasonable time is in trial judge's discretion.
- 3. Notice to Produce
 - a) Ga. Code §§ 38-801, 38-802
 - b) *Brown v. State*, 238 Ga. 98; *Wilson v. State*, 246 Ga. 62 (1)
- 4. Other discovery motions
 - a) Independent examination of evidence by defense expert
Barnard v. Henderson, 514 F. 2d 744 (5th Cir. 1975)
Patterson v. State, 238 Ga. 204

M. Motion for Severance

- 1. Severance of defendants
Ga. Code § 27-2101
- 2. Severance of offenses
Ga. Code § 26-506

N. Other Pre-Trial Motions**1. Bruton Motion**

- a) *Bruton v. United States*, 391 U. S. 123

2. Giglio Motion

- a) *Giglio v. United States*, 405 U. S. 150

- b) *Allen v. State*, 128 Ga. App. 361

3. Stipulations

- a) Polygraph

State v. Chambers, 240 Ga. 76

- b) Expert testimony

O. Motion for Change of Venue

Ga. Code § 27-1201; *Jarrell v. State*, 234 Ga. 410, 416;

United States v. Williams, 523 F. 2d 1203

P. Motion to disqualify

1. Judge

2. Prosecutor

Q. Motion for Continuance

Ga. Code §§ 27-2001—2004

Ga. Code § 81-1401, et seq.

R. Motions Regarding Publicity

1. Change of venue

Murphy v. Fla., 421 U. S. 794

Brooks v. State, 244 Ga. 574

Coleman v. State, 237 Ga. 84

2. Limit pre-trial publicity

Estes v. Texas, 381 U. S. 532

Sheppard v. Maxwell, 384 U. S. 333

3. Motion for private proceedings

Richmond Newspapers, Inc. v. Virginia, — U. S. —, 27

Cr. L. 3261; 48 L. W. 5008

S. Challenge to the Array of Petit Jurors

1. *Whitus v. Georgia*, 385 U. S. 545

2. Ga. Code § 59-803

3. Should be raised at time panels put upon defendant

Young v. State, 232 Ga. 285

- a. Lack of substantial compliance with the statute

- b. Failure to comply with statute

- c. Systematic, purposeful exclusion based upon:

1. Religion

2. Race

3. Sex

II. Trial Proceedings

Some possible errors arising or complained of during trial

A. Voir Dire

1. Challenge for cause

- a) Ga. Code § 59-804

- b) *Witherspoon v. Ill.*, 391 U. S. 510

2. Character and extent of examination of jurors

- a) Ga. Code §§ 59-705, 59-806

- B. Opening Statements
 - 1. Allowance of objectionable comments by state
 - 2. Refusal of particular comments by the defense
- C. Hearings Outside the Presence of the Jury
 - 1. Jackson v. Denno Hearing
 - a) Jackson v. Denno, 378 U. S. 368
 - b) Watson v. State, 227 Ga. 698
 - 2. Motion to quash in-court identification
 - a) Holcomb v. State, 128 Ga. App. 238
 - 3. Motions in limine made during trial
 - Definition: *Harley-Davidson Motor Co., Inc. v. Daniel*, 244 Ga. 284
- D. Basic Categories of Issues Which May Arise Regarding Admissibility of Evidence
 - 1. Authentication
 - Dill v. State*, 106 Ga. 683 (3)
 - Bryan v. State*, 206 Ga. 73, 74
 - Taylor v. State*, 75 Ga. App. 205 (1)
 - Denson v. State*, 209 Ga. 355 (6)
 - 2. Best Evidence Rule, Ga. Code § 28-203, et seq.
 - 3. Character Evidence, Ga. Code §§ 38-202, 38-1804
 - 4. Circumstantial Evidence, Ga. Code §§ 38-102, 38-109, 38-110
 - 5. Competency of Witnesses, Ga. Code § 38-1601 et seq.
 - 6. Conduct of Witnesses
 - 7. Constitutional Rights
 - 8. Demonstrative Evidence
 - a) Tangible Objects, *Haire v. State*, 209 Ga. 378 (1)
 - b) Documents
 - 1) Public — Ga. Code § 28-601, et seq.
 - 2) Private — Ga. Code § 38-701, et seq.
 - 9. Examination of Witnesses, Ga. Code § 38-1701 et seq.
 - a) Direct
 - b) Cross
 - c) Re-direct
 - d) Re-cross
 - 10. Hearsay and Exceptions, Ga. Code § 38-301, et seq.
 - 11. Impeachment, Ga. Code § 38-1801, et seq.
 - 12. Opinion
 - a) Expert, Ga. Code § 38-1710
 - b) Lay, Ga. Code § 38-1708
 - 13. Presumptions
 - 14. Privileged Communications, Ga. Code §§ 38-418—38-419.1, 38-1102, 38-1205
 - 15. Relevancy and Materiality, Ga. Code §§ 38-201, 38-202
- E. Motions for Mistrial and for Corrective Instructions
 - Should be made promptly
 - Cochran v. State*, 213 Ga. 706
- F. Motion for Directed Verdict (Sufficiency of the Evidence)

Criterion — *Merino v. State*, 230 Ga. 604, 605 (1)

Ga. Code § 27-1802

Jackson v. Va., 443 U. S. 307

G. Closing Argument

Ga. Code § 27-2201, et seq.; §§ 9-601; 24-3319; 81-1009

1. Injection by state of matter not in evidence
2. Restriction of argument of defense counsel
3. State commenting on the silence of the accused prior to trial
4. State commenting on defendant's failure to testify in trial —
Ga. Code § 38-415
5. State commenting on failure of defendant's wife to testify
6. Improper comment on the law
7. Expression of purely personal opinion regarding the evidence
or the guilt or innocence of the accused

H. Charge of the Court

Ga. Code § 70-207; § 81-1101, et seq.

1. Exception to charge given
2. Exception to court's refusal to give requested charge
3. Exception to court's failure to charge without request
4. Exception to court's response to jury question

I. Conduct of the Judge

See ABA Standards for Criminal Justice — Trial By Jury 5.6.

1. Comment on the evidence
Ga. Code § 81-1104
2. Control of Counsel
DeFreese v. State, 232 Ga. 739; *Davis v. State*, 234 Ga. 730
3. Physical control of defendant
Allen v. State, 235 Ga. 709
4. Restricting proper use of admitted evidence
Parker v. State, 3 Ga. App. 21
5. Supervision of examination of witnesses by counsel
Pound v. State, 43 Ga. 88; *Dunn v. State*, 123 Ga. App. 607
6. Examination of witnesses by judge
Thomas v. State, 240 Ga. 393; *Perdue v. State*, 147 Ga. App. 648
7. Intimidation of witness
Wynne v. State, 139 Ga. App. 355
8. Supervision of jury
Lyman v. State, 69 Ga. 404
9. Special care in capital cases
Riggins v. State, 226 Ga. 381
10. Comment on merits of defense
Jaques v. State, 111 Ga. 832; *Smallwood v. State*, 95 Ga. App. 766
11. Coercion of jury
King v. State, 92 Ga. App. 616
12. Comments re post-trial remedies
Floyd v. State, 135 Ga. App. 217
13. Comment on failure of defendant to testify
Ash v. State, 109 Ga. App. 177; Ga. App. 177; Ga. Code § 38-415

14. Comment on credibility of witness
Benton v. State, 58 Ga. App. 633
15. Power of court
Ga. Code § 24-104
16. Powers of court to punish for contempt
Ga. Code § 24-105
- J. Conduct of Counsel
Ga. Code §§ 9-601; 38-1605; 81-1009; *Miller v. Pate*, 386 U. S. 1
 1. Misconduct of district attorney
 2. Proper conduct of defense counsel prevented
 3. Manner of conducting direct, cross, re-direct and re-cross examination
 4. Invited error
- K. Conduct of Jurors
 1. Before trial
Hayes v. State, 136 Ga. App. 746
 2. During trial
Denson v. State, 149 Ga. App. 453, 455 (3)
 3. During deliberation
Maltbie v. State, 139 Ga. App. 342
 4. Improper communication with and by non-jurors
Wellmaker v. State, 124 Ga. App. 37
 5. Improper exposure to publicity
United States v. Herring, 568 F. 2d 1099 (5th Cir. 1978)
 6. Separation of jury
Legare v. State, 243 Ga. 744, 752 (11)
 7. Items taken to jury room
Holcomb v. State, 130 Ga. App. 154, 156 (4)
 8. Alternates
Ga. Code § 59-906, et seq.
 9. Jury request to re-hear evidence
Johns v. State, 239 Ga. 681
- L. Conduct of Witnesses
 1. Violation of rule of sequestration
Ga. Code § 38-1703
 2. Failure to comply with court orders
Baker v. State, 131 Ga. App. 48 (2)
- M. Conduct of the Defendant
 1. Presence of the defendant waived by voluntary absence after trial begins.
Byrd v. Ricketts, 233 Ga. 779
 2. Disruptive defendant
Illinois v. Allen, 397 U. S. 337
 3. Assisting in defense
Jackson v. State, 149 Ga. App. 496
- N. Verdict on Issue of Guilt or Innocence
Ga. Code § 27-2301
 1. Substance
 2. Form

3. Poll of jurors
Maddox v. State, 233 Ga. 874, 876
- O. Sentence Phase
Ga. Code §§ 27-2503, 27-2534.1, 27-2537
 1. Evidence
Brown v. State, 235 Ga. 644; *Gregg v. State*, 233 Ga. 117; 428 U. S. 153; *Queen v. State*, 131 Ga. App. 370, 373 (4)
 2. Argument
Brown, supra; *Gregg*, supra
 3. Charge
Spivey v. State, 241 Ga. 477; *Stephens v. Hopper*, 241 Ga. 596
 4. Verdict
Gibson v. State, 236 Ga. 874; *Miller v. State*, 237 Ga. 557, 559
 - a) Substance
 - b) Form
 - c) Poll of jurors
 5. Sentence
- P. Effective Assistance of Counsel
Akridge v. Hopper, 545 F. 2d 457, cert. den. 431 U. S. 941
Gaines v. Hopper, 430 F. Supp. 1173, aff. 575 F. 2d 1147
Brown v. State, 242 Ga. 536, 539
- Q. Review Proceedings
 1. See "Unified Appeal, Outline of Proceedings, Part IV, A."
 2. Motion for New Trial, Ga. Code Title 70
 3. Appeal, Ga. Code Title 6

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