

# **The Georgia Law Enforcement and Prosecutors Manual on Child Exploitation Crimes**

## **Statutory and Case Law**



**NATIONAL LAW CENTER  
FOR CHILDREN AND FAMILIES**



## **National Law Center for Children and Families' Preface to the 2008 Second Edition**

It is our honor at the National Law Center for Children and Families to provide this second edition of the Georgia State Manual. This manual is an update and refinement of the legal manual produced by the National Center for Missing and Exploited Children (NCMEC) in 2004.

The National Law Center is a non-profit law center formed in 1991 and based in Alexandria, Virginia. It has since served as an agent of change and education in the area of child sexual exploitation. The NLC is proud to continue that service today in seminars and through its website, [www.nationallawcenter.org](http://www.nationallawcenter.org). In addition to these projects, the National Law Center has entered into a partnership with the NCMEC to update these existing 25 manuals. Over the next few years we will update these existing manuals and create new manuals for prosecutors and law enforcement professionals to use in the defense of children and families.

Additionally, the manual would not have been completed were it not for the support of NCMEC's Legal Staff and L.J. Decker, NLC Law Clerk (3L Georgetown University Law Center), Christien Oliver, NLC Law Clerk (JD George Washington School of Law 2008), Tara Steinnerd, NLC Law Clerk (3L Catholic University School of Law), Michael Bare (Valparaiso University School of Law), Amanda Rekow (University of Idaho College of Law), Leigh Darrell (University of Baltimore School of Law), Aeri Yum (University of Hawaii Richardson School of Law), Aimee Conway (Suffolk University Law School), Jennifer Allen (University of Hawaii Richardson School of Law), Judith Harris (University of Hawaii Richardson School of Law), Lianne Aoki (University of Hawaii Richardson School of Law), Jeffrey Van Der Veer (University of Colorado School of Law), and Kelly Higa (University of Hawaii Richardson School of Law).

The Editors,

**National Law Center for Children and Families  
June 2008**

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# GEORGIA

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  - c. Jury Charges
  - d. Conviction of a Lesser Crime Warranted
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# GEORGIA

## *Case List by Court*

*A case with ++ indicates that although the subject matter is not child exploitation, the principle presented may still apply.*

### **I. U.S. Supreme Court**

*United States v. Matlock*, 415 U.S. 164 (1974)

### **II. Supreme Court of Georgia**

*Aman v. State*, 409 S.E.2d 645 (Ga. 1991)

*Brewer v. State*, 523 S.E.2d 18 (Ga. 1999)

*Cimildoro v. State*, 387 S.E.2d 335 (Ga. 1990)

*Johnson v. State*, 573 S.E.2d 362 (Ga. 2002)

*Luke v. Battle*, 565 S.E.2d 816 (Ga. 2002)

*Odett v. State*, 541 S.E.2d 29 (Ga. 2001)

*O'Heron v. Blaney*, 583 S.E.2d 834 (Ga. 2003)

*Phagan v. State*, 486 S.E.2d 876 (Ga. 1997)

*Presnell v. State*, 551 S.E.2d 723 (Ga. 2001)

*Pruitt v. State*, 514 S.E.2d 639 (Ga. 1999)

*Reed v. State*, 448 S.E.2d 189 (Ga. 1994)

*State v. Randolph*, 604 S.E.2d 614 (Ga. 2004)

*Woodruff v. Woodruff*, 531 S.E.2d 714 (Ga. 2000)

*Wittschen v. State*, 383 S.E.2d 885 (Ga. 1989)

### **III. Court of Appeals of Arkansas**

*Abdulkadir v. State*, 592 S.E.2d 433 (Ga. Ct. App. 2003)

*Abernathy v. State*, 536 S.E.2d 289 (Ga. Ct. App. 2000)

*Abreu v. State*, 425 S.E.2d 331 (Ga. Ct. App. 1992)

*Akins v. State*, 526 S.E.2d 157 (Ga. Ct. App. 1999)

*Allen v. State*, 533 S.E.2d 401 (Ga. Ct. App. 2000)

*Altman v. State*, 495 S.E.2d 106 (Ga. Ct. App. 1997)

*Alvarado v. State*, 547 S.E.2d 616 (Ga. Ct. App. 2001)

*Arnold v. State*, 545 S.E.2d 312 (Ga. Ct. App. 2001)

*Atkins v. State*, 533 S.E.2d 152 (Ga. Ct. App. 2000)

*Autry v. State*, 549 S.E.2d 769 (Ga. Ct. App. 2001)

*Baker v. State*, 555 S.E.2d 899 (Ga. Ct. App. 2001)

*Baker v. State*, 527 S.E.2d 266 (Ga. Ct. App. 1999)

*Barrett v. State*, 559 S.E.2d 108 (Ga. Ct. App. 2002)

*Bayles v. State*, 373 S.E.2d 266 (Ga. Ct. App. 1988)

*Beck v. State*, 551 S.E.2d 68 (Ga. Ct. App. 2001)

*Beck v. State*, 587 S.E.2d 316 (Ga. Ct. App. 2003)

*Bell v. State*, 589 S.E.2d 653 (Ga. Ct. App. 2003)  
*Berry v. State*, 508 S.E.2d 435 (Ga. Ct. App. 1998)  
*Bing v. State*, 567 S.E.2d 731 (Ga. Ct. App. 2002)  
*Bishop v. State*, 555 S.E.2d 504 (Ga. Ct. App. 2001)  
*Blansit v. State*, 546 S.E.2d 81 (Ga. Ct. App. 2001)  
*Boatright v. State*, 385 S.E.2d 298 (Ga. Ct. App. 1989)  
*Bolton v. State*, 574 S.E.2d 659 (Ga. Ct. App. 2002)  
*Booth v. State*, 590 S.E.2d 789 (Ga. Ct. App. 2003)  
*Bowman v. State*, 490 S.E.2d 163 (Ga. Ct. App. 1997)  
*Bragg v. State*, 457 S.E.2d 262 (Ga. Ct. App. 1995)  
*Branesky v. State*, 584 S.E.2d 669 (Ga. Ct. App. 2003)  
*Brinson v. State*, 530 S.E.2d 798 (Ga. Ct. App. 2000)  
*Brooks v. State*, 501 S.E.2d 286 (Ga. Ct. App. 1998)  
*Brown v. State*, 600 S.E.2d 774 (Ga. Ct. App. 2004)  
*Brownlow v. State*, 544 S.E.2d 472 (Ga. Ct. App. 2001)  
*Bruce v. State*, 603 S.E.2d 33 (Ga. Ct. App. 2004)  
*Bryan v. State*, 541 S.E.2d 97 (Ga. Ct. App. 2000)  
*Buckley v. State*, 561 S.E.2d 188 (Ga. Ct. App. 2002)  
*Callahan v. State*, 418 S.E.2d 157 (Ga. Ct. App. 1992)  
*Callahan v. State*, 568 S.E.2d 780 (Ga. Ct. App. 2002)  
*Campos v. State*, 587 S.E.2d 264 (Ga. Ct. App. 2003)  
*Carolina v. State*, 623 S.E. 2d 151 (Ga. Ct. App. 2005)  
*Carson v. State*, 576 S.E.2d 12 (Ga. Ct. App. 2002)  
*Carswell v. State*, 534 S.E.2d 568 (Ga. Ct. App. 2000)  
*Chalifoux v. State*, 587 S.E.2d 62 (Ga. Ct. App. 2003)  
*Chancey v. State*, 574 S.E.2d 904 (Ga. Ct. App. 2002)  
*Cheek v. State*, 593 S.E.2d 55 (Ga. Ct. App. 2003)  
*Childers v. State*, 571 S.E.2d 420 (Ga. Ct. App. 2002)  
*Coalson v. State*, 555 S.E.2d 128 (Ga. Ct. App. 2001)  
*Cobb v. State*, 561 S.E.2d 124 (Ga. Ct. App. 2002)  
*Colbert v. State*, 564 S.E.2d 787 (Ga. Ct. App. 2002)  
*Collins v. State*, 560 S.E.2d 767 (Ga. Ct. App. 2002)  
*Condra v. State*, 518 S.E.2d 186 (Ga. Ct. App. 1999)  
*Conejo v. State*, 374 S.E.2d 826 (Ga. Ct. App. 1988)  
*Corn v. State*, 568 S.E.2d 583 (Ga. Ct. App. 2002)  
*Cornelius v. State*, 445 S.E.2d 800 (Ga. Ct. App. 1994)  
*Couch v. State*, 545 S.E.2d 685 (Ga. Ct. App. 2001)  
*Cox v. State*, 526 S.E.2d 887 (Ga. Ct. App. 1999)  
*Craft v. State*, 558 S.E.2d 18 (Ga. Ct. App. 2001)  
*Croy v. State*, 545 S.E.2d 80 (Ga. Ct. App. 2001)  
*Damare v. State*, 571 S.E.2d 507 (Ga. Ct. App. 2002)  
*Deal v. State*, 528 S.E.2d 289 (Ga. Ct. App. 2000)  
*Dean v. State*, 555 S.E.2d 868 (Ga. Ct. App. 2001)  
*Dennard v. State*, 534 S.E.2d 182 (Ga. Ct. App. 2000)  
*Dorsey v. State*, 593 S.E.2d 945 (Ga. Ct. App. 2004)  
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*Dowd v. State*, 582 S.E.2d 235 (Ga. Ct. App. 2003)  
*Downs v. State*, 572 S.E.2d 54 (Ga. Ct. App. 2002)  
*Dunagan v. State*, 565 S.E.2d 526 (Ga. Ct. App. 2002)  
*Duncan v. State*, 584 S.E.2d 681 (Ga. Ct. App. 2003)  
*Edwards v. State*, 559 S.E.2d 506 (Ga. Ct. App. 2002)  
*Eggleston v. State*, 544 S.E.2d 722 (Ga. Ct. App. 2001)  
*Eley v. State*, 596 S.E.2d 660 (Ga. Ct. App. 2004)  
*Emanuel v. State*, 396 S.E.2d 83 (Ga. Ct. App. 1990)  
*Enloe v. State*, 556 S.E.2d 873 (Ga. Ct. App. 2001)  
*Falak v. State*, 583 S.E.2d 146 (Ga. Ct. App. 2003)  
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*Ferreri v. State*, 600 S.E.2d 793 (Ga. Ct. App. 2004)  
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*Fiek v. State*, 597 S.E.2d 585 (Ga. Ct. App. 2004)  
*Flowers v. State*, 566 S.E.2d 339 (Ga. Ct. App. 2002)  
*Foster v. State*, 562 S.E.2d 191 (Ga. Ct. App. 2002)  
*Fowler v. State*, 554 S.E.2d 808 (Ga. Ct. App. 2001)  
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*Frazier v. State*, 583 S.E.2d 188 (Ga. Ct. App. 2003)  
*Frei v. State*, 557 S.E.2d 49 (Ga. Ct. App. 2001)  
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*Gore v. State*, 554 S.E.2d 598 (Ga. Ct. App. 2001)  
*Gosnell v. State*, 544 S.E.2d 477 (Ga. Ct. App. 2001)  
*Gosnell v. State*, 586 S.E.2d 350 (Ga. Ct. App. 2003)  
*Griffin v. State*, 523 S.E.2d 910 (Ga. Ct. App. 1999)  
*Green v. State*, 532 S.E.2d 111 (Ga. Ct. App. 2000)  
*Grimsley v. State*, 505 S.E.2d 522 (Ga. Ct. App. 1998)  
*Greulich v. State*, 588 S.E.2d 450 (Ga. Ct. App. 2003)  
*Grooms v. State*, 583 S.E.2d 216 (Ga. Ct. App. 2003)  
*Groves v. State*, 590 S.E.2d 136 (Ga. Ct. App. 2003)  
*Hall v. State*, 566 S.E.2d 374 (Ga. Ct. App. 2002)  
*Hanson v. State*, 587 S.E.2d 200 (Ga. Ct. App. 2003)  
*Hardeman v. State*, 544 S.E.2d 481 (Ga. Ct. App. 2001)  
*Harland v. State*, 586 S.E.2d 705 (Ga. Ct. App. 2003)  
*Harrell v. State*, 559 S.E.2d 155 (Ga. Ct. App. 2002)  
*Hayes v. State*, 557 S.E.2d 468 (Ga. Ct. App. 2001)  
*Hazelrigs v. State*, 567 S.E.2d 79 (Ga. Ct. App. 2002)  
*Heggs v. State*, 540 S.E.2d 643 (Ga. Ct. App. 2000)  
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*Herendeen v. State*, 601 S.E.2d 372 (Ga. Ct. App. 2004)  
*Hicks v. State*, 563 S.E.2d 897 (Ga. Ct. App. 2002)  
*Hines v. State*, 548 S.E.2d 642 (Ga. Ct. App. 2001)  
*Hightower v. State*, 570 S.E.2d 22 (Ga. Ct. App. 2002)  
*Hoffman v. State*, 576 S.E.2d 102 (Ga. Ct. App. 2003)  
*Holloway v. State*, 601 S.E.2d 753 (Ga. Ct. App. 2004)  
*Honeycutt v. State*, 538 S.E.2d 870 (Ga. Ct. App. 2000)  
*Hopper v. State*, 598 S.E.2d 926 (Ga. Ct. App. 2004)  
*Hostetler v. State*, 582 S.E.2d 197 (Ga. Ct. App. 2003)  
*Howard v. State*, 556 S.E.2d 536 (Ga. Ct. App. 2001)  
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*Hunter v. State*, 391 S.E.2d 695 (Ga. Ct. App. 1990)  
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*Ingram v. State*, 585 S.E.2d 211 (Ga. Ct. App. 2003)  
*In the interest of A.M.*, 578 S.E.2d 226 (Ga. Ct. App. 2003)  
*In the Interest of A.H.*, 578 S.E.2d 247 (Ga. Ct. App. 2003)  
*In the Interest of J.D.*, 534 S.E.2d 112 (Ga. Ct. App. 2000)  
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*Joines v. State*, 591 S.E.2d 454 (Ga. Ct. App. 2003)  
*Johns v. State*, 558 S.E.2d 426 (Ga. Ct. App. 2001)  
*Kidd v. State*, 572 S.E.2d 80 (Ga. Ct. App. 2002)  
*Kight v. State*, 528 S.E.2d 542 (Ga. Ct. App. 2000)  
*Lasseter v. State*, 399 S.E.2d 85 (Ga. Ct. App. 1990)  
*Lay v. State*, 591 S.E.2d 427 (Ga. Ct. App. 2003)  
*Leftwich v. State*, 538 S.E.2d 779 (Ga. Ct. App. 2000)  
*Lockett v. State*, 573 S.E.2d 437 (Ga. Ct. App. 2002)  
*Long v. State*, 526 S.E.2d 875 (Ga. Ct. App. 1999)  
*Lopez v. State*, 572 S.E.2d 736 (Ga. Ct. App. 2002)  
*Loveless v. State*, 538 S.E.2d 464 (Ga. Ct. App. 2000)  
*Lunsford v. State*, 581 S.E.2d 638 (Ga. Ct. App. 2003)  
*Mackler v. State*, 298 S.E.2d 589 (Ga. Ct. App. 1982)  
*Malone v. State*, 541 S.E.2d 431 (Ga. Ct. App. 2000)  
*Mayo v. State*, 582 S.E.2d 482 (Ga. Ct. App. 2003)  
*McCrickard v. State*, 549 S.E.2d 505 (Ga. Ct. App. 2001)  
*McDonald v. State*, 548 S.E.2d 361 (Ga. Ct. App. 2001)  
*McEntyre v. State*, 545 S.E.2d 391 (Ga. Ct. App. 2001)  
*McMillian v. State*, 589 S.E.2d 335 (Ga. Ct. App. 2003)  
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*Miller v. State*, 486 S.E.2d 911 (Ga. Ct. App. 1997)  
*Mills v. State*, 553 S.E.2d 353 (Ga. Ct. App. 2001)

*Minter v. State*, 537 S.E.2d 769 (Ga. Ct. App. 2000)  
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*Moss v. State*, 535 S.E.2d 292 (Ga. Ct. App. 2000)  
*Myrick v. State*, 531 S.E.2d 766 (Ga. Ct. App. 2000)  
*Nelson v. State*, 565 S.E.2d 551 (Ga. Ct. App. 2002)  
*Nichols v. State*, 473 S.E.2d 491 (Ga. Ct. App. 1996)  
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*Pearce v. State*, 570 S.E.2d 74 (Ga. Ct. App. 2002)  
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*Phillips v. State*, 604 S.E.2d 520 (Ga. Ct. App. 2004)  
*Pirkle v. State*, 506 S.E.2d 186 (Ga. Ct. App. 1998)  
*Pittman v. State*, 533 S.E.2d 769 (Ga. Ct. App. 2000)  
*Pollard v. State*, 580 S.E.2d 337 (Ga. Ct. App. 2003)  
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*Putnam v. State*, 592 S.E.2d 462 (Ga. Ct. App. 2003)  
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*Robinson v. State*, 594 S.E.2d 696 (Ga. Ct. App. 2004)  
*Rocha v. State*, 545 S.E.2d 173 (Ga. Ct. App. 2001)  
*Rogers v. State*, 560 S.E.2d 286 (Ga. Ct. App. 2002)  
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*Rudisail v. State*, 593 S.E.2d 747 (Ga. Ct. App. 2004)  
*Satterwhite v. State*, 551 S.E.2d 428 (Ga. Ct. App. 2001)  
*Schneider v. State*, 603 S.E.2d 663 (Ga. Ct. App. 2004)  
*Schultz v. State*, 599 S.E.2d 247 (Ga. Ct. App. 2004)  
*Schwindler v. State*, 563 S.E.2d 154 (Ga. Ct. App. 2002)  
*Seidenfaden v. State*, 547 S.E.2d 578 (Ga. Ct. App. 2001)  
*Sewell v. State*, 536 S.E.2d 173 (Ga. Ct. App. 2000)  
*Shamsuddeen v. State*, 565 S.E.2d 544 (Ga. Ct. App. 2002)  
*Siharath v. State*, 541 S.E.2d 71 (Ga. Ct. App. 2000)  
*Slack v. State*, 593 S.E.2d 664 (Ga. Ct. App. 2004)

*Smith v. State*, 547 S.E.2d 598 (Ga. Ct. App. 2001)  
*Smith v. State*, 570 S.E.2d 400 (Ga. Ct. App. 2002)  
*Smith v. State*, 578 S.E.2d 295 (Ga. Ct. App. 2003)  
*State v. Brown*, 551 S.E.2d 773 (Ga. Ct. App. 2001)  
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*State v. Heggs*, 558 S.E.2d 41 (Ga. Ct. App. 2001)  
*State v. Jones*, 560 S.E.2d 112 (Ga. Ct. App. 2002)  
*State v. Kramer*, 580 S.E.2d 314 (Ga. Ct. App. 2003)  
*State v. Staley*, 548 S.E.2d 26 (Ga. Ct. App. 2001)  
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*Taylor v. State*, 601 S.E.2d 815 (Ga. Ct. App. 2004)  
*Terrell v. State*, 536 S.E.2d 528 (Ga. Ct. App. 2000)  
*Thomas v. State*, 598 S.E.2d 882 (Ga. Ct. App. 2004)  
*Thompson v. State*, 537 S.E.2d 807 (Ga. Ct. App. 2000)  
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*Trew v. State*, 534 S.E.2d 804 (Ga. Ct. App. 2000)  
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*Tyler v. State*, 596 S.E.2d 651 (Ga. Ct. App. 2004)  
*Uden v. State*, 462 S.E.2d 408 (Ga. Ct. App. 1995)  
*Veasey v. State*, 507 S.E.2d 799 (Ga. Ct. App. 1998)  
*Vickers v. State*, 527 S.E.2d 217 (Ga. Ct. App. 1999)  
*Wallace v. State*, 558 S.E.2d 773 (Ga. Ct. App. 2002)  
*Wagner v. State*, 560 S.E.2d 754 (Ga. Ct. App. 2002)  
*Walker v. State*, 506 S.E.2d 179 (Ga. Ct. App. 1998)  
*Walsh v. State*, 512 S.E.2d 408 (Ga. Ct. App. 1999)  
*Walthall v. State*, 636 S.E.2d 126 (Ga. Ct. App. 2006)  
*Watts v. State*, 541 S.E.2d 41 (Ga. Ct. App. 2000)  
*Webb v. State*, 608 S.E.2d 241 (Ga. Ct. App. 2004)  
*Wilkerson v. State*, 598 S.E.2d 364 (Ga. Ct. App. 2004)  
*Williams v. State*, 553 S.E.2d 823 (Ga. Ct. App. 2001)  
*Williams v. State*, 570 S.E.2d 645 (Ga. Ct. App. 2002)  
*Williams v. State*, 588 S.E.2d 790 (Ga. Ct. App. 2003)  
*Williams v. State*, 597 S.E.2d 621 (Ga. Ct. App. 2004)  
*Wilson v. State*, 526 S.E.2d 381 (Ga. Ct. App. 1999)  
*Wilt v. State*, 592 S.E.2d 925 (Ga. Ct. App. 2004)  
*Winter v. State*, 557 S.E.2d 436 (Ga. Ct. App. 2001)  
*Wittschen v. State*, 383 S.E.2d 885 (Ga. Ct. App. 1989)  
*Wormley v. State*, 565 S.E.2d 530 (Ga. Ct. App. 2002)  
*Woods v. State*, 535 S.E.2d 524 (Ga. Ct. App. 2000)

*Wright v. State*, 576 S.E.2d 64 (Ga. Ct. App. 2003)  
*Wyatt v. State*, 534 S.E.2d 431 (Ga. Ct. App. 2000)  
*Xulu v. State*, 568 S.E.2d 74 (Ga. Ct. App. 2002)



# GEORGIA

## *Topic Outline with Cases*

### **I. OFFENSES DEFINED**

#### **A. Aiding and Abetting**

##### **1. Party to a Crime**

- *Porter v. State*, 532 S.E.2d 407 (Ga. Ct. App. 2000)

##### **2. Affirmative Action Required**

- *Parker v. State*, 378 S.E.2d 503 (Ga. Ct. App. 1989)
- *Wyatt v. State*, 534 S.E.2d 431 (Ga. Ct. App. 2000)

##### **3. Inference of Participation**

- *Wyatt v. State*, 534 S.E.2d 431 (Ga. Ct. App. 2000)

#### **B. Attempt**

##### **1. Elements of the Offense**

- *Dennard v. State*, 534 S.E.2d 182 (Ga. Ct. App. 2000)
- *Lopez v. State*, 572 S.E.2d 736 (Ga. Ct. App. 2002)
- *Morris v. State*, 345 S.E.2d 686 (Ga. Ct. App. 1986)
- *Sewell v. State*, 536 S.E.2d 173 (Ga. Ct. App. 2000)
- *Wittschen v. State*, 383 S.E.2d 885 (Ga. 1989)

##### **2. Substantial Step**

- *Dennard v. State*, 534 S.E.2d 182 (Ga. Ct. App. 2000)
- *Lopez v. State*, 572 S.E.2d 736 (Ga. Ct. App. 2002)
- *Wittschen v. State*, 383 S.E.2d 885 (Ga. 1989)

##### **3. Attempt to Commit Child Molestation**

###### **a. Elements of the Offense**

- *Colbert v. State*, 564 S.E.2d 787 (Ga. Ct. App. 2002)

**b. Substantial Step**

- *Lopez v. State*, 572 S.E.2d 736 (Ga. Ct. App. 2002)

**C. Child Enticement for Indecent Purposes**

**1. Elements of the Offense**

- *Abreu v. State*, 425 S.E.2d 331 (Ga. Ct. App. 1992)
- *Hicks v. State*, 563 S.E.2d 897 (Ga. Ct. App. 2002)
- *Lasseter v. State*, 399 S.E.2d 85 (Ga. Ct. App. 1990)
- *Morris v. State*, 345 S.E.2d 686 (Ga. Ct. App. 1986)
- *Pierce v. State*, 554 S.E.2d 787 (Ga. Ct. App. 2001)

**2. Asportation**

- *Bragg v. State*, 457 S.E.2d 262 (Ga. Ct. App. 1995)
- *Carolina v. State*, 623 S.E. 2d 151, 154 (Ga. Ct. App. 2005)
- *Cimildoro v. State*, 387 S.E.2d 335 (Ga. 1990)
- *Dennard v. State*, 534 S.E.2d 182, 188 (Ga. Ct. App. 2000)
- *Hicks v. State*, 563 S.E.2d 897 (Ga. Ct. App. 2002)
- *Lasseter v. State*, 399 S.E.2d 85 (Ga. Ct. App. 1990)

**3. Online Enticement/Solicitation for Travel with the Intent to Engage in Sex with a Minor**

No relevant state cases reported.

**D. Child Molestation**

**1. Elements of the Offense**

- *Arnold v. State*, 545 S.E.2d 312 (Ga. Ct. App. 2001)
- *Baker v. State*, 527 S.E.2d 266 (Ga. Ct. App. 1999)
- *Bishop v. State*, 555 S.E.2d 504 (Ga. Ct. App. 2001)
- *Bowman v. State*, 490 S.E.2d 163 (Ga. Ct. App. 1997)
- *Collins v. State*, 560 S.E.2d 767 (Ga. Ct. App. 2002)
- *Damare v. State*, 571 S.E.2d 507 (Ga. Ct. App. 2002)
- *Deal v. State*, 528 S.E.2d 289 (Ga. Ct. App. 2000)
- *Edwards v. State*, 559 S.E.2d 506 (Ga. Ct. App. 2002)
- *Fradly v. State*, 538 S.E.2d 893 (Ga. Ct. App. 2000)
- *Gearin v. State*, 565 S.E.2d 540 (Ga. Ct. App. 2002)
- *Gibbs v. State*, 568 S.E.2d 850 (Ga. Ct. App. 2002)

- *Gilbert v. State*, 538 S.E.2d 104 (Ga. Ct. App. 2000)
- *Goins v. State*, 571 S.E.2d 195 (Ga. Ct. App. 2002)
- *Griffin v. State*, 523 S.E.2d 910 (Ga. Ct. App. 1999)
- *Hicks v. State*, 563 S.E.2d 897 (Ga. Ct. App. 2002)
- *Lopez v. State*, 572 S.E.2d 736 (Ga. Ct. App. 2002)
- *Lunsford v. State*, 581 S.E.2d 638 (Ga. Ct. App. 2003)
- *McCrickard v. State*, 549 S.E.2d 505 (Ga. Ct. App. 2001)
- *McEntyre v. State*, 545 S.E.2d 391 (Ga. Ct. App. 2001)
- *Perdue v. State*, 551 S.E.2d 65 (Ga. Ct. App. 2001)
- *Peterson v. State*, 559 S.E.2d 126 (Ga. Ct. App. 2002)
- *Price v. State*, 556 S.E.2d 168 (Ga. Ct. App. 2001)
- *Rainey v. State*, 584 S.E.2d 13 (Ga. Ct. App. 2003)
- *Rice v. State*, 531 S.E.2d 182 (Ga. Ct. App. 2000)
- *Schultz v. State*, 599 S.E.2d 247 (Ga. Ct. App. 2004)
- *Seidenfaden v. State*, 547 S.E.2d 578 (Ga. Ct. App. 2001)
- *Slack v. State*, 593 S.E.2d 664 (Ga. Ct. App. 2004)
- *State v. Vines*, 487 S.E.2d 521 (Ga. Ct. App. 1997)
- *Stroeining v. State*, 486 S.E.2d 670 (Ga. Ct. App. 1997)
- *Thompson v. State*, 537 S.E.2d 807 (Ga. Ct. App. 2000)
- *Wilkerson v. State*, 598 S.E.2d 364 (Ga. Ct. App. 2004)
- *Winter v. State*, 557 S.E.2d 436 (Ga. Ct. App. 2001)
- *Wormley v. State*, 565 S.E.2d 530 (Ga. Ct. App. 2002)

## 2. “Immoral or Indecent Act” Defined

- *Bowman v. State*, 490 S.E.2d 163 (Ga. Ct. App. 1997)
- *State v. Vines*, 487 S.E.2d 521 (Ga. Ct. App. 1997)
- *Wormley v. State*, 565 S.E.2d 530 (Ga. Ct. App. 2002)

### a. Focus on the Adult’s Action

- *Stroeining v. State*, 486 S.E.2d 670 (Ga. Ct. App. 1997)

### b. Determination of Immorality or Indecency

- *Slack v. State*, 593 S.E.2d 664 (Ga. Ct. App. 2004)
- *Stroeining v. State*, 486 S.E.2d 670 (Ga. Ct. App. 1997)

### c. Verbal Acts

- *Hicks v. State*, 563 S.E.2d 897 (Ga. Ct. App. 2002)
- *State v. Vines*, 487 S.E.2d 521 (Ga. Ct. App. 1997)

- i. Speech Unaccompanied by Other Acts**
    - *Bowman v. State*, 490 S.E.2d 163 (Ga. Ct. App. 1997)
  - ii. Telephone Conversations**
    - *State v. Vines*, 487 S.E.2d 521 (Ga. Ct. App. 1997)
- 3. Age of the Child Victim**
  - *Terrell v. State*, 536 S.E.2d 528 (Ga. Ct. App. 2000)
- 4. Use of Victim’s Body in Physical Capacity**
  - *Grimsley v. State*, 505 S.E.2d 522 (Ga. Ct. App. 1998)
    - a. Touching of a Minor Child**
      - *Walsh v. State*, 512 S.E.2d 408 (Ga. Ct. App. 1999)
    - b. Skin-to-Skin Contact**
      - *In the Interest of J.D.*, 534 S.E.2d 112 (Ga. Ct. App. 2000)
- 5. No Requirement of Force or Injury**
  - *Branesky v. State*, 584 S.E.2d 669 (Ga. Ct. App. 2003)
  - *Childers v. State*, 571 S.E.2d 420 (Ga. Ct. App. 2002)
  - *Price v. State*, 556 S.E.2d 168 (Ga. Ct. App. 2001)
- 6. Requirement of a Child’s Presence**
  - *Arnold v. State*, 545 S.E.2d 312 (Ga. Ct. App. 2001)
  - *Rainey v. State*, 584 S.E.2d 13 (Ga. Ct. App. 2003)
- 7. Victimization of the Child’s Mind**
  - *Bowman v. State*, 490 S.E.2d 163 (Ga. Ct. App. 1997)
  - *State v. Vines*, 487 S.E.2d 521 (Ga. Ct. App. 1997)
- 8. Examples of Child Molestation**
  - a. Touching of Child’s Vagina**
    - *Hayes v. State*, 557 S.E.2d 468 (Ga. Ct. App. 2001)

**b. Exposure of Sexual Organs**

- *Rainey v. State*, 584 S.E.2d 13 (Ga. Ct. App. 2003)
- *Wilkerson v. State*, 598 S.E.2d 364 (Ga. Ct. App. 2004)

**9. Lesser-Included Offenses: Sexual Battery**

**a. Charge of Sexual Battery Required**

- *Jarvis v. State*, 560 S.E.2d 29 (Ga. Ct. App. 2002)

**b. Charge of Sexual Battery Not Warranted**

- *Enloe v. State*, 556 S.E.2d 873 (Ga. Ct. App. 2001)
- *Jarvis v. State*, 560 S.E.2d 29 (Ga. Ct. App. 2002)

**c. Fondling the Genitalia of a Minor Child**

- *Enloe v. State*, 556 S.E.2d 873 (Ga. Ct. App. 2001)

**10. Corroboration**

- *Baker v. State*, 555 S.E.2d 899 (Ga. Ct. App. 2001)
- *Greulich v. State*, 588 S.E.2d 450 (Ga. Ct. App. 2003)
- *Price v. State*, 556 S.E.2d 168 (Ga. Ct. App. 2001)

**11. Admission of Pornographic Materials**

- *Greulich v. State*, 588 S.E.2d 450 (Ga. Ct. App. 2003)

**12. Aggravated Child Molestation**

**a. Elements of the Offense**

- *Barrett v. State*, 559 S.E.2d 108 (Ga. Ct. App. 2002)
- *Bishop v. State*, 555 S.E.2d 504 (Ga. Ct. App. 2001)
- *Brewer v. State*, 523 S.E.2d 18 (Ga. 1999)
- *Brownlow v. State*, 544 S.E.2d 472 (Ga. Ct. App. 2001)
- *Collins v. State*, 560 S.E.2d 767 (Ga. Ct. App. 2002)
- *Gearin v. State*, 565 S.E.2d 540 (Ga. Ct. App. 2002)
- *Gilbert v. State*, 538 S.E.2d 104 (Ga. Ct. App. 2000)
- *Griffin v. State*, 523 S.E.2d 910 (Ga. Ct. App. 1999)
- *Grooms v. State*, 583 S.E.2d 216 (Ga. Ct. App. 2003)
- *Johnson v. State*, 573 S.E.2d 362 (Ga. 2002)
- *Perdue v. State*, 551 S.E.2d 65 (Ga. Ct. App. 2001)

- *Rice v. State*, 531 S.E.2d 182 (Ga. Ct. App. 2000)
- *Wright v. State*, 576 S.E.2d 64 (Ga. Ct. App. 2003)

**b. “Sodomy” Defined**

- *Wright v. State*, 576 S.E.2d 64 (Ga. Ct. App. 2003)

**c. Lesser-Included Offense: Child Molestation**

- *Brownlow v. State*, 544 S.E.2d 472 (Ga. Ct. App. 2001)
- *Foster v. State*, 562 S.E.2d 191 (Ga. Ct. App. 2002)

**d. Merger**

- *Brewer v. State*, 553 S.E.2d 363 (Ga. Ct. App. 2001)

**E. Contributing to the Delinquency of a Minor**

- *Pierce v. State*, 554 S.E.2d 787 (Ga. Ct. App. 2001)

**F. Cruelty to Children**

**1. First Degree**

**a. Elements of the Offense**

- *Gearin v. State*, 565 S.E.2d 540 (Ga. Ct. App. 2002)
- *Groves v. State*, 590 S.E.2d 136 (Ga. Ct. App. 2003)
- *Hall v. State*, 566 S.E.2d 374 (Ga. Ct. App. 2002)
- *Hightower v. State*, 570 S.E.2d 22 (Ga. Ct. App. 2002)
- *Loveless v. State*, 538 S.E.2d 464 (Ga. Ct. App. 2000)
- *Perdue v. State*, 551 S.E.2d 65 (Ga. Ct. App. 2001)
- *Porter v. State*, 532 S.E.2d 407 (Ga. Ct. App. 2000)
- *Smith v. State*, 547 S.E.2d 598 (Ga. Ct. App. 2001)

**b. Pain**

**i. Severe Physical Pain**

- *Tucker v. State*, 559 S.E.2d 171 (Ga. Ct. App. 2002)

**ii. Jury Determination**

- *Hightower v. State*, 570 S.E.2d 22 (Ga. Ct. App. 2002)
- *Perdue v. State*, 551 S.E.2d 65 (Ga. Ct. App. 2001)

**c. Malice**

- *Hightower v. State*, 570 S.E.2d 22 (Ga. Ct. App. 2002)
- *Loveless v. State*, 538 S.E.2d 464 (Ga. Ct. App. 2000)

**i. Intent**

- *Hightower v. State*, 570 S.E.2d 22 (Ga. Ct. App. 2002)

**ii. More than a Sexual Relationship Is Required**

- *Hightower v. State*, 570 S.E.2d 22 (Ga. Ct. App. 2002)

**2. Second Degree**

- *Hazelrigs v. State*, 567 S.E.2d 79 (Ga. Ct. App. 2002)

**G. Public Indecency**

- *Damare v. State*, 571 S.E.2d 507 (Ga. Ct. App. 2002)

**H. Rape**

**1. Elements of the Offense**

- *Jenkins v. State*, 576 S.E.2d 68 (Ga. Ct. App. 2003)
- *Lay v. State*, 591 S.E.2d 427 (Ga. Ct. App. 2003)

**2. Definitions**

**a. “Carnal Knowledge”**

- *Lay v. State*, 591 S.E.2d 427 (Ga. Ct. App. 2003)

**b. “Against Her Will”**

- *Jenkins v. State*, 576 S.E.2d 68 (Ga. Ct. App. 2003)

**c. “Forcibly”**

- *Jenkins v. State*, 576 S.E.2d 68 (Ga. Ct. App. 2003)



**3. Force**

- *Branesky v. State*, 584 S.E.2d 669 (Ga. Ct. App. 2003)
- *Jenkins v. State*, 576 S.E.2d 68 (Ga. Ct. App. 2003)
- *Minter v. State*, 537 S.E.2d 769 (Ga. Ct. App. 2000)
- *Siharath v. State*, 541 S.E.2d 71 (Ga. Ct. App. 2000)

**4. Penetration**

- *Emanuel v. State*, 396 S.E.2d 83 (Ga. Ct. App. 1990)

**5. Victim Testimony**

- *Greulich v. State*, 588 S.E.2d 450 (Ga. Ct. App. 2003)

**6. Statutory Rape**

**a. Elements of the Offense**

- *Perdue v. State*, 551 S.E.2d 65 (Ga. Ct. App. 2001)
- *Peterson v. State*, 559 S.E.2d 126 (Ga. Ct. App. 2002)

**b. Force**

- *Hightower v. State*, 570 S.E.2d 22 (Ga. Ct. App. 2002)

**c. Penetration**

- *Wallace v. State*, 558 S.E.2d 773 (Ga. Ct. App. 2002)

**I. Sexual Assault: Supervisory Authority**

- *Groves v. State*, 590 S.E.2d 136 (Ga. Ct. App. 2003)

**J. Sexual Battery**

**1. Elements of the Offense**

- *Dorsey v. State*, 595 S.E.2d 106 (Ga. Ct. App. 2004)
- *Thompson v. State*, 537 S.E.2d 807 (Ga. Ct. App. 2000)

**2. “Intimate Parts” Defined**

- *Thompson v. State*, 537 S.E.2d 807 (Ga. Ct. App. 2000)

### **3. Aggravated Sexual Battery**

#### **a. Elements of the Offense**

- *Bishop v. State*, 555 S.E.2d 504 (Ga. Ct. App. 2001)
- *Deal v. State*, 528 S.E.2d 289 (Ga. Ct. App. 2000)
- *Gearin v. State*, 565 S.E.2d 540 (Ga. Ct. App. 2002)
- *Hardeman v. State*, 544 S.E.2d 481 (Ga. Ct. App. 2001)
- *Johnson v. State*, 573 S.E.2d 362 (Ga. 2002)
- *Peterson v. State*, 559 S.E.2d 126 (Ga. Ct. App. 2002)
- *Ragan v. State*, 550 S.E.2d 476 (Ga. Ct. App. 2001)
- *Seidenfaden v. State*, 547 S.E.2d 578 (Ga. Ct. App. 2001)

#### **b. “Foreign Object” Defined**

- *Hardeman v. State*, 544 S.E.2d 481 (Ga. Ct. App. 2001)
- *Johnson v. State*, 573 S.E.2d 362 (Ga. 2002)

#### **c. Victim Testimony**

- *Greulich v. State*, 588 S.E.2d 450 (Ga. Ct. App. 2003)

### **K. Sexual Exploitation of Children**

#### **1. Offenses**

##### **a. Possess or Control Material of Sexually-Explicit Conduct**

###### **i. Elements of the Offense**

- *Aman v. State*, 409 S.E.2d 645 (Ga. 1991)
- *Conejo v. State*, 374 S.E.2d 826 (Ga. Ct. App. 1988)
- *Craft v. State*, 558 S.E.2d 18 (Ga. Ct. App. 2001)
- *Gilbert v. State*, 538 S.E.2d 104 (Ga. Ct. App. 2000)
- *Winter v. State*, 557 S.E.2d 436 (Ga. Ct. App. 2001)

###### **ii. “Depicts a Minor” Defined**

- *Aman v. State*, 409 S.E.2d 645 (Ga. 1991)

##### **b. Create, Reproduce, Publish, Promote, Sell, Distribute, Give, Exhibit Visual Medium of Sexually-Explicit Conduct**

**i. Elements of the Offense**

- *Coalson v. State*, 555 S.E.2d 128 (Ga. Ct. App. 2001)
- *Craft v. State*, 558 S.E.2d 18 (Ga. Ct. App. 2001)
- *State v. Brown*, 551 S.E.2d 773 (Ga. Ct. App. 2001)

**ii. Victim**

- *Coalson v. State*, 555 S.E.2d 128 (Ga. Ct. App. 2001)

**iii. Clothed Children**

- *Craft v. State*, 558 S.E.2d 18 (Ga. Ct. App. 2001)

**c. Employ, Use, Persuade, Induce, Entice, or Coerce a Minor for Production of Visual Medium of Sexually-Explicit Conduct**

- *Phagan v. State*, 486 S.E.2d 876 (Ga. 1997)
- *Phillips v. State*, 604 S.E.2d 520 (Ga. Ct. App. 2004)
- *Reed v. State*, 448 S.E.2d 189 (Ga. 1994)
- *Rice v. State*, 531 S.E.2d 182 (Ga. Ct. App. 2000)

**d. Bring or Cause to Be Brought into the State Material of Sexually-Explicit Conduct**

- *Craft v. State*, 558 S.E.2d 18 (Ga. Ct. App. 2001)

**e. Virtual or Simulated Child Pornography**

No relevant state cases reported.

**2. Definitions**

**a. “Visual Medium”**

- *State v. Brown*, 551 S.E.2d 773, 774 (Ga. Ct. App. 2001).

**b. “Sexually-Explicit Conduct”**

- *Craft v. State*, 558 S.E.2d 18 (Ga. Ct. App. 2001)
- *Phagan v. State*, 486 S.E.2d 876 (Ga. 1997)
- *Phillips v. State*, 604 S.E.2d 520 (Ga. Ct. App. 2004)
- *Rice v. State*, 531 S.E.2d 182 (Ga. Ct. App. 2000)

**i. Lewdness**

- *Unden v. State*, 462 S.E.2d 408 (Ga. Ct. App. 1995)

**ii. Essential Element**

- *Rice v. State*, 531 S.E.2d 182 (Ga. Ct. App. 2000)

**c. “Minor”**

- *Phagan v. State*, 486 S.E.2d 876 (Ga. 1997)
- *Reed v. State*, 448 S.E.2d 189 (Ga. 1994)

**3. Computer Pornography & Child Exploitation Prevention Act of 1999**

- *Dennard v. State*, 534 S.E.2d 182 (Ga. Ct. App. 2000)

**L. Sodomy**

**1. Elements of the Offense**

- *Morgan v. State*, 486 S.E.2d 632 (Ga. Ct. App. 1997)
- *Rice v. State*, 531 S.E.2d 182 (Ga. Ct. App. 2000)
- *Schneider v. State*, 603 S.E.2d 663 (Ga. Ct. App. 2004)

**2. Aggravated Sodomy**

**a. Elements of the Offense**

- *Blansit v. State*, 546 S.E.2d 81 (Ga. Ct. App. 2001)
- *Brewer v. State*, 523 S.E.2d 18 (Ga. 1999)
- *Chancey v. State*, 574 S.E.2d 904 (Ga. Ct. App. 2002)
- *In the Interest of J.D.*, 534 S.E.2d 112 (Ga. Ct. App. 2000)
- *Johnson v. State*, 573 S.E.2d 362 (Ga. 2002)
- *Patterson v. State*, 531 S.E.2d 759 (Ga. Ct. App. 2000)
- *Rice v. State*, 531 S.E.2d 182 (Ga. Ct. App. 2000)
- *Schneider v. State*, 603 S.E.2d 663 (Ga. Ct. App. 2004)

**b. Force**

- *Alvarado v. State*, 547 S.E.2d 616 (Ga. Ct. App. 2001)
- *Blansit v. State*, 546 S.E.2d 81 (Ga. Ct. App. 2001)
- *Brewer v. State*, 523 S.E.2d 18 (Ga. 1999)
- *Chancey v. State*, 574 S.E.2d 904 (Ga. Ct. App. 2002)
- *In the Interest of J.D.*, 534 S.E.2d 112 (Ga. Ct. App. 2000)

- *Luke v. Battle*, 565 S.E.2d 816 (Ga. 2002)
- *Patterson v. State*, 531 S.E.2d 759 (Ga. Ct. App. 2000)
- *Rice v. State*, 531 S.E.2d 182 (Ga. Ct. App. 2000)

**i. “Force” Defined**

- *Blansit v. State*, 546 S.E.2d 81 (Ga. Ct. App. 2001)
- *Brewer v. State*, 523 S.E.2d 18 (Ga. 1999)
- *In the Interest of J.D.*, 534 S.E.2d 112 (Ga. Ct. App. 2000)
- *Luke v. Battle*, 565 S.E.2d 816 (Ga. 2002)
- *Patterson v. State*, 531 S.E.2d 759 (Ga. Ct. App. 2000)
- *Rice v. State*, 531 S.E.2d 182 (Ga. Ct. App. 2000)

**(a) Lack of Resistance Induced by Fear**

- *Callahan v. State*, 418 S.E.2d 157 (Ga. Ct. App. 1992)
- *Long v. State*, 526 S.E.2d 875 (Ga. Ct. App. 1999)

**(b) Force Inferred: Evidence of Intimidation**

- *Long v. State*, 526 S.E.2d 875 (Ga. Ct. App. 1999)
- *Schneider v. State*, 603 S.E.2d 663 (Ga. Ct. App. 2004)

**(c) Direct or Circumstantial Proof**

- *Alvarado v. State*, 547 S.E.2d 616 (Ga. Ct. App. 2001)
- *Blansit v. State*, 546 S.E.2d 81 (Ga. Ct. App. 2001)
- *Long v. State*, 526 S.E.2d 875 (Ga. Ct. App. 1999)
- *Rice v. State*, 531 S.E.2d 182 (Ga. Ct. App. 2000)
- *Schneider v. State*, 603 S.E.2d 663 (Ga. Ct. App. 2004)

**ii. Age of Victim**

- *Luke v. Battle*, 565 S.E.2d 816 (Ga. 2002)
- *Patterson v. State*, 531 S.E.2d 759 (Ga. Ct. App. 2000)

**M. Torture and Depravity of Mind**

**1. Elements of the Offense**

- *Presnell v. State*, 551 S.E.2d 723 (Ga. 2001)

**2. Age of the Victim**

- *Presnell v. State*, 551 S.E.2d 723 (Ga. 2001)

**N. Transporting a Minor for the Purposes of Prostitution**

No relevant state cases reported.

**II. MANDATORY REPORTING**

**A. Reports of Child Abuse**

- *O'Heron v. Blaney*, 583 S.E.2d 834 (Ga. 2003)

**1. Required Information**

- *O'Heron v. Blaney*, 583 S.E.2d 834 (Ga. 2003)

**2. Reports Made to or Discovered by Child-Welfare Agency**

- *Moss v. State*, 535 S.E.2d 292 (Ga. Ct. App. 2000)

**C. Confidentiality of Child-Abuse Records**

**1. General Rule**

- *Dunagan v. State*, 565 S.E.2d 526 (Ga. Ct. App. 2002)
- *Honeycutt v. State*, 538 S.E.2d 870 (Ga. Ct. App. 2000)

**2. Access to Records**

- *Dunagan v. State*, 565 S.E.2d 526 (Ga. Ct. App. 2002)
- *Honeycutt v. State*, 538 S.E.2d 870 (Ga. Ct. App. 2000)

**C. Immunity**

- *O'Heron v. Blaney*, 583 S.E.2d 834 (Ga. 2003)

**1. Attachment of Immunity**

- *O'Heron v. Blaney*, 583 S.E.2d 834 (Ga. 2003)

**a. Reasonable Cause**

- *O'Heron v. Blaney*, 583 S.E.2d 834 (Ga. 2003)

**b. Good Faith**

- *O'Heron v. Blaney*, 583 S.E.2d 834 (Ga. 2003)

**III. SEARCH AND SEIZURE OF ELECTRONIC EVIDENCE**

**A. Search Warrants**

**1. Probable Cause**

**a. Determination of Probable Cause**

- *Walthall v. State*, 636 S.E.2d 126 (Ga. Ct. App. 2006)
- *Buckley v. State*, 561 S.E.2d 188 (Ga. Ct. App. 2002)
- *Craft v. State*, 558 S.E.2d 18 (Ga. Ct. App. 2001)
- *State v. Staley*, 548 S.E.2d 26 (Ga. Ct. App. 2001)

**b. Time**

- *Bayles v. State*, 373 S.E.2d 266 (Ga. Ct. App. 1988)

**c. Hearsay**

**i. Generally**

- *Buckley v. State*, 561 S.E.2d 188 (Ga. Ct. App. 2002)

**ii. Reliability**

- *Buckley v. State*, 561 S.E.2d 188 (Ga. Ct. App. 2002)
- *Miller v. State*, <sup>++</sup> 464 S.E.2d 621 (Ga. Ct. App. 1995)

**d. Omission of Material Information**

- *Watts v. State*, 541 S.E.2d 41 (Ga. Ct. App. 2000)

**e. Appellate Review**

- *Buckley v. State*, 561 S.E.2d 188 (Ga. Ct. App. 2002)
- *Craft v. State*, 558 S.E.2d 18 (Ga. Ct. App. 2001)
- *Schwindler v. State*, 563 S.E.2d 154 (Ga. Ct. App. 2002)
- *Walsh v. State*, 512 S.E.2d 408 (Ga. Ct. App. 1999)

**2. Scope of the Search Warrant**

- *Miller v. State*, <sup>++</sup> 464 S.E.2d 621 (Ga. Ct. App. 1995)
- *State v. Kramer*, 580 S.E.2d 314 (Ga. Ct. App. 2003)
- *Tyler v. State*, 335 S.E.2d 691 (Ga. Ct. App. 1985)

**a. First-Amendment Issues**

- *State v. Kramer*, 580 S.E.2d 314 (Ga. Ct. App. 2003)

**b. Videotapes**

- *State v. Kramer*, 580 S.E.2d 314 (Ga. Ct. App. 2003)

**c. Items Not Listed in the Warrant**

- *Phillips v. State*, 604 S.E.2d 520 (Ga. Ct. App. 2004)

**3. Staleness**

- *Buckley v. State*, 561 S.E.2d 188 (Ga. Ct. App. 2002)
- *Craft v. State*, 558 S.E.2d 18 (Ga. Ct. App. 2001)

**a. Time**

- *Buckley v. State*, 561 S.E.2d 188 (Ga. Ct. App. 2002)
- *State v. Evans*, 384 S.E.2d 404 (Ga. Ct. App. 1989)

**b. Good Faith**

- *State v. Evans*, 384 S.E.2d 404 (Ga. Ct. App. 1989)

**B. Anticipatory Warrants**

No relevant state cases reported.

**C. Methods of Searching**

No relevant state cases reported.



**D. Types of Searches**

**1. Employer Searches**

No relevant state cases reported.

**2. Private Searches**

No relevant state cases reported.

**3. University-Campus Searches**

No relevant state cases reported.

**4. Warrantless Searches**

**a. Third-Party Consent**

- *Howell v. State*, 324 S.E.2d 754 (Ga. Ct. App. 1984)
- *Presnell v. State*, 551 S.E.2d 723 (Ga. 2001)
- *State v. Randolph*, 604 S.E.2d 614 (Ga. 2004)
- *United States v. Matlock*, 415 U.S. 164, 171 (1974)
- *Walsh v. State*, 512 S.E.2d 408 (Ga. Ct. App. 1999)

**b. Plain-View Searches**

- *Phillips v. State*, 604 S.E.2d 520 (Ga. Ct. App. 2004)

**E. Computer-Technician/Repairperson Discoveries**

No relevant state cases reported.

**F. Photo-Development Discoveries**

No relevant state cases reported.

**G. Exclusionary Rule**

- *Joines v. State*, 591 S.E.2d 454 (Ga. Ct. App. 2003)

**H. Criminal Forfeiture**

No relevant state cases reported.

**I. Disciplinary Hearings for Federal and State Officers**

No relevant state cases reported.

**IV. JURISDICTION AND NEXUS**

**A. Jurisdictional Nexus**

No relevant state cases reported.

**B. Internet Nexus**

No relevant state cases reported.

**C. State Jurisdiction, Federal Jurisdiction, Concurrent Jurisdiction**

**1. State: Venue**

**a. Determination and Proof of Venue**

- *Branesky v. State*, 584 S.E.2d 669 (Ga. Ct. App. 2003)
- *Gearin v. State*, 565 S.E.2d 540 (Ga. Ct. App. 2002)

**b. Jurisdiction Based on Child Residing in State**

- *State v. Brown*, 551 S.E.2d 773 (Ga. Ct. App. 2001)

**c. Boundary Line of Two Counties**

- *Carswell v. State*, 534 S.E.2d 568 (Ga. Ct. App. 2000)

**d. Exclusive Jurisdiction Over Juveniles**

- *Johnson v. State*, 573 S.E.2d 362 (Ga. 2002)

**e. Burden of Proof**

- *Branesky v. State*, 584 S.E.2d 669 (Ga. Ct. App. 2003)
- *Carswell v. State*, 534 S.E.2d 568 (Ga. Ct. App. 2000)
- *Chalifoux v. State*, 587 S.E.2d 62 (Ga. Ct. App. 2003)
- *Cox v. State*, 526 S.E.2d 887 (Ga. Ct. App. 1999)
- *Gearin v. State*, 565 S.E.2d 540 (Ga. Ct. App. 2002)

**2. Federal**

No relevant state cases reported.

**3. Concurrent**

No relevant state cases reported.

**D. Interstate Possession of Child Pornography**

No relevant state cases reported.

**V. DISCOVERY AND EVIDENCE**

**A. Timely Review of Evidence**

No relevant state cases reported.

**B. Discovery**

**1. Criminal Procedure Discovery Act**

- *Downs v. State*, 572 S.E.2d 54 (Ga. Ct. App. 2002)

**2. Discovery by the Defendant**

**a. Defense Requests for Copies of Child Pornography**

No relevant state cases reported.

**b. Reports of Examinations and Tests**

- *Xulu v. State*, 568 S.E.2d 74 (Ga. Ct. App. 2002)

**3. Discovery by the Government**

- *Beck v. State*, 551 S.E.2d 68 (Ga. Ct. App. 2001)

**4. Brady Materials**

**a. General Inspection by Defense Not Permitted**

- *Boatright v. State*, 385 S.E.2d 298 (Ga. Ct. App. 1989)

**b. No Affirmative Obligation to Seek Out Information**

- *Frei v. State*, 557 S.E.2d 49 (Ga. Ct. App. 2001)

**c. Fishing Expeditions Not Allowed**

- *Boatright v. State*, 385 S.E.2d 298 (Ga. Ct. App. 1989)

## **5. Discovery Misconduct**

- *Beck v. State*, 551 S.E.2d 68 (Ga. Ct. App. 2001)

## **C. Accusatory Instrument: Indictments**

### **1. Requirements**

- *Bowman v. State*, 490 S.E.2d 163 (Ga. Ct. App. 1997)
- *Williams v. State*, 570 S.E.2d 645 (Ga. Ct. App. 2002)

#### **a. Sufficiency**

- *Williams v. State*, 570 S.E.2d 645 (Ga. Ct. App. 2002)

#### **b. Definiteness of the Indictment**

- *Schwindler v. State*, 563 S.E.2d 154 (Ga. Ct. App. 2002)

#### **c. Language**

- *Bowman v. State*, 490 S.E.2d 163 (Ga. Ct. App. 1997)
- *Dennard v. State*, 534 S.E.2d 182 (Ga. Ct. App. 2000)

#### **d. Place of the Crime**

- *Schwindler v. State*, 563 S.E.2d 154 (Ga. Ct. App. 2002)

#### **e. Date of the Crime**

- *Cox v. State*, 526 S.E.2d 887 (Ga. Ct. App. 1999)
- *Dean v. State*, 555 S.E.2d 868 (Ga. Ct. App. 2001)
- *Grimsley v. State*, 505 S.E.2d 522 (Ga. Ct. App. 1998)
- *Miller v. State*, 486 S.E.2d 911 (Ga. Ct. App. 1997)
- *Schwindler v. State*, 563 S.E.2d 154 (Ga. Ct. App. 2002)
- *Tyler v. State*, 596 S.E.2d 651 (Ga. Ct. App. 2004)
- *Wallace v. State*, 558 S.E.2d 773 (Ga. Ct. App. 2002)
- *Wilt v. State*, 592 S.E.2d 925 (Ga. Ct. App. 2004)

**f. Name of the Victim**

- *Coalson v. State*, 555 S.E.2d 128 (Ga. Ct. App. 2001)
- *Dennard v. State*, 534 S.E.2d 182 (Ga. Ct. App. 2000)

**2. Commission of the Crime in More than One Way**

- *Hostetler v. State*, 582 S.E.2d 197 (Ga. Ct. App. 2003)

**3. Demurrers**

**a. Special Demurrers**

- *Wallace v. State*, 558 S.E.2d 773 (Ga. Ct. App. 2002)

**b. General Demurrers**

- *Wallace v. State*, 558 S.E.2d 773 (Ga. Ct. App. 2002)

**4. Fatal Variance**

**a. General Rule**

- *Nichols v. State*, 473 S.E.2d 491 (Ga. Ct. App. 1996)
- *Woods v. State*, 535 S.E.2d 524 (Ga. Ct. App. 2000)

**b. Proper Inquiry**

- *Woods v. State*, 535 S.E.2d 524 (Ga. Ct. App. 2000)

**5. Punishment for More than One Count**

- *Frazier v. State*, 524 S.E.2d 768 (Ga. Ct. App. 1999)

**D. Chain of Custody**

- *Winter v. State*, 557 S.E.2d 436 (Ga. Ct. App. 2001)

**1. Tampering**

- *Winter v. State*, 557 S.E.2d 436 (Ga. Ct. App. 2001)

**2. Inapplicability of Chain-of-Custody Requirements**

- *Mobley v. State*, 564 S.E.2d 851 (Ga. Ct. App. 2002)

**E. Introduction of E-mails into Evidence**

**1. Hearsay/Authentication Issues**

No relevant state cases reported.

**2. Circumstantial Evidence**

No relevant state cases reported.

**3. Technical Aspects of Electronic Evidence Regarding Admissibility**

No relevant state cases reported.

**F. Text-Only Evidence**

**1. Introduction into Evidence**

No relevant state cases reported.

**2. Relevance**

No relevant state cases reported.

**G. Evidence Obtained from Internet Service Providers**

**1. Electronic Communications Privacy Act**

No relevant state cases reported.

**2. Cable Act**

No relevant state cases reported.

**3. Patriot Act**

**a. National Trap and Trace Authority**

No relevant state cases reported.

**b. State-Court-Judge Jurisdictional Limits**

No relevant state cases reported.

## **H. Wiretapping, Eavesdropping, and Surveillance**

- *Malone v. State*, 541 S.E.2d 431 (Ga. Ct. App. 2000)
- 1. Child Under 18 Years of Age as a Party**
  - *Malone v. State*, 541 S.E.2d 431 (Ga. Ct. App. 2000)
- 2. Parental Interception of Conversations**
  - *Bishop v. State*, 555 S.E.2d 504 (Ga. Ct. App. 2001)

## **I. Authentication**

- *Phagan v. State*, 486 S.E.2d 876 (Ga. 1997)
- 1. Videotapes**
  - *Mobley v. State*, 564 S.E.2d 851 (Ga. Ct. App. 2002)
  - *Phagan v. State*, 486 S.E.2d 876 (Ga. 1997)
- 2. Unavailability of Authenticating Witness**
  - *Craft v. State*, 558 S.E.2d 18 (Ga. Ct. App. 2001)
  - *Phagan v. State*, 486 S.E.2d 876 (Ga. 1997)

## **J. General Admissibility of Evidence**

- 1. Cardinal Rule of Evidence**
  - *Grimsley v. State*, 505 S.E.2d 522 (Ga. Ct. App. 1998)
- 2. Relevant Evidence**
  - *Phillips v. State*, 604 S.E.2d 520 (Ga. Ct. App. 2004)

## **K. Types of Evidence**

- 1. Character Evidence**
  - *Smith v. State*, 570 S.E.2d 400 (Ga. Ct. App. 2002)
  - a. Character Not in Issue**
    - *Griffin v. State*, 523 S.E.2d 910 (Ga. Ct. App. 1999)
    - *Taylor v. State*, 592 S.E.2d 148 (Ga. Ct. App. 2003)

**b. Character in Issue**

- *Porter v. State*, 532 S.E.2d 407 (Ga. Ct. App. 2000)

**c. General Versus Specific Bad Character**

**i. General Bad Character**

- *Johns v. State*, 558 S.E.2d 426 (Ga. Ct. App. 2001)

**ii. Specific Acts of Bad Character**

- *Johns v. State*, 558 S.E.2d 426 (Ga. Ct. App. 2001)
- *Pruitt v. State*, 514 S.E.2d 639 (Ga. 1999)

**2. Homosexuality and Pederasty**

- *Green v. State*, 532 S.E.2d 111 (Ga. Ct. App. 2000)

**a. Aggravated Sodomy**

- *Green v. State*, 532 S.E.2d 111 (Ga. Ct. App. 2000)

**b. Inappropriate Touching of a Male Child**

- *Alvarado v. State*, 547 S.E.2d 616 (Ga. Ct. App. 2001)

**3. Prior Acts, Crimes, and Wrongs**

**a. Inadmissible**

**i. General Rule**

- *Myrick v. State*, 531 S.E.2d 766 (Ga. Ct. App. 2000)

**ii. Relevance**

- *Barrett v. State*, 559 S.E.2d 108 (Ga. Ct. App. 2002)

**b. Admissible**

**i. Sexual Offenses**

- *Barrett v. State*, 559 S.E.2d 108 (Ga. Ct. App. 2002)
- *Eggleston v. State*, 544 S.E.2d 722 (Ga. Ct. App. 2001)
- *Peterson v. State*, 559 S.E.2d 126 (Ga. Ct. App. 2002)



**ii. Relevance**

- *Barrett v. State*, 559 S.E.2d 108 (Ga. Ct. App. 2002)

**iii. Unique Bent of Mind**

- *Turner v. State*, 538 S.E.2d 125 (Ga. Ct. App. 2000)

**c. Test to Admit Evidence of Prior Crime**

- *Barrett v. State*, 559 S.E.2d 108 (Ga. Ct. App. 2002)
- *Cornelius v. State*, 445 S.E.2d 800 (Ga. Ct. App. 1994)
- *Eggleston v. State*, 544 S.E.2d 722 (Ga. Ct. App. 2001)
- *Hoffman v. State*, 576 S.E.2d 102 (Ga. Ct. App. 2003)
- *Hostetler v. State*, 582 S.E.2d 197 (Ga. Ct. App. 2003)
- *Turner v. State*, 538 S.E.2d 125 (Ga. Ct. App. 2000)
- *Winter v. State*, 557 S.E.2d 436 (Ga. Ct. App. 2001)

**i. Proper Focus**

- *Mooney v. State*, 597 S.E.2d 589 (Ga. Ct. App. 2004)

**ii. Hearing**

- *Xulu v. State*, 568 S.E.2d 74 (Ga. Ct. App. 2002)

**d. Res Gestae Evidence, Malice, Intent, or Motive**

- *Myrick v. State*, 531 S.E.2d 766 (Ga. Ct. App. 2000)

**e. Identity, Plan, Scheme, State of Mind, and Course of Conduct**

- *Hoffman v. State*, 576 S.E.2d 102 (Ga. Ct. App. 2003)
- *Hostetler v. State*, 582 S.E.2d 197 (Ga. Ct. App. 2003)
- *Turner v. State*, 538 S.E.2d 125 (Ga. Ct. App. 2000)

**f. State of Mind**

- *Goins v. State*, 571 S.E.2d 195 (Ga. Ct. App. 2002)

**g. When the Defendant's Character Is in Evidence**

- *Miller v. State*, 486 S.E.2d 911 (Ga. Ct. App. 1997)

**h. Pattern of Sexual Abuse: Generational Abuse**

- *Wright v. State*, 576 S.E.2d 64 (Ga. Ct. App. 2003)

**i. Similar-Transaction Evidence**

- *Beck v. State*, 587 S.E.2d 316 (Ga. Ct. App. 2003)
- *Condra v. State*, 518 S.E.2d 186 (Ga. Ct. App. 1999)
- *Duncan v. State*, 584 S.E.2d 681 (Ga. Ct. App. 2003)
- *Fields v. State*, 504 S.E.2d 777 (Ga. Ct. App. 1998)
- *Foster v. State*, 562 S.E.2d 191 (Ga. Ct. App. 2002)
- *Goins v. State*, 571 S.E.2d 195 (Ga. Ct. App. 2002)
- *Helton v. State*, 602 S.E.2d 198 (Ga. Ct. App. 2004)
- *Hostetler v. State*, 582 S.E.2d 197 (Ga. Ct. App. 2003)
- *Johns v. State*, 558 S.E.2d 426 (Ga. Ct. App. 2001)
- *Nichols v. State*, 473 S.E.2d 491 (Ga. Ct. App. 1996)
- *Pirkle v. State*, 506 S.E.2d 186 (Ga. Ct. App. 1998)
- *Schwindler v. State*, 563 S.E.2d 154 (Ga. Ct. App. 2002)
- *Wagner v. State*, 560 S.E.2d 754 (Ga. Ct. App. 2002)

**i. Admissibility of Similar-Transaction Evidence**

- *Couch v. State*, 545 S.E.2d 685 (Ga. Ct. App. 2001)
- *Fraday v. State*, 538 S.E.2d 893 (Ga. Ct. App. 2000)
- *Nelson v. State*, 565 S.E.2d 551 (Ga. Ct. App. 2002)
- *Winter v. State*, 557 S.E.2d 436 (Ga. Ct. App. 2001)

**ii. Must the Crime Be Identical?**

- *Foster v. State*, 562 S.E.2d 191 (Ga. Ct. App. 2002)
- *Johns v. State*, 558 S.E.2d 426 (Ga. Ct. App. 2001)
- *Mills v. State*, 553 S.E.2d 353 (Ga. Ct. App. 2001)
- *Wagner v. State*, 560 S.E.2d 754 (Ga. Ct. App. 2002)

**iii. Difference in Victims' Ages**

- *Satterwhite v. State*, 551 S.E.2d 428 (Ga. Ct. App. 2001)
- *Wagner v. State*, 560 S.E.2d 754 (Ga. Ct. App. 2002)

**iv. Proof of Similarity, Lustful Intent, and Bent of Mind, and Corroboration of the Victim's Testimony**

- *Condra v. State*, 518 S.E.2d 186 (Ga. Ct. App. 1999)
- *Eggleston v. State*, 544 S.E.2d 722 (Ga. Ct. App. 2001)

- *Frazier v. State*, 583 S.E.2d 188 (Ga. Ct. App. 2003)
- *Hardeman v. State*, 544 S.E.2d 481 (Ga. Ct. App. 2001)
- *Hoffman v. State*, 576 S.E.2d 102 (Ga. Ct. App. 2003)
- *Hostetler v. State*, 582 S.E.2d 197 (Ga. Ct. App. 2003)
- *Mackler v. State*, 298 S.E.2d 589 (Ga. Ct. App. 1982)
- *Peterson v. State*, 559 S.E.2d 126 (Ga. Ct. App. 2002)
- *Schneider v. State*, 603 S.E.2d 663 (Ga. Ct. App. 2004)
- *Xulu v. State*, 568 S.E.2d 74 (Ga. Ct. App. 2002)

**(a) Child-Molestation Cases**

- *Baker v. State*, 527 S.E.2d 266 (Ga. Ct. App. 1999)
- *Craft v. State*, 558 S.E.2d 18 (Ga. Ct. App. 2001)
- *Duncan v. State*, 584 S.E.2d 681 (Ga. Ct. App. 2003)
- *Hostetler v. State*, 582 S.E.2d 197 (Ga. Ct. App. 2003)
- *Mackler v. State*, 298 S.E.2d 589 (Ga. Ct. App. 1982)
- *Schneider v. State*, 603 S.E.2d 663 (Ga. Ct. App. 2004)

**(b) Consideration of the Defendant's Youth**

- *Condra v. State*, 518 S.E.2d 186 (Ga. Ct. App. 1999)

**v. Masking Evidence of Good Character**

- *Miller v. State*, 486 S.E.2d 911 (Ga. Ct. App. 1997)

**vi. Forcible Sexual Assaults**

- *Wagner v. State*, 560 S.E.2d 754 (Ga. Ct. App. 2002)

**vii. Sufficient Similarity: Sexual Abuse and Child Molestation**

- *Baker v. State*, 527 S.E.2d 266 (Ga. Ct. App. 1999)
- *Beck v. State*, 587 S.E.2d 316 (Ga. Ct. App. 2003)
- *Condra v. State*, 518 S.E.2d 186 (Ga. Ct. App. 1999)
- *Couch v. State*, 545 S.E.2d 685 (Ga. Ct. App. 2001)
- *Foster v. State*, 562 S.E.2d 191 (Ga. Ct. App. 2002)

- *Fraday v. State*, 538 S.E.2d 893 (Ga. Ct. App. 2000)
- *Godbey v. State*, 526 S.E.2d 415 (Ga. Ct. App. 1999)
- *Goins v. State*, 571 S.E.2d 195 (Ga. Ct. App. 2002)
- *Hardeman v. State*, 544 S.E.2d 481 (Ga. Ct. App. 2001)
- *Hostetler v. State*, 582 S.E.2d 197 (Ga. Ct. App. 2003)
- *Myrick v. State*, 531 S.E.2d 766 (Ga. Ct. App. 2000)
- *Nelson v. State*, 565 S.E.2d 551 (Ga. Ct. App. 2002)
- *Schwindler v. State*, 563 S.E.2d 154 (Ga. Ct. App. 2002)
- *Trammell v. State*, 560 S.E.2d 312 (Ga. Ct. App. 2002)
- *Xulu v. State*, 568 S.E.2d 74 (Ga. Ct. App. 2002)

**viii. Not Limited to Illegal Conduct**

- *Mills v. State*, 553 S.E.2d 353 (Ga. Ct. App. 2001)
- *Phagan v. State*, 486 S.E.2d 876 (Ga. 1997)

**ix. Lapse of Time/Remoteness**

- *Condra v. State*, 518 S.E.2d 186 (Ga. Ct. App. 1999)
- *Godbey v. State*, 526 S.E.2d 415 (Ga. Ct. App. 1999)
- *Johnson v. State*, 475 S.E.2d 918 (Ga. Ct. App. 1996)
- *Nichols v. State*, 473 S.E.2d 491 (Ga. Ct. App. 1996)
- *Schneider v. State*, 603 S.E.2d 663 (Ga. Ct. App. 2004)
- *Turner v. State*, 536 S.E.2d 814 (Ga. Ct. App. 2000)

**x. Repeated Sexual Abuse**

- *Cox v. State*, 526 S.E.2d 887 (Ga. Ct. App. 1999)

**xi. Use of Similar Transactions Despite Severed Offenses**

- *Corn v. State*, 568 S.E.2d 583 (Ga. Ct. App. 2002)

**xii. Appellate Review**

- *Condra v. State*, 518 S.E.2d 186 (Ga. Ct. App. 1999)
- *Duncan v. State*, 584 S.E.2d 681 (Ga. Ct. App. 2003)
- *Helton v. State*, 602 S.E.2d 198 (Ga. Ct. App. 2004)
- *Hostetler v. State*, 582 S.E.2d 197 (Ga. Ct. App. 2003)
- *Phillips v. State*, 604 S.E.2d 520 (Ga. Ct. App. 2004)

**j. Prior Acts Toward the Victim**

- *Goins v. State*, 571 S.E.2d 195 (Ga. Ct. App. 2002)

- *McCrickard v. State*, 549 S.E.2d 505 (Ga. Ct. App. 2001)
- *Myrick v. State*, 531 S.E.2d 766 (Ga. Ct. App. 2000)

**k. Prior-Difficulties Evidence**

**i. Generally**

- *Hall v. State*, 566 S.E.2d 374 (Ga. Ct. App. 2002)

**ii. Limiting Instruction**

- *Cobb v. State*, 561 S.E.2d 124 (Ga. Ct. App. 2002)
- *Hall v. State*, 566 S.E.2d 374 (Ga. Ct. App. 2002)
- *Myrick v. State*, 531 S.E.2d 766 (Ga. Ct. App. 2000)

**l. Sexual Offense Involving Adult Victim**

- *Barrett v. State*, 559 S.E.2d 108 (Ga. Ct. App. 2002)
- *Helton v. State*, 602 S.E.2d 198 (Ga. Ct. App. 2004)

**m. Sexual Paraphernalia and Sexually-Explicit Material**

- *Alvarado v. State*, 547 S.E.2d 616 (Ga. Ct. App. 2001)
- *Beck v. State*, 551 S.E.2d 68 (Ga. Ct. App. 2001)
- *Bryan v. State*, 541 S.E.2d 97 (Ga. Ct. App. 2000)
- *Corn v. State*, 568 S.E.2d 583 (Ga. Ct. App. 2002)
- *Ferrell v. State*, 569 S.E.2d 899 (Ga. Ct. App. 2002)
- *Frazier v. State*, 524 S.E.2d 768 (Ga. Ct. App. 1999)
- *Gatewood v. State*, 559 S.E.2d 81 (Ga. Ct. App. 2002)
- *Greulich v. State*, 588 S.E.2d 450 (Ga. Ct. App. 2003)
- *Groves v. State*, 590 S.E.2d 136 (Ga. Ct. App. 2003)
- *Hoffman v. State*, 576 S.E.2d 102 (Ga. Ct. App. 2003)
- *Lunsford v. State*, 581 S.E.2d 638 (Ga. Ct. App. 2003)
- *McDonald v. State*, 548 S.E.2d 361 (Ga. Ct. App. 2001)
- *Mooney v. State*, 597 S.E.2d 589 (Ga. Ct. App. 2004)
- *Phillips v. State*, 604 S.E.2d 520 (Ga. Ct. App. 2004)
- *Ragan v. State*, 550 S.E.2d 476 (Ga. Ct. App. 2001)
- *Smith v. State*, 570 S.E.2d 400 (Ga. Ct. App. 2002)
- *Summage v. State*, 546 S.E.2d 910 (Ga. Ct. App. 2001)

**n. Relevance**

- *Helton v. State*, 602 S.E.2d 198 (Ga. Ct. App. 2004)

**o. Proof of Prior Conviction**

- *Turner v. State*, 538 S.E.2d 125 (Ga. Ct. App. 2000)

**4. Real and Demonstrative Evidence**

**a. Anatomically Correct Drawings**

- *Edwards v. State*, 559 S.E.2d 506 (Ga. Ct. App. 2002)

**b. Juror Use of Transcript**

- *Edwards v. State*, 559 S.E.2d 506 (Ga. Ct. App. 2002)

**c. Photographs and Videotapes**

- *Craft v. State*, 558 S.E.2d 18 (Ga. Ct. App. 2001)

**d. Res Gestae Evidence**

- *Altman v. State*, 495 S.E.2d 106 (Ga. Ct. App. 1997)
- *Berry v. State*, 508 S.E.2d 435 (Ga. Ct. App. 1998)
- *Brooks v. State*, 501 S.E.2d 286 (Ga. Ct. App. 1998)

**6. Scienter Evidence**

**a. Intent**

- *Arnold v. State*, 545 S.E.2d 312 (Ga. Ct. App. 2001)
- *Collins v. State*, 560 S.E.2d 767 (Ga. Ct. App. 2002)
- *Gearin v. State*, 565 S.E.2d 540 (Ga. Ct. App. 2002)
- *Gore v. State*, 554 S.E.2d 598 (Ga. Ct. App. 2001)
- *Kidd v. State*, 572 S.E.2d 80 (Ga. Ct. App. 2002)
- *McEntyre v. State*, 545 S.E.2d 391 (Ga. Ct. App. 2001)
- *Seidenfaden v. State*, 547 S.E.2d 578 (Ga. Ct. App. 2001)

**7. Scientific Evidence**

**a. Determination of Verifiable Certainty**

- *Leftwich v. State*, 538 S.E.2d 779 (Ga. Ct. App. 2000)

**b. Polygraphs**

- *Lockett v. State*, 573 S.E.2d 437 (Ga. Ct. App. 2002)
- *Thompson v. State*, 571 S.E.2d 158 (Ga. Ct. App. 2002)

**L. Rape-Shield Statute**

- *Abdulkadir v. State*, 592 S.E.2d 433 (Ga. Ct. App. 2003)
- *Berry v. State*, 508 S.E.2d 435 (Ga. Ct. App. 1998)
- *Bishop v. State*, 555 S.E.2d 504 (Ga. Ct. App. 2001)
- *Brooks v. State*, 500 S.E.2d 11 (Ga. Ct. App. 1998)
- *Callahan v. State*, 568 S.E.2d 780 (Ga. Ct. App. 2002)
- *Carson v. State*, 576 S.E.2d 12 (Ga. Ct. App. 2002)
- *Cobb v. State*, 561 S.E.2d 124 (Ga. Ct. App. 2002)
- *Cox v. State*, 526 S.E.2d 887 (Ga. Ct. App. 1999)
- *Eggleston v. State*, 544 S.E.2d 722 (Ga. Ct. App. 2001)
- *Flowers v. State*, 566 S.E.2d 339 (Ga. Ct. App. 2002)
- *Jarvis v. State*, 560 S.E.2d 29 (Ga. Ct. App. 2002)
- *Mooney v. State*, 597 S.E.2d 589 (Ga. Ct. App. 2004)
- *Pollard v. State*, 580 S.E.2d 337 (Ga. Ct. App. 2003)
- *Rocha v. State*, 545 S.E.2d 173 (Ga. Ct. App. 2001)
- *Slack v. State*, 593 S.E.2d 664 (Ga. Ct. App. 2004)
- *Williams v. State*, 553 S.E.2d 823 (Ga. Ct. App. 2001)
- *Williams v. State*, 588 S.E.2d 790 (Ga. Ct. App. 2003)

**1. Child's Past Sexual History**

- *Rocha v. State*, 545 S.E.2d 173 (Ga. Ct. App. 2001)

**2. Consent**

- *Williams v. State*, 553 S.E.2d 823 (Ga. Ct. App. 2001)

**3. Reputation for Non-Chastity or Preoccupation With Sex**

- *Abdulkadir v. State*, 592 S.E.2d 433 (Ga. Ct. App. 2003)
- *Berry v. State*, 508 S.E.2d 435 (Ga. Ct. App. 1998)
- *Bishop v. State*, 555 S.E.2d 504 (Ga. Ct. App. 2001)
- *Brooks v. State*, 500 S.E.2d 11 (Ga. Ct. App. 1998)
- *Callahan v. State*, 568 S.E.2d 780 (Ga. Ct. App. 2002)
- *Carson v. State*, 576 S.E.2d 12 (Ga. Ct. App. 2002)
- *Cobb v. State*, 561 S.E.2d 124 (Ga. Ct. App. 2002)
- *Cox v. State*, 526 S.E.2d 887 (Ga. Ct. App. 1999)
- *Jarvis v. State*, 560 S.E.2d 29 (Ga. Ct. App. 2002)
- *Pollard v. State*, 580 S.E.2d 337 (Ga. Ct. App. 2003)

- *Slack v. State*, 593 S.E.2d 664 (Ga. Ct. App. 2004)
- *Williams v. State*, 553 S.E.2d 823 (Ga. Ct. App. 2001)
- *Williams v. State*, 588 S.E.2d 790 (Ga. Ct. App. 2003)

**4. Victim Confusion**

- *Williams v. State*, 553 S.E.2d 823 (Ga. Ct. App. 2001)

**5. Admissibility of Past Sexual Behavior**

- *Bing v. State*, 567 S.E.2d 731 (Ga. Ct. App. 2002)
- *Taylor v. State*, 601 S.E.2d 815 (Ga. Ct. App. 2004)
- *Williams v. State*, 588 S.E.2d 790 (Ga. Ct. App. 2003)
- *Wilt v. State*, 592 S.E.2d 925 (Ga. Ct. App. 2004)

**a. Consent Is at Issue**

- *Mooney v. State*, 597 S.E.2d 589 (Ga. Ct. App. 2004)

**b. Rebuttal Evidence**

- *Mooney v. State*, 597 S.E.2d 589 (Ga. Ct. App. 2004)

**c. Impeachment: Lack of Sexual Experience**

- *Wagner v. State*, 560 S.E.2d 754 (Ga. Ct. App. 2002)

**d. Child-Abuse Syndrome**

- *Flowers v. State*, 566 S.E.2d 339 (Ga. Ct. App. 2002)

**e. Behavioral Symptoms or Medical Testimony**

- *Berry v. State*, 508 S.E.2d 435 (Ga. Ct. App. 1998)
- *Bishop v. State*, 555 S.E.2d 504 (Ga. Ct. App. 2001)
- *Pollard v. State*, 580 S.E.2d 337 (Ga. Ct. App. 2003)
- *Rocha v. State*, 545 S.E.2d 173 (Ga. Ct. App. 2001)
- *Williams v. State*, 553 S.E.2d 823 (Ga. Ct. App. 2001)
- *Williams v. State*, 588 S.E.2d 790 (Ga. Ct. App. 2003)



**f. Prior False Accusations**

- *Cobb v. State*, 561 S.E.2d 124 (Ga. Ct. App. 2002)
- *Long v. State*, 526 S.E.2d 875 (Ga. Ct. App. 1999)
- *Wagner v. State*, 560 S.E.2d 754 (Ga. Ct. App. 2002)
- *Williams v. State*, 597 S.E.2d 621 (Ga. Ct. App. 2004)

**i. Attack on Credibility**

- *Berry v. State*, 508 S.E.2d 435 (Ga. Ct. App. 1998)
- *Bishop v. State*, 555 S.E.2d 504 (Ga. Ct. App. 2001)
- *Long v. State*, 526 S.E.2d 875 (Ga. Ct. App. 1999)

**ii. Reasonable Probability of Falsity**

- *Cheek v. State*, 593 S.E.2d 55 (Ga. Ct. App. 2003)
- *Cobb v. State*, 561 S.E.2d 124 (Ga. Ct. App. 2002)
- *Eley v. State*, 596 S.E.2d 660 (Ga. Ct. App. 2004)
- *Holmes v. State*, 588 S.E.2d 825 (Ga. Ct. App. 2003)
- *Palmer v. State*, 546 S.E.2d 886 (Ga. Ct. App. 2001)
- *Wagner v. State*, 560 S.E.2d 754 (Ga. Ct. App. 2002)
- *Williams v. State*, 597 S.E.2d 621 (Ga. Ct. App. 2004)

**6. Previous Accusations of Sexual Misconduct**

**a. Inadmissible**

- *Johns v. State*, 558 S.E.2d 426 (Ga. Ct. App. 2001)

**b. Admissible**

- *Johns v. State*, 558 S.E.2d 426 (Ga. Ct. App. 2001)

**7. Evidentiary Exceptions**

- *Mooney v. State*, 597 S.E.2d 589 (Ga. Ct. App. 2004)

**8. Impeachment Evidence**

- *Jenkins v. State*, 539 S.E.2d 542 (Ga. Ct. App. 2000)

**9. Judicial Discretion**

- *Abdulkadir v. State*, 592 S.E.2d 433 (Ga. Ct. App. 2003)

## **M. Witnesses and Testimony**

### **1. Pretrial Interviews**

- *Abernathy v. State*, 536 S.E.2d 289 (Ga. Ct. App. 2000)

### **2. Competence**

#### **a. Presumption of Competence**

- *Pollard v. State*, 580 S.E.2d 337 (Ga. Ct. App. 2003)
- *Smith v. State*, 547 S.E.2d 598 (Ga. Ct. App. 2001)

#### **b. Competency of a Child Witness**

##### **i. Judicial Discretion**

- *Conejo v. State*, 374 S.E.2d 826 (Ga. Ct. App. 1988)
- *Hunter v. State*, 391 S.E.2d 695 (Ga. Ct. App. 1990)
- *Pollard v. State*, 580 S.E.2d 337 (Ga. Ct. App. 2003)

##### **ii. Test to Establish Competency of a Child Witness**

- *Ferrell v. State*, 569 S.E.2d 899 (Ga. Ct. App. 2002)
- *Mackler v. State*, 298 S.E.2d 589 (Ga. Ct. App. 1982)
- *Ochoa v. State*, 555 S.E.2d 857 (Ga. Ct. App. 2001)

##### **iii. Availability of a Child Witness**

- *Woodruff v. Woodruff*, 531 S.E.2d 714 (Ga. 2000)

##### **iv. Inconsistencies in Child's Testimony**

- *Conejo v. State*, 374 S.E.2d 826 (Ga. Ct. App. 1988)

### **3. Credibility**

#### **a. Province of the Jury**

- *Atkins v. State*, 533 S.E.2d 152 (Ga. Ct. App. 2000)
- *Baker v. State*, 527 S.E.2d 266 (Ga. Ct. App. 1999)
- *Branesky v. State*, 584 S.E.2d 669 (Ga. Ct. App. 2003)
- *Brown v. State*, 600 S.E.2d 774 (Ga. Ct. App. 2004)
- *Cheek v. State*, 593 S.E.2d 55 (Ga. Ct. App. 2003)
- *Coalson v. State*, 555 S.E.2d 128 (Ga. Ct. App. 2001)

- *Dorsey v. State*, 593 S.E.2d 945 (Ga. Ct. App. 2004)
- *Dowd v. State*, 582 S.E.2d 235 (Ga. Ct. App. 2003)
- *Duncan v. State*, 584 S.E.2d 681 (Ga. Ct. App. 2003)
- *Falak v. State*, 583 S.E.2d 146 (Ga. Ct. App. 2003)
- *Fiek v. State*, 597 S.E.2d 585 (Ga. Ct. App. 2004)
- *Fields v. State*, 504 S.E.2d 777 (Ga. Ct. App. 1998)
- *Frazier v. State*, 583 S.E.2d 188 (Ga. Ct. App. 2003)
- *Godbey v. State*, 526 S.E.2d 415 (Ga. Ct. App. 1999)
- *Grooms v. State*, 583 S.E.2d 216 (Ga. Ct. App. 2003)
- *Holloway v. State*, 601 S.E.2d 753 (Ga. Ct. App. 2004)
- *Hopper v. State*, 598 S.E.2d 926 (Ga. Ct. App. 2004)
- *In the interest of A.M.*, 578 S.E.2d 226 (Ga. Ct. App. 2003)
- *McMillian v. State*, 589 S.E.2d 335 (Ga. Ct. App. 2003)
- *Nichols v. State*, 473 S.E.2d 491 (Ga. Ct. App. 1996)
- *Odett v. State*, 541 S.E.2d 29 (Ga. 2001)
- *Roberson v. State*, 526 S.E.2d 428 (Ga. Ct. App. 1999)
- *Schwindler v. State*, 563 S.E.2d 154 (Ga. Ct. App. 2002)
- *Smith v. State*, 578 S.E.2d 295 (Ga. Ct. App. 2003)
- *Turner v. State*, 536 S.E.2d 814 (Ga. Ct. App. 2000)
- *Vickers v. State*, 527 S.E.2d 217 (Ga. Ct. App. 1999)
- *Williams v. State*, 597 S.E.2d 621 (Ga. Ct. App. 2004)
- *Wilson v. State*, 526 S.E.2d 381 (Ga. Ct. App. 1999)
- *Winter v. State*, 557 S.E.2d 436 (Ga. Ct. App. 2001)

**b. Victim’s Inability to Describe Acts**

- *Helton v. State*, 602 S.E.2d 198 (Ga. Ct. App. 2004)

**c. Prior Consistent Statements**

- *Phillips v. State*, 527 S.E.2d 604 (Ga. Ct. App. 2000)

**d. Reliability of Testimony**

- *Hunter v. State*, 391 S.E.2d 695 (Ga. Ct. App. 1990)

**e. Bolstering Witness Credibility**

**i. Truthfulness**

- *Branesky v. State*, 584 S.E.2d 669 (Ga. Ct. App. 2003)
- *Godbey v. State*, 526 S.E.2d 415 (Ga. Ct. App. 1999)
- *Morris v. State*, 601 S.E.2d 804 (Ga. Ct. App. 2004)

- *Pollard v. State*, 580 S.E.2d 337 (Ga. Ct. App. 2003)
- *Roberson v. State*, 526 S.E.2d 428 (Ga. Ct. App. 1999)
- *Williams v. State*, 597 S.E.2d 621 (Ga. Ct. App. 2004)

**ii. Prior Consistent Statements**

- *Joines v. State*, 591 S.E.2d 454 (Ga. Ct. App. 2003)

**f. Impeachment of Witness Testimony**

**i. Contradictory Statements**

- *Robinson v. State*, 594 S.E.2d 696 (Ga. Ct. App. 2004)

**ii. Previous Accusations of Sexual Misconduct**

**(a) Inadmissible**

- *Hardeman v. State*, 544 S.E.2d 481 (Ga. Ct. App. 2001)

**(b) Admissible**

- *Hardeman v. State*, 544 S.E.2d 481 (Ga. Ct. App. 2001)

**iii. Prior False Accusations**

- *Hall v. State*, 561 S.E.2d 464 (Ga. Ct. App. 2002)
- *Hardeman v. State*, 544 S.E.2d 481 (Ga. Ct. App. 2001)

**iv. Bias: Prior Act of Molestation**

- *Beck v. State*, 551 S.E.2d 68 (Ga. Ct. App. 2001)

**4. Victim Testimony: Sufficiency of Victim Testimony Alone**

- *Dowd v. State*, 582 S.E.2d 235 (Ga. Ct. App. 2003)
- *Grooms v. State*, 583 S.E.2d 216 (Ga. Ct. App. 2003)
- *Kidd v. State*, 572 S.E.2d 80 (Ga. Ct. App. 2002)
- *Roberts v. State*, 572 S.E.2d 744 (Ga. Ct. App. 2002)
- *Slack v. State*, 593 S.E.2d 664 (Ga. Ct. App. 2004)
- *Wilkerson v. State*, 600 S.E.2d 677 (Ga. Ct. App. 2004)
- *Winter v. State*, 557 S.E.2d 436 (Ga. Ct. App. 2001)

**a. Child Molestation, Incest, and Rape**

- *Abdulkadir v. State*, 592 S.E.2d 433 (Ga. Ct. App. 2003)
- *Atkins v. State*, 533 S.E.2d 152 (Ga. Ct. App. 2000)
- *Callahan v. State*, 568 S.E.2d 780 (Ga. Ct. App. 2002)
- *Dorsey v. State*, 593 S.E.2d 945 (Ga. Ct. App. 2004)
- *Eley v. State*, 596 S.E.2d 660 (Ga. Ct. App. 2004)
- *Greulich v. State*, 588 S.E.2d 450 (Ga. Ct. App. 2003)
- *Ingram v. State*, 585 S.E.2d 211 (Ga. Ct. App. 2003)
- *Ferrell v. State*, 569 S.E.2d 899 (Ga. Ct. App. 2002)
- *Perdue v. State*, 551 S.E.2d 65 (Ga. Ct. App. 2001)
- *Siharath v. State*, 541 S.E.2d 71 (Ga. Ct. App. 2000)

**b. Statutory Rape**

- *Eley v. State*, 596 S.E.2d 660 (Ga. Ct. App. 2004)

**5. Child Witnesses**

- *Beck v. State*, 551 S.E.2d 68 (Ga. Ct. App. 2001)
- *Boatright v. State*, 385 S.E.2d 298 (Ga. Ct. App. 1989)

**6. Experts**

**a. Judicial Discretion**

- *Brooks v. State*, 501 S.E.2d 286 (Ga. Ct. App. 1998)
- *Pruitt v. State*, 514 S.E.2d 639 (Ga. 1999)

**b. Qualification of an Expert**

- *Siharath v. State*, 541 S.E.2d 71 (Ga. Ct. App. 2000)

**c. Inadmissible Expert Testimony**

**i. Addressing Credibility of Victim and Ultimate Issues**

- *Brownlow v. State*, 544 S.E.2d 472 (Ga. Ct. App. 2001)
- *Bruce v. State*, 603 S.E.2d 33 (Ga. Ct. App. 2004)
- *Gosnell v. State*, 544 S.E.2d 477 (Ga. Ct. App. 2001)
- *Odom v. State*, 531 S.E.2d 207 (Ga. Ct. App. 2000)
- *Summage v. State*, 546 S.E.2d 910 (Ga. Ct. App. 2001)

**(a) Truthfulness of a Victim**

- *Long v. State*, 526 S.E.2d 875 (Ga. Ct. App. 1999)
- *Pollard v. State*, 580 S.E.2d 337 (Ga. Ct. App. 2003)

**(b) Ultimate Issue**

- *Atkins v. State*, 533 S.E.2d 152 (Ga. Ct. App. 2000)

**ii. Facts Not within Personal Knowledge**

- *Porter v. State*, 532 S.E.2d 407 (Ga. Ct. App. 2000)

**iii. Occurrence of Abuse/Molestation**

- *Atkins v. State*, 533 S.E.2d 152 (Ga. Ct. App. 2000)
- *Gosnell v. State*, 544 S.E.2d 477 (Ga. Ct. App. 2001)

**iv. Dangerous of Defendant**

- *Cornelius v. State*, 445 S.E.2d 800 (Ga. Ct. App. 1994)

**d. Admissibility of Expert Testimony**

**i. Qualifications**

- *Godbey v. State*, 526 S.E.2d 415 (Ga. Ct. App. 1999)
- *Hall v. State*, 566 S.E.2d 374 (Ga. Ct. App. 2002)
- *McCrickard v. State*, 549 S.E.2d 505 (Ga. Ct. App. 2001)
- *Siharath v. State*, 541 S.E.2d 71 (Ga. Ct. App. 2000)

**ii. Conclusion Beyond Ken of Average Laymen**

- *Atkins v. State*, 533 S.E.2d 152 (Ga. Ct. App. 2000)
- *Eley v. State*, 596 S.E.2d 660 (Ga. Ct. App. 2004)
- *Porter v. State*, 532 S.E.2d 407 (Ga. Ct. App. 2000)

**iii. Symptoms and History Consistent with Molestation**

- *Atkins v. State*, 533 S.E.2d 152 (Ga. Ct. App. 2000)
- *Gosnell v. State*, 544 S.E.2d 477 (Ga. Ct. App. 2001)

- *Mills v. State*, 553 S.E.2d 353 (Ga. Ct. App. 2001)
- *Rogers v. State*, 560 S.E.2d 286 (Ga. Ct. App. 2002)
- *Williams v. State*, 597 S.E.2d 621 (Ga. Ct. App. 2004)

**iv. Creation of False Memories**

- *McDonald v. State*, 548 S.E.2d 361 (Ga. Ct. App. 2001)

**v. Bolstering Credibility**

- *Bruce v. State*, 603 S.E.2d 33 (Ga. Ct. App. 2004)
- *Odom v. State*, 531 S.E.2d 207 (Ga. Ct. App. 2000)

**vi. Interview Techniques**

- *Hall v. State*, 566 S.E.2d 374 (Ga. Ct. App. 2002)

**7. Use of Identification Procedures**

- *Croy v. State*, 545 S.E.2d 80 (Ga. Ct. App. 2001)

**N. Hearsay**

**1. Inadmissible**

**a. Child Who Witnesses an Act of Sexual Abuse**

- *Hanson v. State*, 587 S.E.2d 200 (Ga. Ct. App. 2003)

**b. Statement Against Interest**

- *Corn v. State*, 568 S.E.2d 583 (Ga. Ct. App. 2002)

**2. Admissible**

**a. Child-Hearsay Statute**

**i. Application**

**(a) Acts of Sexual Contact or Physical Abuse**

- *Mayo v. State*, 582 S.E.2d 482 (Ga. Ct. App. 2003)
- *Watts v. State*, 541 S.E.2d 41 (Ga. Ct. App. 2000)

**(b) Testimony Contemplated under Statute**

- *Howard v. State*, 556 S.E.2d 536 (Ga. Ct. App. 2001)

**ii. Requirements**

- *Baker v. State*, 555 S.E.2d 899 (Ga. Ct. App. 2001)
- *Bell v. State*, 589 S.E.2d 653 (Ga. Ct. App. 2003)
- *Berry v. State*, 508 S.E.2d 435 (Ga. Ct. App. 1998)
- *Cimildoro v. State*, 387 S.E.2d 335 (Ga. 1990)
- *Deal v. State*, 528 S.E.2d 289 (Ga. Ct. App. 2000)
- *Flowers v. State*, 566 S.E.2d 339 (Ga. Ct. App. 2002)
- *Fraday v. State*, 538 S.E.2d 893 (Ga. Ct. App. 2000)
- *Hayes v. State*, 557 S.E.2d 468 (Ga. Ct. App. 2001)
- *Howard v. State*, 556 S.E.2d 536 (Ga. Ct. App. 2001)
- *In the Interest of A.H.*, 578 S.E.2d 247 (Ga. Ct. App. 2003)
- *In the Interest of J.D.*, 534 S.E.2d 112 (Ga. Ct. App. 2000)
- *In the Interest of K.C.*, 574 S.E.2d 413 (Ga. Ct. App. 2002)
- *Ingram v. State*, 585 S.E.2d 211 (Ga. Ct. App. 2003)
- *Ivey v. State*, 574 S.E.2d 908 (Ga. Ct. App. 2002)
- *Kight v. State*, 528 S.E.2d 542 (Ga. Ct. App. 2000)
- *Nelson v. State*, 565 S.E.2d 551 (Ga. Ct. App. 2002)
- *Phillips v. State*, 604 S.E.2d 520 (Ga. Ct. App. 2004)
- *Trew v. State*, 534 S.E.2d 804 (Ga. Ct. App. 2000)
- *Woodruff v. Woodruff*, 531 S.E.2d 714 (Ga. 2000)
- *Wright v. State*, 576 S.E.2d 64 (Ga. Ct. App. 2003)

**(a) No Requirement of In-Person Testimony**

- *Fowler v. State*, 554 S.E.2d 808 (Ga. Ct. App. 2001)

**(b) Videotaped Statements**

- *Frazier v. State*, 557 S.E.2d 12 (Ga. Ct. App. 2001)

**(c) No Corroboration Required**

- *Bell v. State*, 589 S.E.2d 653 (Ga. Ct. App. 2003)



- *In the Interest of K.C.*, 574 S.E.2d 413 (Ga. Ct. App. 2002)

**iii. Trial-Court Discretion**

- *Fiek v. State*, 597 S.E.2d 585 (Ga. Ct. App. 2004)
- *Howard v. State*, 556 S.E.2d 536 (Ga. Ct. App. 2001)
- *In the Interest of K.C.*, 574 S.E.2d 413 (Ga. Ct. App. 2002)
- *Kight v. State*, 528 S.E.2d 542 (Ga. Ct. App. 2000)
- *Nelson v. State*, 565 S.E.2d 551 (Ga. Ct. App. 2002)
- *Putnam v. State*, 592 S.E.2d 462 (Ga. Ct. App. 2003)

**iv. Procedure**

- *Baker v. State*, 555 S.E.2d 899 (Ga. Ct. App. 2001)

**v. Dual Burden**

- *Ferreri v. State*, 600 S.E.2d 793 (Ga. Ct. App. 2004)
- *Roberson v. State*, 526 S.E.2d 428 (Ga. Ct. App. 1999)

**vi. Pretrial Hearing: *Gregg* Hearing**

- *Ferreri v. State*, 600 S.E.2d 793 (Ga. Ct. App. 2004)
- *Roberson v. State*, 526 S.E.2d 428 (Ga. Ct. App. 1999)

**vii. Limitations of Statute: Availability and Reliability**

- *Trew v. State*, 534 S.E.2d 804 (Ga. Ct. App. 2000)

**(a) Availability**

- *Bell v. State*, 589 S.E.2d 653 (Ga. Ct. App. 2003)
- *Hines v. State*, 548 S.E.2d 642 (Ga. Ct. App. 2001)

**(b) Indicia of Reliability**

- *Campos v. State*, 587 S.E.2d 264 (Ga. Ct. App. 2003)
- *Ferreri v. State*, 600 S.E.2d 793 (Ga. Ct. App. 2004)

- *Fiek v. State*, 597 S.E.2d 585 (Ga. Ct. App. 2004)
- *Flowers v. State*, 566 S.E.2d 339 (Ga. Ct. App. 2002)
- *Frazier v. State*, 557 S.E.2d 12 (Ga. Ct. App. 2001)
- *Hayes v. State*, 557 S.E.2d 468 (Ga. Ct. App. 2001)
- *Howard v. State*, 556 S.E.2d 536 (Ga. Ct. App. 2001)
- *In the Interest of A.H.*, 578 S.E.2d 247 (Ga. Ct. App. 2003)
- *In the Interest of K.C.*, 574 S.E.2d 413 (Ga. Ct. App. 2002)
- *Kight v. State*, 528 S.E.2d 542 (Ga. Ct. App. 2000)
- *Myrick v. State*, 531 S.E.2d 766 (Ga. Ct. App. 2000)
- *Nelson v. State*, 565 S.E.2d 551 (Ga. Ct. App. 2002)
- *Roberson v. State*, 526 S.E.2d 428 (Ga. Ct. App. 1999)

**(i) Remoteness**

- *Kight v. State*, 528 S.E.2d 542, 545 (Ga. Ct. App. 2000).

**(ii) Specific Findings of Reliability**

- *Flowers v. State*, 566 S.E.2d 339 (Ga. Ct. App. 2002)
- *Ingram v. State*, 585 S.E.2d 211 (Ga. Ct. App. 2003)
- *Ivey v. State*, 574 S.E.2d 908 (Ga. Ct. App. 2002)
- *Xulu v. State*, 568 S.E.2d 74 (Ga. Ct. App. 2002)

**(A) Not a Condition Precedent**

- *Baker v. State*, 555 S.E.2d 899, (Ga. Ct. App. 2001)
- *In the Interest of K.C.*, 574 S.E.2d 413 (Ga. Ct. App. 2002)

- *Nelson v. State*, 565 S.E.2d 551 (Ga. Ct. App. 2002)

**(B) Satisfaction of Statutory Requirement**

- *Baker v. State*, 555 S.E.2d 899 (Ga. Ct. App. 2001)
- *Flowers v. State*, 566 S.E.2d 339 (Ga. Ct. App. 2002)
- *Nelson v. State*, 565 S.E.2d 551 (Ga. Ct. App. 2002)
- *In the Interest of K.C.*, 574 S.E.2d 413 (Ga. Ct. App. 2002)
- *Ivey v. State*, 574 S.E.2d 908 (Ga. Ct. App. 2002)

**(iii) Hearing**

- *Baker v. State*, 555 S.E.2d 899 (Ga. Ct. App. 2001)
- *Xulu v. State*, 568 S.E.2d 74 (Ga. Ct. App. 2002)

**viii. Bolstering of Hearsay Statements**

- *Trew v. State*, 534 S.E.2d 804 (Ga. Ct. App. 2000)

**ix. Conflict with Evidentiary Rules: Requirement of Separate Hearing**

- *Roberson v. State*, 526 S.E.2d 428 (Ga. Ct. App. 1999)

**b. Necessity**

- *Baker v. State*, 527 S.E.2d 266 (Ga. Ct. App. 1999)
- *Booth v. State*, 590 S.E.2d 789 (Ga. Ct. App. 2003)

**i. Guarantee of Trustworthiness**

- *Booth v. State*, 590 S.E.2d 789 (Ga. Ct. App. 2003)

**ii. Unavailability**

- *Baker v. State*, 527 S.E.2d 266 (Ga. Ct. App. 1999)

**c. Prior Statement by a Witness**

- *Croy v. State*, 545 S.E.2d 80 (Ga. Ct. App. 2001)
- *In the Interest of K.C.*, 574 S.E.2d 413 (Ga. Ct. App. 2002)

**i. Prior Consistent Statement**

- *Joines v. State*, 591 S.E.2d 454 (Ga. Ct. App. 2003)
- *Shamsuddeen v. State*, 565 S.E.2d 544 (Ga. Ct. App. 2002)

**ii. Prior Inconsistent Statement**

- *Condra v. State*, 518 S.E.2d 186 (Ga. Ct. App. 1999)
- *Robinson v. State*, 594 S.E.2d 696 (Ga. Ct. App. 2004)

**O. Privileges**

**1. Attorney-Client Privilege**

- *Johnson v. State*, 475 S.E.2d 918 (Ga. Ct. App. 1996)

**2. Psychotherapist-Patient Privilege**

**a. Communications**

- *Gore v. State*, 554 S.E.2d 598 (Ga. Ct. App. 2001)

**b. Records**

- *Herendeen v. State*, 601 S.E.2d 372 (Ga. Ct. App. 2004)

**c. Invocation of Privilege**

- *Herendeen v. State*, 601 S.E.2d 372 (Ga. Ct. App. 2004)

**i. Creation of a Confidential Relationship**

- *Herendeen v. State*, 601 S.E.2d 372 (Ga. Ct. App. 2004)

**ii. Voluntariness**

- *Herendeen v. State*, 601 S.E.2d 372 (Ga. Ct. App. 2004)

**3. Spousal Privilege**

**a. Availability of Privilege**

- *Beck v. State*, 587 S.E.2d 316 (Ga. Ct. App. 2003)
- *Ingram v. State*, 585 S.E.2d 211 (Ga. Ct. App. 2003)

**b. Waiver of the Privilege**

- *Ingram v. State*, 585 S.E.2d 211 (Ga. Ct. App. 2003)

**P. Appellate Review of Evidence**

**1. Admission of Evidence**

- *Craft v. State*, 558 S.E.2d 18 (Ga. Ct. App. 2001)
- *Fields v. State*, 504 S.E.2d 777 (Ga. Ct. App. 1998)
- *Howell v. State*, 324 S.E.2d 754 (Ga. Ct. App. 1984)
- *Phillips v. State*, 604 S.E.2d 520 (Ga. Ct. App. 2004)
- *Tyler v. State*, 335 S.E.2d 691 (Ga. Ct. App. 1985)

**2. Denial of Motion for New Trial and Sufficiency of Evidence**

- *Abdulkadir v. State*, 592 S.E.2d 433 (Ga. Ct. App. 2003)
- *Altman v. State*, 495 S.E.2d 106 (Ga. Ct. App. 1997)
- *Akins v. State*, 526 S.E.2d 157 (Ga. Ct. App. 1999)
- *Atkins v. State*, 533 S.E.2d 152 (Ga. Ct. App. 2000)
- *Baker v. State*, 527 S.E.2d 266 (Ga. Ct. App. 1999)
- *Bell v. State*, 589 S.E.2d 653 (Ga. Ct. App. 2003)
- *Brinson v. State*, 530 S.E.2d 798 (Ga. Ct. App. 2000)
- *Brown v. State*, 600 S.E.2d 774 (Ga. Ct. App. 2004)
- *Coalson v. State*, 555 S.E.2d 128 (Ga. Ct. App. 2001)
- *Cox v. State*, 526 S.E.2d 887 (Ga. Ct. App. 1999)
- *Craft v. State*, 558 S.E.2d 18 (Ga. Ct. App. 2001)
- *Deal v. State*, 528 S.E.2d 289 (Ga. Ct. App. 2000)
- *Dowd v. State*, 582 S.E.2d 235 (Ga. Ct. App. 2003)
- *Falak v. State*, 583 S.E.2d 146 (Ga. Ct. App. 2003)
- *Frazier v. State*, 583 S.E.2d 188 (Ga. Ct. App. 2003)
- *Grimsley v. State*, 505 S.E.2d 522 (Ga. Ct. App. 1998)
- *Grooms v. State*, 583 S.E.2d 216 (Ga. Ct. App. 2003)
- *Groves v. State*, 590 S.E.2d 136 (Ga. Ct. App. 2003)
- *Hopper v. State*, 598 S.E.2d 926 (Ga. Ct. App. 2004)
- *Hostetler v. State*, 582 S.E.2d 197 (Ga. Ct. App. 2003)
- *Kight v. State*, 528 S.E.2d 542 (Ga. Ct. App. 2000)
- *Loveless v. State*, 538 S.E.2d 464 (Ga. Ct. App. 2000)
- *Phillips v. State*, 604 S.E.2d 520 (Ga. Ct. App. 2004)

- *Pierce v. State*, 554 S.E.2d 787 (Ga. Ct. App. 2001)
- *Walker v. State*, 506 S.E.2d 179 (Ga. Ct. App. 1998)

### **3. Sufficiency of Evidence and Motions for Directed Verdict or New Trial**

- *Akins v. State*, 526 S.E.2d 157 (Ga. Ct. App. 1999)
- *Atkins v. State*, 533 S.E.2d 152 (Ga. Ct. App. 2000)
- *Baker v. State*, 527 S.E.2d 266 (Ga. Ct. App. 1999)
- *Blansit v. State*, 546 S.E.2d 81 (Ga. Ct. App. 2001)
- *Cheek v. State*, 593 S.E.2d 55 (Ga. Ct. App. 2003)
- *Dorsey v. State*, 595 S.E.2d 106 (Ga. Ct. App. 2004)
- *Duncan v. State*, 584 S.E.2d 681 (Ga. Ct. App. 2003)
- *Griffin v. State*, 523 S.E.2d 910 (Ga. Ct. App. 1999)
- *Grooms v. State*, 583 S.E.2d 216 (Ga. Ct. App. 2003)
- *Phillips v. State*, 604 S.E.2d 520 (Ga. Ct. App. 2004)
- *Rudisail v. State*, 593 S.E.2d 747 (Ga. Ct. App. 2004)
- *Winter v. State*, 557 S.E.2d 436 (Ga. Ct. App. 2001)

### **4. Motions to Suppress**

- *Buckley v. State*, 561 S.E.2d 188 (Ga. Ct. App. 2002)
- *Craft v. State*, 558 S.E.2d 18 (Ga. Ct. App. 2001)
- *Howell v. State*, 324 S.E.2d 754 (Ga. Ct. App. 1984)
- *Lay v. State*, 591 S.E.2d 427 (Ga. Ct. App. 2003)
- *Malone v. State*, 541 S.E.2d 431 (Ga. Ct. App. 2000)
- *Moss v. State*, 535 S.E.2d 292 (Ga. Ct. App. 2000)
- *Phillips v. State*, 604 S.E.2d 520 (Ga. Ct. App. 2004)
- *State v. Kramer*, 580 S.E.2d 314 (Ga. Ct. App. 2003)
- *Walsh v. State*, 512 S.E.2d 408 (Ga. Ct. App. 1999)

### **5. Upholding of Jury Verdict**

- *Baker v. State*, 527 S.E.2d 266 (Ga. Ct. App. 1999)
- *Dorsey v. State*, 593 S.E.2d 945 (Ga. Ct. App. 2004)
- *Dowd v. State*, 582 S.E.2d 235 (Ga. Ct. App. 2003)
- *Pittman v. State*, 533 S.E.2d 769 (Ga. Ct. App. 2000)
- *Rudisail v. State*, 593 S.E.2d 747 (Ga. Ct. App. 2004)

## **IV. AGE OF CHILD VICTIM**

### **A. Proving the Age of the Child Depicted**

No relevant state cases reported.

**B. The Defendant’s Knowledge of the Age of the Child Depicted**

No relevant state cases reported.

**V. MULTIPLE COUNTS**

**A. What Constitutes an Item in Child Pornography?**

No relevant state cases reported.

**B. Merger**

**1. Matter of Fact**

**a. Generally**

- *Childers v. State*, 571 S.E.2d 420 (Ga. Ct. App. 2002)
- *Johnson v. State*, 573 S.E.2d 362 (Ga. 2002)
- *Seidenfaden v. State*, 547 S.E.2d 578 (Ga. Ct. App. 2001)
- *Shamsuddeen v. State*, 565 S.E.2d 544 (Ga. Ct. App. 2002)
- *Turner v. State*, 560 S.E.2d 539 (Ga. Ct. App. 2002)

**b. Child Molestation and Child Enticement**

- *Hicks v. State*, 563 S.E.2d 897 (Ga. Ct. App. 2002)
- *Wittschen v. State*, 383 S.E.2d 885 (Ga. Ct. App. 1989)

**2. Crime Committed in More than One Way**

- *Brewer v. State*, 553 S.E.2d 363 (Ga. Ct. App. 2001)

**3. Multiple Punishment**

- *Dorsey v. State*, 593 S.E.2d 945 (Ga. Ct. App. 2004)

**4. Conviction for Greater Offense and Merger of Lesser Offenses**

- *Dorsey v. State*, 593 S.E.2d 945 (Ga. Ct. App. 2004)

**C. Joinder**

**1. Generally**

- *Bolton v. State*, 574 S.E.2d 659 (Ga. Ct. App. 2002)
- *Schwindler v. State*, 563 S.E.2d 154 (Ga. Ct. App. 2002)

**2. Modus Operandi**

- *Wright v. State*, 576 S.E.2d 64 (Ga. Ct. App. 2003)

**D. Severance of Offenses**

**1. When Is Severance Required?**

- *Bolton v. State*, 574 S.E.2d 659 (Ga. Ct. App. 2002)
- *Smith v. State*, 547 S.E.2d 598 (Ga. Ct. App. 2001)
- *Wright v. State*, 576 S.E.2d 64 (Ga. Ct. App. 2003)

**2. When Is Severance Not Mandated?**

- *Bolton v. State*, 574 S.E.2d 659 (Ga. Ct. App. 2002)
- *Smith v. State*, 547 S.E.2d 598 (Ga. Ct. App. 2001)
- *Wright v. State*, 576 S.E.2d 64 (Ga. Ct. App. 2003)

**E. Issues of Double Jeopardy**

- *State v. Heggs*, 558 S.E.2d 41 (Ga. Ct. App. 2001)

**1. Determining the Number of Offenses**

- *State v. Evans*, 384 S.E.2d 404 (Ga. Ct. App. 1989)

**2. Continuous Character of an Offense**

- *State v. Evans*, 384 S.E.2d 404 (Ga. Ct. App. 1989)

**3. Crimes Based on Same Criminal Conduct**

- *Hunter v. State*, 589 S.E.2d 306 (Ga. Ct. App. 2003)
- *Lunsford v. State*, 581 S.E.2d 638 (Ga. Ct. App. 2003)
- *Rudisail v. State*, 593 S.E.2d 747 (Ga. Ct. App. 2004)

**4. Lesser-Included Offenses**

- *Damare v. State*, 571 S.E.2d 507 (Ga. Ct. App. 2002)
- *Lay v. State*, 591 S.E.2d 427 (Ga. Ct. App. 2003)

**a. Determination of a Lesser-Included Offense**

- *Damare v. State*, 571 S.E.2d 507 (Ga. Ct. App. 2002)
- *Hunter v. State*, 589 S.E.2d 306 (Ga. Ct. App. 2003)



- *Morris v. State*, 345 S.E.2d 686 (Ga. Ct. App. 1986)

**b. Sexual Offenses**

**i. Child Molestation and Rape**

- *Heggs v. State*, 540 S.E.2d 643 (Ga. Ct. App. 2000)
- *Lay v. State*, 591 S.E.2d 427 (Ga. Ct. App. 2003)

**ii. Child Molestation and Aggravated Child Molestation**

- *Brownlow v. State*, 544 S.E.2d 472 (Ga. Ct. App. 2001)

**iii. Contributing to Delinquency of Minor and Child Molestation**

- *Slack v. State*, 593 S.E.2d 664 (Ga. Ct. App. 2004)

**iv. Public Indecency or Assault and Child Molestation**

- *Damare v. State*, 571 S.E.2d 507 (Ga. Ct. App. 2002)

**c. Jury Charges**

- *Conejo v. State*, 374 S.E.2d 826 (Ga. Ct. App. 1988)
- *Damare v. State*, 571 S.E.2d 507 (Ga. Ct. App. 2002)
- *Heggs v. State*, 540 S.E.2d 643 (Ga. Ct. App. 2000)
- *Rainey v. State*, 584 S.E.2d 13 (Ga. Ct. App. 2003)
- *Wright v. State*, 576 S.E.2d 64 (Ga. Ct. App. 2003)

**d. Conviction of a Lesser Crime Warranted**

- *Heggs v. State*, 540 S.E.2d 643 (Ga. Ct. App. 2000)

**e. Retrial of the Greater Offense**

- *Collins v. State*, 601 S.E.2d 111 (Ga. Ct. App. 2004)
- *State v. Heggs*, 558 S.E.2d 41 (Ga. Ct. App. 2001)

**5. Improper Termination of a Former Prosecution**

- *Putnam v. State*, 537 S.E.2d 384 (Ga. Ct. App. 2000)

**a. Existence of Manifest Necessity**

- *Putnam v. State*, 537 S.E.2d 384 (Ga. Ct. App. 2000)

**b. Judicial Deference**

- *Putnam v. State*, 537 S.E.2d 384 (Ga. Ct. App. 2000)

**6. Set Aside Conviction**

- *State v. Heggs*, 558 S.E.2d 41 (Ga. Ct. App. 2001)

**7. Subsequent Proceedings**

- *State v. Heggs*, 558 S.E.2d 41 (Ga. Ct. App. 2001)

**VI. DEFENSES**

**A. Consent**

- *Coalson v. State*, 555 S.E.2d 128 (Ga. Ct. App. 2001)
- *Phagan v. State*, 486 S.E.2d 876 (Ga. 1997)
- *Slack v. State*, 593 S.E.2d 664 (Ga. Ct. App. 2004)

**B. Diminished Capacity**

**1. Addiction to the Internet**

No relevant state cases reported.

**2. Insanity: Notice of Intent**

- *Jackson v. State*, 570 S.E.2d 40 (Ga. Ct. App. 2002)

**C. First Amendment**

No relevant state cases reported.

**D. Impossibility**

**1. Factual**

No relevant state cases reported.

**2. Legal**

No relevant state cases reported.

**E. Manufacturing Jurisdiction**

No relevant state cases reported.

**F. Mistake**

**1. Of Fact**

**a. Generally**

- *Schultz v. State*, 599 S.E.2d 247 (Ga. Ct. App. 2004)

**b. The Victim's Age**

- *Allen v. State*, 533 S.E.2d 401 (Ga. Ct. App. 2000)
- *Schultz v. State*, 599 S.E.2d 247 (Ga. Ct. App. 2004)
- *Veasey v. State*, 507 S.E.2d 799 (Ga. Ct. App. 1998)

**2. Of Law**

No relevant state cases reported.

**G. Outrageous Conduct**

No relevant state cases reported.

**H. Researcher**

No relevant state cases reported.

**I. Sexual Orientation**

No relevant state cases reported.

**VII. PLEAS**

**A. Factual Basis for a Plea**

- *Johanson v. State*, 581 S.E.2d 564 (Ga. Ct. App. 2003)

**B. No Requirement of Corroboration**

- *Johanson v. State*, 581 S.E.2d 564 (Ga. Ct. App. 2003)

**C. *Alford Pleas***

- *Thomas v. State*, 598 S.E.2d 882 (Ga. Ct. App. 2004)

**D. *Waiver***

**1. *Appeal Rights***

- *Phillips v. State*, 512 S.E.2d 32 (Ga. Ct. App. 1999)

**2. *Admissibility of Evidence***

- *Gilbert v. State*, 538 S.E.2d 104 (Ga. Ct. App. 2000)

**E. *Challenging Validity of Guilty Plea: Burden of Proof***

- *Harland v. State*, 586 S.E.2d 705 (Ga. Ct. App. 2003)

**F. *Promises or Agreements of the Prosecutor***

- *Phillips v. State*, 512 S.E.2d 32 (Ga. Ct. App. 1999)

**G. *Withdrawal of a Guilty Plea***

- *Johanson v. State*, 581 S.E.2d 564 (Ga. Ct. App. 2003)

**VIII. SENTENCING ISSUES**

**A. *Pre-Sentencing Reports***

- *Ingram v. State*, 585 S.E.2d 211 (Ga. Ct. App. 2003)
- *Palmer v. State*, 546 S.E.2d 886 (Ga. Ct. App. 2001)

**B. *Evidence***

- *Ingram v. State*, 585 S.E.2d 211 (Ga. Ct. App. 2003)

**1. *Victim Statements***

- *Taylor v. State*, 592 S.E.2d 148 (Ga. Ct. App. 2003)

**2. *Evidence in Aggravation of Punishment***

**a. *Admissibility***

- *Autry v. State*, 549 S.E.2d 769 (Ga. Ct. App. 2001)

**b. Aggravating Factors**

**i. Age of Victim**

No relevant state cases reported.

**ii. Distribution/Intent to Traffic**

No relevant state cases reported.

**iii. Motive, Lack of Remorse, Moral Character, Predisposition**

- *Ingram v. State*, 585 S.E.2d 211 (Ga. Ct. App. 2003)
- *Pearce v. State*, 570 S.E.2d 74 (Ga. Ct. App. 2002)

**iv. Number of Images**

No relevant state cases reported.

**v. Pattern of Activity for Sexual Exploitation**

No relevant state cases reported.

**vi. Prior Convictions**

- *Pearce v. State*, 570 S.E.2d 74 (Ga. Ct. App. 2002)

**vii. Sadistic, Masochistic, or Violent Material**

No relevant state cases reported.

**viii. Use of a Computer**

No relevant state cases reported.

**C. Serious Violent Felonies**

**1. Mandatory Minimum Term of Imprisonment**

- *Johnson v. State*, 573 S.E.2d 362 (Ga. 2002)
- *Rolader v. State*, 547 S.E.2d 778 (Ga. Ct. App. 2001)

**2. Life Imprisonment Without Parole**

- *Gosnell v. State*, 586 S.E.2d 350 (Ga. Ct. App. 2003)
- *Webb v. State*, 608 S.E.2d 241 (Ga. Ct. App. 2004)

**D. Criminal History: Punishment for Subsequent Offenses**

**1. First Reoffense**

- *State v. Jones*, 560 S.E.2d 112 (Ga. Ct. App. 2002)

**2. Third Reoffense**

- *State v. Jones*, 560 S.E.2d 112 (Ga. Ct. App. 2002)

**E. Conversion of Concurrent Sentence**

- *Alvarado v. State*, 547 S.E.2d 616 (Ga. Ct. App. 2001)

**F. Cruel and Unusual Punishment**

- *Couch v. State*, 545 S.E.2d 685 (Ga. Ct. App. 2001)
- *Schwindler v. State*, 563 S.E.2d 154 (Ga. App. 2002)

**IX. SUPERVISED RELEASE: PROBATION**

**A. Conditions**

**1. Imposition of Conditions Reasonably Related**

- *Harrell v. State*, 559 S.E.2d 155 (Ga. Ct. App. 2002)

**2. Restriction on Presence at Certain Locations**

- *Harrell v. State*, 559 S.E.2d 155 (Ga. Ct. App. 2002)

**3. Counseling for Child Molesters**

- *Couch v. State*, 545 S.E.2d 685 (Ga. Ct. App. 2001)

**B. Prior Convictions**

No relevant state cases reported.

**C. Reasonable Grounds for a Warrantless Search of a Probationer**

- *Harrell v. State*, 559 S.E.2d 155 (Ga. Ct. App. 2002)

# GEORGIA

## *Offenses Defined*

### **I. Aiding and Abetting**

#### **A. Party to a Crime**

- A person is a party to a crime only if he or she:
  - (1) directly commits the crime;
  - (2) 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;
  - (3) intentionally aids or abets in the commission of the crime; or
  - (4) intentionally advises, encourages, hires, counsels, or procures another to commit the crime.

GA. CODE ANN. §16-2-20(b).

– *Porter v. State*, 532 S.E.2d 407, 410 (Ga. Ct. App. 2000).

#### **B. Affirmative Action Required**

- Presence at the scene is not sufficient.  
– *Parker v. State*, 378 S.E.2d 503, 504 (Ga. Ct. App. 1989).
- Even approval of the act, not amounting to encouragement, will not suffice.  
– *Parker v. State*, 378 S.E.2d 503, 504 (Ga. Ct. App. 1989).
- Mere knowledge by a private citizen that a crime is going to be committed, in the absence of the duty to prevent it, does not make the citizen guilty of participating in the crime.  
– *Parker v. State*, 378 S.E.2d 503, 504 (Ga. Ct. App. 1989).
- Aiding and abetting the commission of a crime requires affirmative action and an individual's mere knowledge that a crime will be committed, and failure to take steps to prevent that crime, do not amount to aiding and abetting; however, if the person had knowledge of the intended crime and shared in the criminal intent of the principal actor, he or she is an aider and abettor.  
– *Parker v. State*, 378 S.E.2d 503, 504 (Ga. Ct. App. 1989).  
– *Wyatt v. State*, 534 S.E.2d 431, 432 (Ga. Ct. App. 2000).
- If the defendant was at the scene and did not disapprove or oppose the commission of the offense, a trier of fact may consider such conduct in



connection with prior knowledge and would be authorized to conclude the defendant assented to the commission of the offense, that or she he lent his or her approval to it, thereby aiding and abetting commission of the crime.

– *Parker v. State*, 378 S.E.2d 503, 504 (Ga. Ct. App. 1989).

– *Wyatt v. State*, 534 S.E.2d 431, 432 (Ga. Ct. App. 2000).

### **C. Inference of Participation**

- While mere presence at the scene of the commission of a crime is not sufficient evidence to convict one of being a party thereto, presence, companionship, and conduct before and after the offense are circumstances from which one's participation in the criminal intent may be inferred.

– *Wyatt v. State*, 534 S.E.2d 431, 432 (Ga. Ct. App. 2000).

## **II. Attempt**

### **A. Elements of the Offense**

- A person is guilty of criminal attempt if, with the intent to commit a specific crime, he or she performs any act that constitutes a substantial step toward the commission of that crime.

– *Dennard v. State*, 534 S.E.2d 182, 186 (Ga. Ct. App. 2000).

– *Lopez v. State*, 572 S.E.2d 736, 737(Ga. Ct. App. 2002).

– *Sewell v. State*, 536 S.E.2d 173, 176 (Ga. Ct. App. 2000).

- An attempt to commit a crime consists of three elements:  
(1) the intent to commit the crime;  
(2) the performance of some overt act towards the commission of the crime;  
and  
(3) failure to consummate its commission.

– *Morris v. State*, 345 S.E.2d 686, 687 (Ga. Ct. App. 1986).

– *Wittschen v. State*, 383 S.E.2d 885, 886 (Ga. 1989).

### **B. Substantial Step**

- What constitutes a substantial step is a question of degree and depends upon the circumstances of each case.

– *Dennard v. State*, 534 S.E.2d 182, 186 (Ga. Ct. App. 2000).

– *Lopez v. State*, 572 S.E.2d 736, 737(Ga. Ct. App. 2002).

– *Wittschen v. State*, 383 S.E.2d 885, 887 (Ga. 1989).

- The substantial step is to be considered in light of previous acts.

– *Lopez v. State*, 572 S.E.2d 736, 737(Ga. Ct. App. 2002).

- To constitute a substantial step, an act must be one that is done in pursuance of the intent, and more or less directly tending to the commission of the crime.  
– *Dennard v. State*, 534 S.E.2d 182, 186 (Ga. Ct. App. 2000).  
– *Wittschen v. State*, 383 S.E.2d 885, 887 (Ga. 1989).
- In general, the act must be inexplicable as a lawful act and must be more than mere preparation, yet it cannot accurately be said that no preparations can amount to an attempt.  
– *Dennard v. State*, 534 S.E.2d 182, 186 (Ga. Ct. App. 2000).  
– *Wittschen v. State*, 383 S.E.2d 885, 887 (Ga. 1989).
- The phrase “inexplicable as a lawful act” does not mean that the act itself must be unlawful. Rather it means that the act, in light of previous acts, constitutes a substantial step toward the commission of a crime.  
– *Dennard v. State*, 534 S.E.2d 182, 186 (Ga. Ct. App. 2000).  
– *Wittschen v. State*, 383 S.E.2d 885, 887 (Ga. 1989).
- The fact that further steps must be taken before the crime can be completed does not preclude a finding that the steps already undertaken are substantial; therefore, the mere fact that physical presence is an element of the completed crime does not mean that it is indispensable in proving criminal attempt.  
– *Dennard v. State*, 534 S.E.2d 182, 186 (Ga. Ct. App. 2000).

## **C. Attempt to Commit Child Molestation**

### **1. Elements of the Offense**

- A person would be guilty of criminal attempt to commit child molestation when, with intent to commit the crime, he or she performs any act that constitutes a substantial step toward committing the offense.  
– *Colbert v. State*, 564 S.E.2d 787, 788 (Ga. Ct. App. 2002).
- In the event that a defendant actually completes the offense of child molestation, the jury would still be authorized to find him or her guilty of criminal attempt.  
– *Colbert v. State*, 564 S.E.2d 787, 788 (Ga. Ct. App. 2002).

### **2. Substantial Step**

- The Supreme Court found that a substantial step toward the commission of child molestation had been made where the defendant drove up to two girls in a residential neighborhood and offered them money if they let him stick his hand down their pants.  
– *Lopez v. State*, 572 S.E.2d 736, 738 (Ga. Ct. App. 2002).

### III. Child Enticement for Indecent Purposes

#### A. Elements of the Offense

- A person commits the offense of enticing a child for indecent purposes when he or she solicits, entices, or takes any child under the age of 16 years to any place whatsoever for the purpose of child molestation or indecent acts.  
GA. CODE ANN. § 16-6-5(a).  
– *Hicks v. State*, 563 S.E.2d 897, 899 (Ga. Ct. App. 2002).  
– *Pierce v. State*, 554 S.E.2d 787, 790 (Ga. Ct. App. 2001).
- A conviction need not be based upon evidence that an act of indecency or child molestation was accomplished or even attempted. Accordingly, the crime is complete when the child is enticed with the requisite intent, regardless of the ultimate site whereat the enticer contemplates that the act of indecency or child molestation is to be perpetrated; however, a conviction must be based upon some evidence that an act of indecency or child molestation was the intended motivation for the enticement.  
– *Abreu v. State*, 425 S.E.2d 331, 333 (Ga. Ct. App. 1992).  
– *Lasseter v. State*, 399 S.E.2d 85, 87 (Ga. Ct. App. 1990).  
– *Morris v. State*, 345 S.E.2d 686, 687 (Ga. Ct. App. 1986).
- The crime of enticing a child for indecent purposes requires the showing of a joint operation of the act of enticing a child and the intention to commit acts of indecency or child molestation.  
– *Abreu v. State*, 425 S.E.2d 331, 333 (Ga. Ct. App. 1992).  
– *Lasseter v. State*, 399 S.E.2d 85, 86 (Ga. Ct. App. 1990).

#### B. Asportation

- The offense of enticing a child for indecent purposes has been held to include the element of asportation; however, it does not require abduction.  
– *Cimildoro v. State*, 387 S.E.2d 335, 336 (Ga. 1990).  
– *Lasseter v. State*, 399 S.E.2d 85, 86 (Ga. Ct. App. 1990).
- The asportation element of the offense is satisfied whether the taking involves physical force, enticement, or persuasion.  
– *Bragg v. State*, 457 S.E.2d 262, 262 (Ga. Ct. App. 1995).  
– *Cimildoro v. State*, 387 S.E.2d 335, 336 (Ga. 1990).
- Any asportation, however slight, is sufficient to show the taking element of enticing a child for indecent purposes.  
– *Bragg v. State*, 457 S.E.2d 262, 262 (Ga. Ct. App. 1995).  
– *Hicks v. State*, 563 S.E.2d 897, 898 (Ga. Ct. App. 2002).
- Even if the child voluntarily goes with the perpetrator, if any persuasion is involved then the asportation element has been met.  
– *Carolina v. State*, 623 S.E. 2d 151, 154 (Ga. Ct. App. 2005).

- The elements of asportation plus intent are enough to satisfy the offense of enticement. Enticement should be distinguished from criminal attempt. When the defendant attempts to entice a child but is unsuccessful with respect to the asportation element, then criminal attempt should be charged.  
- *Dennard v. State*, 534 S.E.2d 182, 188 (Ga. Ct. App. 2000).

### C. **Online Enticement/Solicitation for Travel with the Intent to Engage in Sex with a Minor**

No relevant state cases reported.

## IV. **Child Molestation**

### A. **Elements of the Offense**

- A person commits the offense of child molestation when he or she does any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person. GA. CODE ANN. § 16-6-4(a).  
- *Arnold v. State*, 545 S.E.2d 312, 315 (Ga. Ct. App. 2001).  
- *Baker v. State*, 527 S.E.2d 266, 267 (Ga. Ct. App. 1999).  
- *Bishop v. State*, 555 S.E.2d 504, 505 (Ga. Ct. App. 2001).  
- *Bowman v. State*, 490 S.E.2d 163, 165 (Ga. Ct. App. 1997).  
- *Collins v. State*, 560 S.E.2d 767, 768 (Ga. Ct. App. 2002).  
- *Damare v. State*, 571 S.E.2d 507, 508 (Ga. Ct. App. 2002).  
- *Deal v. State*, 528 S.E.2d 289, 291 (Ga. Ct. App. 2000).  
- *Edwards v. State*, 559 S.E.2d 506, 510 (Ga. Ct. App. 2002).  
- *Fraday v. State*, 538 S.E.2d 893, 895 (Ga. Ct. App. 2000).  
- *Gearin v. State*, 565 S.E.2d 540,543 (Ga. Ct. App. 2002).  
- *Gibbs v. State*, 568 S.E.2d 850, 852 (Ga. Ct. App. 2002).  
- *Gilbert v. State*, 538 S.E.2d 104, 106 (Ga. Ct. App. 2000).  
- *Goins v. State*, 571 S.E.2d 195, 196 (Ga. Ct. App. 2002).  
- *Griffin v. State*, 523 S.E.2d 910, 911(Ga. Ct. App. 1999).  
- *Hicks v. State*, 563 S.E.2d 897, 898 (Ga. Ct. App. 2002).  
- *Lopez v. State*, 572 S.E.2d 736, 738 (Ga. Ct. App. 2002).  
- *Lunsford v. State*, 581 S.E.2d 638, 641 (Ga. Ct. App. 2003).  
- *McCrickard v. State*, 549 S.E.2d 505, 507 (Ga. Ct. App. 2001).  
- *McEntyre v. State*, 545 S.E.2d 391, 392 (Ga. Ct. App. 2001).  
- *Perdue v. State*, 551 S.E.2d 65, 67 (Ga. Ct. App. 2001).  
- *Peterson v. State*, 559 S.E.2d 126, 129 (Ga. Ct. App. 2002).  
- *Price v. State*, 556 S.E.2d 168, 169 (Ga. Ct. App. 2001).  
- *Rainey v. State*, 584 S.E.2d 13, 14 (Ga. Ct. App. 2003).  
- *Rice v. State*, 531 S.E.2d 182, 184 (Ga. Ct. App. 2000).  
- *Schultz v. State*, 599 S.E.2d 247, 248 (Ga. Ct. App. 2004).  
- *Slack v. State*, 593 S.E.2d 664, 666 (Ga. Ct. App. 2004).  
- *State v. Vines*, 487 S.E.2d 521, 522 (Ga. Ct. App. 1997).  
- *Stroeining v. State*, 486 S.E.2d 670, 671 (Ga. Ct. App. 1997).  
- *Thompson v. State*, 537 S.E.2d 807, 809 (Ga. Ct. App. 2000).  
- *Wilkerson v. State*, 598 S.E.2d 364, 365 (Ga. Ct. App. 2004).  
- *Winter v. State*, 557 S.E.2d 436, 438 (Ga. Ct. App. 2001).

– *Wormley v. State*, 565 S.E.2d 530, 531 (Ga. Ct. App. 2002).

- The offense of child molestation can be committed where one commits an immoral and indecent act with the intent to arouse and satisfy his or her own sexual desires and those sexual desires of the victim by touching, rubbing, and fondling the buttocks, breast, chest, vagina, and vaginal area of the child.  
– *Seidenfaden v. State*, 547 S.E.2d 578, 582-83 (Ga. Ct. App. 2001).
- The child molestation statute does not set forth alternative methods by which the crime may be committed.  
– *Edwards v. State*, 559 S.E.2d 506, 510 (Ga. Ct. App. 2002).

## **B. “Immoral or Indecent Act” Defined**

- Immoral or indecent acts constituting child molestation refer to acts that offend against the public’s sense of propriety as well as to acts more suggestive of sexually-oriented misconduct to a child’s body than simply assaultive in nature.  
– *Bowman v. State*, 490 S.E.2d 163, 165 (Ga. Ct. App. 1997).  
– *State v. Vines*, 487 S.E.2d 521, 522 (Ga. Ct. App. 1997).  
– *Wormley v. State*, 565 S.E.2d 530, 531 (Ga. Ct. App. 2002).
- The Georgia law against child molestation affords protection to a child’s body in those cases where the act or acts are more suggestive of sexually-oriented misconduct than simply assaultive in nature.  
– *Wormley v. State*, 565 S.E.2d 530, 531 (Ga. Ct. App. 2002).
- An act generally viewed as morally and sexually indelicate, improper, and offensive can constitute child molestation.  
– *Bowman v. State*, 490 S.E.2d 163, 165 (Ga. Ct. App. 1997).  
– *State v. Vines*, 487 S.E.2d 521, 522 (Ga. Ct. App. 1997).  
– *Wormley v. State*, 565 S.E.2d 530, 531 (Ga. Ct. App. 2002).

### **1. Focus on the Adult’s Action**

- The focus is on the adult’s action toward the child in relation to the motive for the action.  
– *Stroeining v. State*, 486 S.E.2d 670, 671 (Ga. Ct. App. 1997).

### **2. Determination of Immorality or Indecency**

- Whether a particular act is “immoral or indecent” is a jury question that may be determined in conjunction with the intent that drives the act.  
– *Slack v. State*, 593 S.E.2d 664, 666 (Ga. Ct. App. 2004).  
– *Stroeining v. State*, 486 S.E.2d 670, 671 (Ga. Ct. App. 1997).

### **3. Verbal Acts**

- The act required by the statute may be merely verbal.
  - *Hicks v. State*, 563 S.E.2d 897, 898 (Ga. Ct. App. 2002).
  - *State v. Vines*, 487 S.E.2d 521, 522 (Ga. Ct. App. 1997).

**a. Speech Unaccompanied by Other Acts**

- The sexually-exploitive nature of the alleged act is not altered by the fact that it involved speech unaccompanied by other acts. Accordingly, the allegation of a conversation alone, without any further allegation of physical contact with the child or other conduct by the defendant, is sufficient to satisfy the statutory requirement that the accused committed an immoral or indecent act.
  - *Bowman v. State*, 490 S.E.2d 163, 166 (Ga. Ct. App. 1997).

**b. Telephone Conversations**

- Although the language of the statute obviously applies to acts committed in the physical presence of the child, it does not require such physical presence, and the language is clearly broad enough to apply to an act committed by communication in a telephone conversation between the accused and the child.
  - *State v. Vines*, 487 S.E.2d 521, 523 (Ga. Ct. App. 1997).
- The mere fact that the alleged conversation was communicated by telephone rather than in the physical presence of a child does not change the sexually-exploitive and psychologically-damaging nature of the act and thus does not remove it from the scope of prohibited acts.
  - *State v. Vines*, 487 S.E.2d 521, 523 (Ga. Ct. App. 1997).

**C. Age of the Child Victim**

- The State is required to prove that the victim was under the age of 16 because that is an essential element of the crime of child molestation.
  - *Terrell v. State*, 536 S.E.2d 528, 529 (Ga. Ct. App. 2000).

**D. Use of Victim’s Body in Physical Capacity**

- A defendant need not have intended to actually use the child’s body in some physical capacity in order to commit an act of molestation.
  - *Grimsley v. State*, 505 S.E.2d 522, 526-27 (Ga. Ct. App. 1998).
- It is sufficient if a person utilizes or capitalizes on a child’s mere presence as a witness to the person’s intentional immoral or indecent act, provided the act is

accomplished with the intent to arouse or satisfy the sexual desires of either the child or the person. GA. CODE ANN. § 16-6-4 (a).  
– *Grimsley v. State*, 505 S.E.2d 522, 526-27 (Ga. Ct. App. 1998).

### **1. Touching of a Minor Child**

- A conviction for child molestation does not require a showing that the victim was touched beneath his or her clothing.  
– *Walsh v. State*, 512 S.E.2d 408, 413 (Ga. Ct. App. 1999).
- The issue of whether the touching was sexual in nature is for the jury.  
– *Walsh v. State*, 512 S.E.2d 408, 413 (Ga. Ct. App. 1999).

### **2. Skin-to-Skin Contact**

- Skin-to-skin contact is not a necessary element of child molestation.  
– *In the Interest of J.D.*, 534 S.E.2d 112, 113 (Ga. Ct. App. 2000).

## **E. No Requirement of Force or Injury**

- Force or injury is not a necessary element of the crime of child molestation.  
– *Branesky v. State*, 584 S.E.2d 669, 671 (Ga. Ct. App. 2003).  
– *Price v. State*, 556 S.E.2d 168, 170 (Ga. Ct. App. 2001).
- In cases involving child molestation, the absence of physical injury does not mandate an acquittal.  
– *Childers v. State*, 571 S.E.2d 420, 422 (Ga. Ct. App. 2002).

## **F. Requirement of a Child’s Presence**

- Although a strict construction of this statute requires that the perpetrator perform the immoral or indecent act in the child’s presence, the court is aware of no authority that requires the child to observe the entire act.  
– *Arnold v. State*, 545 S.E.2d 312, 315 (Ga. Ct. App. 2001).
- There no basis to hold that there is a specific limit to how far away someone can be before they can no longer be considered to be in the presence of a child where the child can see the person and the person is aware of the presence of the child.  
– *Rainey v. State*, 584 S.E.2d 13, 15 (Ga. Ct. App. 2003).

## **G. Victimization of the Child’s Mind**

- A child’s mind may be victimized by molestation as well.  
– *Bowman v. State*, 490 S.E.2d 163, 165 (Ga. Ct. App. 1997).  
– *State v. Vines*, 487 S.E.2d 521, 522 (Ga. Ct. App. 1997).

- Soliciting a child to engage in sexual intercourse and sodomy and of asking the child to place a condom on the defendant's penis are acts that victimize the child's mind, and are not inchoate but are in and of themselves violative of the statute.  
– *Bowman v. State*, 490 S.E.2d 163, 166 (Ga. Ct. App. 1997).

## **H. Examples of Child Molestation**

### **1. Touching of Child's Vagina**

- A person would indeed be guilty of child molestation if he touched a child's vagina with his penis.  
– *Hayes v. State*, 557 S.E.2d 468, 470 (Ga. Ct. App. 2001).

### **2. Exposure of Sexual Organs**

- Simply exposing one's sexual organs to a child can be sufficient proof of child molestation.  
– *Rainey v. State*, 584 S.E.2d 13, 15 (Ga. Ct. App. 2003).  
– *Wilkerson v. State*, 598 S.E.2d 364, 365 (Ga. Ct. App. 2004).
- Exposing one's sexual organs even though the child does not actually see them is sufficient proof of child molestation.  
– *Rainey v. State*, 584 S.E.2d 13, 15 (Ga. Ct. App. 2003).

## **I. Lesser-Included Offenses: Sexual Battery**

### **1. Charge of Sexual Battery Required**

- A charge on sexual battery as a lesser-included offense of child molestation is required when the indictment puts the defendant on notice that he or she could be convicted of the lesser-included offense and the evidence presented at trial is sufficient to establish the lesser-included offense consistent with these averments.  
– *Jarvis v. State*, 560 S.E.2d 29, 32 (Ga. Ct. App. 2002).

### **2. Charge of Sexual Battery Not Warranted**

- It is true that sexual battery may be a lesser-included offense of child molestation as a matter of fact; however, when the State has established that the defendant committed the charged offense of child molestation with the necessary specific intent of arousing or satisfying the sexual desires of either the defendant or the victim, no charge on sexual battery is warranted.  
– *Enloe v. State*, 556 S.E.2d 873, 874 (Ga. Ct. App. 2001).  
– *Jarvis v. State*, 560 S.E.2d 29, 32 (Ga. Ct. App. 2002).



### **3. Fondling the Genitalia of a Minor Child**

- The act of fondling the genitalia of a 12-year-old child with only an inference of the intent to arouse sexual desires would satisfy all the elements of both child molestation and sexual battery.  
– *Enloe v. State*, 556 S.E.2d 873, 874 (Ga. Ct. App. 2001).

### **J. Corroboration**

- As to charges regarding child molestation, the evidence of the victim alone is sufficient to authorize the jury to find the defendant guilty of such charges.  
– *Greulich v. State*, 588 S.E.2d 450, 452 (Ga. Ct. App. 2003).
- No requirement exists that the testimony of the victim be corroborated.  
– *Baker v. State*, 555 S.E.2d 899, 902 (Ga. Ct. App. 2001).  
– *Greulich v. State*, 588 S.E.2d 450, 452 (Ga. Ct. App. 2003).  
– *Price v. State*, 556 S.E.2d 168, 170 (Ga. Ct. App. 2001).

### **K. Admission of Pornographic Materials**

- In the prosecution of child molestation, pornographic materials are admissible only when relevant to the offenses being tried.  
– *Greulich v. State*, 588 S.E.2d 450, 451 (Ga. Ct. App. 2003).

### **L. Aggravated Child Molestation**

#### **1. Elements of the Offense**

- Child molestation advances to aggravated child molestation with the addition of either physical injury to the child or sodomy.  
– *Barrett v. State*, 559 S.E.2d 108, 110 (Ga. Ct. App. 2002).  
– *Bishop v. State*, 555 S.E.2d 504, 505 (Ga. Ct. App. 2001).  
– *Brewer v. State*, 523 S.E.2d 18, 20 (Ga. 1999).  
– *Brownlow v. State*, 544 S.E.2d 472, 475 (Ga. Ct. App. 2001).  
– *Collins v. State*, 560 S.E.2d 767, 768 (Ga. Ct. App. 2002).  
– *Gearin v. State*, 565 S.E.2d 540, 543 (Ga. Ct. App. 2002).  
– *Gilbert v. State*, 538 S.E.2d 104, 106 (Ga. Ct. App. 2000).  
– *Griffin v. State*, 523 S.E.2d 910, 911 (Ga. Ct. App. 1999).  
– *Grooms v. State*, 583 S.E.2d 216, 218 (Ga. Ct. App. 2003).  
– *Johnson v. State*, 573 S.E.2d 362, 364 (Ga. 2002).  
– *Perdue v. State*, 551 S.E.2d 65, 67 (Ga. Ct. App. 2001).  
– *Rice v. State*, 531 S.E.2d 182, 184 (Ga. Ct. App. 2000).  
– *Wright v. State*, 576 S.E.2d 64, 66 (Ga. Ct. App. 2003).

#### **2. “Sodomy” Defined**

- “Sodomy” is defined as any sexual act involving the sex organs of one person and the mouth or anus of another.

– *Wright v. State*, 576 S.E.2d 64, 67 (Ga. Ct. App. 2003).

### **3. Lesser-Included Offense: Child Molestation**

- Child molestation is necessarily a lesser-included offense of aggravated child molestation.
  - *Brownlow v. State*, 544 S.E.2d 472, 475 (Ga. Ct. App. 2001).
  - *Foster v. State*, 562 S.E.2d 191, 193 (Ga. Ct. App. 2002).

### **4. Merger**

- Aggravated child molestation cannot merge with child molestation as a matter of law, since it is a greater, not lesser, offense involving additional elements.
  - *Brewer v. State*, 553 S.E.2d 363, 364 (Ga. Ct. App. 2001).

## **V. Contributing to the Delinquency of a Minor**

- A person contributes to the delinquency of a minor when he or she knowingly and willfully encourages, causes, or aids a minor in committing a delinquent act.
  - *Pierce v. State*, 554 S.E.2d 787, 790 (Ga. Ct. App. 2001).

## **VI. Cruelty to Children**

### **A. First Degree**

#### **1. Elements of the Offense**

- A person commits cruelty to children when he or she maliciously causes a child under the age of 18 cruel or excessive physical or mental pain. GA. CODE ANN. § 16-5-70(b).
  - *Gearin v. State*, 565 S.E.2d 540, 543 (Ga. Ct. App. 2002).
  - *Groves v. State*, 590 S.E.2d 136, 139 (Ga. Ct. App. 2003).
  - *Hall v. State*, 566 S.E.2d 374, 378 (Ga. Ct. App. 2002).
  - *Hightower v. State*, 570 S.E.2d 22, 23 (Ga. Ct. App. 2002).
  - *Loveless v. State*, 538 S.E.2d 464, 466-67 (Ga. Ct. App. 2000).
  - *Perdue v. State*, 551 S.E.2d 65, 67 (Ga. Ct. App. 2001).
  - *Porter v. State*, 532 S.E.2d 407, 410 (Ga. Ct. App. 2000).
  - *Smith v. State*, 547 S.E.2d 598, 602 (Ga. Ct. App. 2001).

#### **2. Pain**

##### **a. Severe Physical Pain**

- Sustaining a conviction on a charge of cruelty to children requires a finding of probability that the minor victim suffered severe physical pain.
  - *Tucker v. State*, 559 S.E.2d 171, 173 (Ga. Ct. App. 2002).

**b. Jury Determination**

- What constitutes cruel or excessive physical or mental pain must be resolved by a jury.
  - *Hightower v. State*, 570 S.E.2d 22, 24 (Ga. Ct. App. 2002).
  - *Perdue v. State*, 551 S.E.2d 65, 67 (Ga. Ct. App. 2001).

**3. Malice**

- The crime of cruelty to children may not be based on a parent's or guardian's negligent mistake in judgment, but must be based on the malicious failure to provide care.
  - *Loveless v. State*, 538 S.E.2d 464, 466-67 (Ga. Ct. App. 2000).
- The malice element of the offense imports the absence of justification or excuse and the presence of actual intent to cause the harm produced or the wanton and willful doing of an act with the awareness that it is likely to produce the particular harm.
  - *Hightower v. State*, 570 S.E.2d 22, 25 (Ga. Ct. App. 2002).
  - *Loveless v. State*, 538 S.E.2d 464, 466-67 (Ga. Ct. App. 2000).

**a. Intent**

- Intention may be manifest by the circumstances connected with the perpetration of the offense.
  - *Hightower v. State*, 570 S.E.2d 22, 25 (Ga. Ct. App. 2002).
- Intent is a question of fact to be determined upon consideration of:
  - (1) words;
  - (2) conduct;
  - (3) demeanor;
  - (4) motive; and
  - (5) all other circumstances connected with the act for which the accused is prosecuted.
    - *Hightower v. State*, 570 S.E.2d 22, 25 (Ga. Ct. App. 2002).

**b. More than a Sexual Relationship Is Required**

- The charge of maliciously causing pain requires more than the fact of a sexual relationship with a minor, otherwise, every incident of statutory rape would also constitute the crime of cruelty to children. Under such circumstances, the charges would merge as a matter of law.
  - *Hightower v. State*, 570 S.E.2d 22, 25 (Ga. Ct. App. 2002).

## **B. Second Degree**

- Any person commits the offense of cruelty to children in the second degree when such person, who is the primary aggressor, having knowledge that a child under the age of 18 is present and sees or hears the act, commits a forcible felony, battery, or family-violence battery. GA. CODE ANN. § 16-5-70(c).  
– *Hazelrigs v. State*, 567 S.E.2d 79, 82 (Ga. Ct. App. 2002).

## **VII. Public Indecency**

- A person commits public indecency when, in a lewd manner while in a public place, he or she either exposes his or her sexual organs or appears partially nude. GA. CODE ANN. §§ 16-6-8(a)(2)-(3).  
– *Damare v. State*, 571 S.E.2d 507, 511 (Ga. Ct. App. 2002).

## **VIII. Rape**

### **A. Elements of the Offense**

- A person commits the offense of rape when he has carnal knowledge of a female forcibly and against her will. GA. CODE ANN. § 16-6-1(a)(1).  
– *Jenkins v. State*, 576 S.E.2d 68, 69 (Ga. Ct. App. 2003).  
– *Lay v. State*, 591 S.E.2d 427, 429 (Ga. Ct. App. 2003).
- The offense of rape is committed where a person has carnal knowledge of a female who is less than 10 years of age. GA. CODE ANN. § 16-6-1(a)(2).  
– *Jenkins v. State*, 576 S.E.2d 68, 69 (Ga. Ct. App. 2003).  
– *Lay v. State*, 591 S.E.2d 427, 429 (Ga. Ct. App. 2003).
- The terms “forcibly” and “against her will” constitute two separate elements in rape cases and although the fact that a victim is under the age of consent may supply the “against her will” element in a forcible rape case (because it shows that the victim is incapable of giving legal consent), it cannot supply the element of force. Presuming force from the victim’s age in forcible rape cases would, as a practical matter, eliminate the crime of statutory rape.  
– *Jenkins v. State*, 576 S.E.2d 68, 69-70 (Ga. Ct. App. 2003).

### **B. Definitions**

#### **1. “Carnal Knowledge”**

- Carnal knowledge results when there is any penetration of the female sex organ by the male sex organ.  
– *Lay v. State*, 591 S.E.2d 427, 429 (Ga. Ct. App. 2003).

## 2. “Against Her Will”

- “Against her will” means without consent.  
– *Jenkins v. State*, 576 S.E.2d 68, 69 (Ga. Ct. App. 2003).

## 3. “Forcibly”

- “Forcibly” means acts of physical force, threats of death, physical bodily harm, or mental coercion, such as intimidation.  
– *Jenkins v. State*, 576 S.E.2d 68, 69 (Ga. Ct. App. 2003).

### C. Force

- The State must prove the element of force as a factual matter in forcible rape cases rather than presuming force as a matter of law based on the victim’s age.  
– *Minter v. State*, 537 S.E.2d 769, 771 (Ga. Ct. App. 2000).
- In order to prove the rape of a child, only minimal evidence of force is required.  
– *Siharath v. State*, 541 S.E.2d 71, 74 (Ga. Ct. App. 2000).
- Proof of physical violence, intimidation, or threats may be used to prove force.  
– *Branesky v. State*, 584 S.E.2d 669, 671 (Ga. Ct. App. 2003).  
– *Siharath v. State*, 541 S.E.2d 71, 74 (Ga. Ct. App. 2000).
- Lack of resistance, induced by fear, is force, and may be shown by the victim’s state of mind from prior experience with the defendant and subjective apprehension of danger.  
– *Branesky v. State*, 584 S.E.2d 669, 671 (Ga. Ct. App. 2003).  
– *Jenkins v. State*, 576 S.E.2d 68, 70 (Ga. Ct. App. 2003).  
– *Siharath v. State*, 541 S.E.2d 71, 74 (Ga. Ct. App. 2000).

### D. Penetration

- The penetration of the female sexual organ by the sexual organ of the male, which is necessary to constitute rape, need be only slight  
– *Emanuel v. State*, 396 S.E.2d 83, 84 (Ga. Ct. App. 1990).
- It is not necessary that the vagina be entered or the hymen ruptured.  
– *Emanuel v. State*, 396 S.E.2d 83, 84 (Ga. Ct. App. 1990).
- An entering of the anterior of the organ, known as the vulva or labia, is sufficient.  
– *Emanuel v. State*, 396 S.E.2d 83, 84 (Ga. Ct. App. 1990).

## **E. Victim Testimony**

- The testimony of the victim alone is sufficient to affirm a rape conviction.  
– *Greulich v. State*, 588 S.E.2d 450, 452 (Ga. Ct. App. 2003).

## **F. Statutory Rape**

### **1. Elements of the Offense**

- A person commits the offense of statutory rape when he or she engages in sexual intercourse with any person under the age of 16 years with another who is not his or her spouse. GA. CODE ANN. § 16-6-3(a).  
– *Perdue v. State*, 551 S.E.2d 65, 67 (Ga. Ct. App. 2001).  
– *Peterson v. State*, 559 S.E.2d 126, 129 (Ga. Ct. App. 2002).

### **2. Force**

- Acts of force are irrelevant in a statutory rape case.  
– *Hightower v. State*, 570 S.E.2d 22, 25 (Ga. Ct. App. 2002).
- It is the act of sexual intercourse and the age of the victim that constitute the crime of statutory rape.  
– *Hightower v. State*, 570 S.E.2d 22, 25 (Ga. Ct. App. 2002).

### **3. Penetration**

- Although penetration is an essential element of the crime of rape, it may be slight.  
– *Wallace v. State*, 558 S.E.2d 773, 776 (Ga. Ct. App. 2002).
- Penetration may be proved by indirect or circumstantial evidence.  
– *Wallace v. State*, 558 S.E.2d 773, 776 (Ga. Ct. App. 2002).

## **IX. Sexual Assault: Supervisory Authority**

- A person with supervisory authority over a student can be guilty of sexual assault against a student enrolled in school when he engages in sexual contact with the student. GA. CODE ANN. § 16-6-5.1(b).  
– *Groves v. State*, 590 S.E.2d 136, 139 (Ga. Ct. App. 2003).

## **X. Sexual Battery**

### **A. Elements of the Offense**

- A person commits sexual battery when he or she intentionally makes physical contact with the intimate parts of the body of another without that person's consent. GA. CODE ANN. § 16-6-22.1(b).
  - *Dorsey v. State*, 595 S.E.2d 106, 108 (Ga. Ct. App. 2004).
  - *Thompson v. State*, 537 S.E.2d 807, 809 (Ga. Ct. App. 2000).

### **B. “Intimate Parts” Defined**

- “Intimate parts” includes the buttocks.
  - *Thompson v. State*, 537 S.E.2d 807, 809 (Ga. Ct. App. 2000).

### **C. Aggravated Sexual Battery**

#### **1. Elements of the Offense**

- A person commits the offense of aggravated sexual battery when he or she intentionally penetrates with a foreign object, such as a finger, the sexual organ or anus of another person without the consent of that person. GA. CODE ANN. § 16-6-22.2(b).
  - *Bishop v. State*, 555 S.E.2d 504, 505 (Ga. Ct. App. 2001).
  - *Deal v. State*, 528 S.E.2d 289, 291 (Ga. Ct. App. 2000).
  - *Gearin v. State*, 565 S.E.2d 540, 543 (Ga. Ct. App. 2002).
  - *Hardeman v. State*, 544 S.E.2d 481, 483 (Ga. Ct. App. 2001).
  - *Johnson v. State*, 573 S.E.2d 362, 364 (Ga. 2002).
  - *Peterson v. State*, 559 S.E.2d 126, 129 (Ga. Ct. App. 2002).
  - *Ragan v. State*, 550 S.E.2d 476, 479 (Ga. Ct. App. 2001).
  - *Seidenfaden v. State*, 547 S.E.2d 578, 583 (Ga. Ct. App. 2001).

#### **2. “Foreign Object” Defined**

- “Foreign object” is statutorily defined as “any article or instrument other than the sexual organ of a person.” GA. CODE ANN. § 16-6-22.2(a).
  - *Johnson v. State*, 573 S.E.2d 362, 364 (Ga. 2002).
- The term foreign object includes not only inanimate instruments, but also a person's body parts, such as a finger.
  - *Hardeman v. State*, 544 S.E.2d 481, 483 (Ga. Ct. App. 2001).
  - *Johnson v. State*, 573 S.E.2d 362, 364 (Ga. 2002).

#### **3. Victim Testimony**

- A conviction of aggravated sexual battery is sufficiently supported by the testimony of the victim to prove guilt beyond a reasonable doubt.
  - *Greulich v. State*, 588 S.E.2d 450, 452 (Ga. Ct. App. 2003).

## **XI. Sexual Exploitation of Children**

### **A. Offenses**

#### **1. Possess or Control Material of Sexually-Explicit Conduct**

##### **a. Elements of the Offense**

- It is unlawful for any person knowingly to possess or control any material that depicts a minor engaged in sexually-explicit conduct. GA. CODE ANN. § 16-12-100(b)(8).
  - *Aman v. State*, 409 S.E.2d 645, 646 (Ga. 1991).
  - *Conejo v. State*, 374 S.E.2d 826, 828 (Ga. Ct. App. 1988).
  - *Craft v. State*, 558 S.E.2d 18, 24 (Ga. Ct. App. 2001).
  - *Gilbert v. State*, 538 S.E.2d 104, 106 (Ga. Ct. App. 2000).
  - *Winter v. State*, 557 S.E.2d 436, 438 (Ga. Ct. App. 2001).

##### **b. “Depicts a Minor” Defined**

- The statutory term “depicts a minor” must be understood as limited to any photographic representation that was made of a human being who at that time was a minor and was engaged in any sexually explicit conduct, as defined by the statute.
  - *Aman v. State*, 409 S.E.2d 645, 646 (Ga. 1991).

#### **2. Create, Reproduce, Publish, Promote, Sell, Distribute, Give, Exhibit Visual Medium of Sexually-Explicit Conduct**

##### **a. Elements of the Offense**

- It is unlawful for any person knowingly to create, reproduce, publish, promote, sell, distribute, give, exhibit, or possess with intent to sell or distribute any visual medium, which depicts a minor engaged in any sexually explicit conduct. GA. CODE ANN. § 16-12-100(b)(5).
  - *Coalson v. State*, 555 S.E.2d 128, 132 (Ga. Ct. App. 2001).
  - *Craft v. State*, 558 S.E.2d 18, 24 (Ga. Ct. App. 2001).
  - *State v. Brown*, 551 S.E.2d 773, 774 (Ga. Ct. App. 2001).

##### **b. Victim**

- For the purposes of indictment under § 16-12-100(b)(5), the victim contemplated therein is the public at large.
  - *Coalson v. State*, 555 S.E.2d 128, 132 (Ga. Ct. App. 2001).



**c. Clothed Children**

- Surreptitiously photographing the genitals of children who are clothed constitutes conduct that is not within the precise language of the statute.  
– *Craft v. State*, 558 S.E.2d 18, 25 (Ga. Ct. App. 2001).

**3. Employ, Use, Persuade, Induce, Entice, or Coerce a Minor for Production of Visual Medium of Sexually-Explicit Conduct**

- It is unlawful for any person knowingly to employ, use, persuade, induce, entice, or coerce any minor to engage in or assist any other person to engage in sexually-explicit conduct for the purpose of producing any visual medium depicting such conduct. GA. CODE ANN. § 16-12-100(b)(1).  
– *Phagan v. State*, 486 S.E.2d 876, 881 (Ga. 1997).  
– *Phillips v. State*, 604 S.E.2d 520, 527 (Ga. Ct. App. 2004).  
– *Reed v. State*, 448 S.E.2d 189, 190 (Ga. 1994).  
– *Rice v. State*, 531 S.E.2d 182, 186 (Ga. Ct. App. 2000).

**4. Bring or Cause to Be Brought into the State Material of Sexually-Explicit Conduct**

- It is unlawful for any person knowingly to bring or cause to be brought into this state any material that depicts a minor engaged in any sexually explicit conduct. GA. CODE ANN. § 16-12-100(b)(7).  
– *Craft v. State*, 558 S.E.2d 18, 24 (Ga. Ct. App. 2001).

**5. Virtual or Simulated Child Pornography**

No relevant state cases reported.

**B. Definitions**

**1. “Visual Medium”**

- Visual medium is defined as any film, photograph, negative, slide, magazine, or other visual medium. Ga. Code Ann. § 16-12-100(a)(5).  
– *State v. Brown*, 551 S.E.2d 773, 774 (Ga. Ct. App. 2001).
- The legislature did not intend to restrict the definition of visual media to tangible objects; visual media includes digital codes that a defendant distributes electronically.  
– *State v. Brown*, 551 S.E.2d 773, 776 (Ga. Ct. App. 2001).

## 2. “Sexually-Explicit Conduct”

- “Sexually-explicit conduct” is defined, in relevant part, as actual or simulated masturbation, lewd exhibition of the genitals or pubic area of any person, penetration of the vagina or rectum by any object except when done as part of a recognized medical procedure, and defecation or urination for the purpose of sexual stimulation of the viewer. GA. CODE ANN. § 16-12-100(a)(4).  
– *Craft v. State*, 558 S.E.2d 18, 24 (Ga. Ct. App. 2001).  
– *Phillips v. State*, 604 S.E.2d 520, 527 (Ga. Ct. App. 2004).
- “Sexually-explicit conduct” is defined as the condition of being fettered, bound, or otherwise physically restrained on the part of a person who is nude. GA. CODE ANN. § 16-12-100(a)(4)(F).  
– *Rice v. State*, 531 S.E.2d 182, 185 (Ga. Ct. App. 2000).
- “Sexually-explicit conduct” means actual or simulated sexual intercourse.  
– *Phagan v. State*, 486 S.E.2d 876, 881 (Ga. 1997).

### a. Lewdness

- Unless an act is found not to be lewd as a matter of law, whether such act is lewd under the attendant circumstances usually is best left to a jury for determination.  
– *Uden v. State*, 462 S.E.2d 408, 411 (Ga. Ct. App. 1995).

### b. Essential Element

- Sexually-explicit conduct is an essential element of the offense of sexual exploitation of children, but the statutory definition is not.  
– *Rice v. State*, 531 S.E.2d 182, 185 (Ga. Ct. App. 2000).

## 3. “Minor”

- “Minor” is defined as any person under the age of 18 years. Ga. Code Ann. § 16-12-100(a)(1).  
– *Phagan v. State*, 486 S.E.2d 876, 881 (Ga. 1997).  
– *Reed v. State*, 448 S.E.2d 189, 190 (Ga. 1994).

## C. Computer Pornography & Child Exploitation Prevention Act of 1999

- Under the Act, effective July 1, 1999, a person commits a high and aggravated misdemeanor when he or she intentionally or willfully utilizes a computer on-line service, Internet service, or local bulletin-board service to seduce, solicit,

lure, or entice or attempt to seduce, solicit, lure, or entice a child or another person believed by such person to be a child, to commit:

- (1) sodomy or aggravated sodomy;
- (2) child molestation or aggravated child molestation;
- (3) enticing a child for indecent purposes;
- (4) public indecency; or
- (5) to engage in any conduct that, by its nature, is an unlawful sexual offense against a child.

GA. CODE ANN. § 16-12-100.2.

– *Denard v. State*, 534 S.E.2d 182, 188-189 (Ga. Ct. App. 2000).

## **XII. Sodomy**

### **A. Elements of the Offense**

- A person commits the offense of sodomy when the person performs or submits to any sexual act involving the sex organ of one and the mouth or anus of another. GA. CODE ANN. § 16-6-2(a).  
– *Rice v. State*, 531 S.E.2d 182, 185 (Ga. Ct. App. 2000).  
– *Schneider v. State*, 603 S.E.2d 663, 664 (Ga. Ct. App. 2004).
- Penetration is not an element of sodomy.  
– *Morgan v. State*, 486 S.E.2d 632, 634 (Ga. Ct. App. 1997).

### **B. Aggravated Sodomy**

#### **1. Elements of the Offense**

- A person commits the offense of aggravated sodomy when he or she commits sodomy with force and against the will of the other person. GA. CODE ANN. § 16-6-2(a).  
– *Blansit v. State*, 546 S.E.2d 81, 82 (Ga. Ct. App. 2001).  
– *Brewer v. State*, 523 S.E.2d 18, 19 (Ga. 1999).  
– *In the Interest of J.D.*, 534 S.E.2d 112, 113 (Ga. Ct. App. 2000).  
– *Patterson v. State*, 531 S.E.2d 759, 760 (Ga. Ct. App. 2000).  
– *Rice v. State*, 531 S.E.2d 182, 185 (Ga. Ct. App. 2000).  
– *Schneider v. State*, 603 S.E.2d 663, 664 (Ga. Ct. App. 2004).
- Aggravated sodomy includes sodomy with a person who is less than 10 years of age, regardless of force or consent. GA. CODE ANN. § 16-6-2(a).  
– *Chancey v. State*, 574 S.E.2d 904, 906 (Ga. Ct. App. 2002).  
– *Johnson v. State*, 573 S.E.2d 362, 364 (Ga. 2002).

## 2. Force

- Force is a separate essential element that the State is required to prove to obtain a conviction for aggravated sodomy against a victim under the age of consent.
  - *Brewer v. State*, 523 S.E.2d 18, 19 (Ga. 1999).
  - *Luke v. Battle*, 565 S.E.2d 816, 818 (Ga. 2002).
- A person cannot be convicted of aggravated sodomy involving an underage victim without proof of force.
  - *Alvarado v. State*, 547 S.E.2d 616, 617 (Ga. Ct. App. 2001).
- Only a minimal amount of evidence is necessary to prove force against a child.
  - *Blansit v. State*, 546 S.E.2d 81, 82 (Ga. Ct. App. 2001).
  - *Brewer v. State*, 523 S.E.2d 18, 20 (Ga. 1999).
  - *In the Interest of J.D.*, 534 S.E.2d 112, 113 (Ga. Ct. App. 2000).
  - *Luke v. Battle*, 565 S.E.2d 816, 818 (Ga. 2002).
  - *Patterson v. State*, 531 S.E.2d 759, 760 (Ga. Ct. App. 2000).
  - *Rice v. State*, 531 S.E.2d 182, 185 (Ga. Ct. App. 2000).
- The element of force is shown if the defendant’s words or acts were sufficient to instill in the victim a reasonable apprehension of bodily harm, violence, or other dangerous consequences to herself or others.
  - *Chancey v. State*, 574 S.E.2d 904, 906 (Ga. Ct. App. 2002).

### a. “Force” Defined

- The term force means acts of physical force, threats of death or physical bodily harm, or mental coercion, such as intimidation.
  - *Blansit v. State*, 546 S.E.2d 81, 82 (Ga. Ct. App. 2001).
  - *Brewer v. State*, 523 S.E.2d 18, 20 (Ga. 1999).
  - *In the Interest of J.D.*, 534 S.E.2d 112, 113 (Ga. Ct. App. 2000).
  - *Luke v. Battle*, 565 S.E.2d 816, 818 (Ga. 2002).
  - *Patterson v. State*, 531 S.E.2d 759, 760 (Ga. Ct. App. 2000).
  - *Rice v. State*, 531 S.E.2d 182, 185 (Ga. Ct. App. 2000).
- Only a minimal amount of evidence is necessary to prove force against a child.
  - *Blansit v. State*, 546 S.E.2d 81, 82 (Ga. Ct. App. 2001).
  - *Brewer v. State*, 523 S.E.2d 18, 20 (Ga. 1999).
  - *In the Interest of J.D.*, 534 S.E.2d 112, 113 (Ga. Ct. App. 2000).
  - *Luke v. Battle*, 565 S.E.2d 816, 818 (Ga. 2002).
  - *Patterson v. State*, 531 S.E.2d 759, 760 (Ga. Ct. App. 2000).
  - *Rice v. State*, 531 S.E.2d 182, 185 (Ga. Ct. App. 2000).

**i. Lack of Resistance Induced by Fear**

- Lack of resistance, induced by fear, is not legally cognizable consent, but is force.
  - *Callahan v. State*, 418 S.E.2d 157, 159 (Ga. Ct. App. 1992).
  - *Long v. State*, 526 S.E.2d 875, 877 (Ga. Ct. App. 1999).

**ii. Force Inferred: Evidence of Intimidation**

- Force as an element of aggravated sodomy may be inferred by evidence of intimidation arising from the familial relationship.
  - *Long v. State*, 526 S.E.2d 875, 877 (Ga. Ct. App. 1999).
  - *Schneider v. State*, 603 S.E.2d 663, 665 (Ga. Ct. App. 2004).

**iii. Direct or Circumstantial Proof**

- Proof of force may be direct or circumstantial.
  - *Alvarado v. State*, 547 S.E.2d 616, 617 (Ga. Ct. App. 2001).
  - *Blansit v. State*, 546 S.E.2d 81, 82 (Ga. Ct. App. 2001).
  - *Long v. State*, 526 S.E.2d 875, 877 (Ga. Ct. App. 1999).
  - *Rice v. State*, 531 S.E.2d 182, 185 (Ga. Ct. App. 2000).
  - *Schneider v. State*, 603 S.E.2d 663, 665 (Ga. Ct. App. 2004).

**b. Age of Victim**

- Merely proving that an act of sodomy was committed on a victim under the legal age of consent does not automatically prove that it was perpetrated with force and against the will. Instead, the State must prove force by acts of force, which could include acts of intimidation and mental coercion against the victim.
  - *Luke v. Battle*, 565 S.E.2d 816, 818 (Ga. 2002).
  - *Patterson v. State*, 531 S.E.2d 759, 760 (Ga. Ct. App. 2000).

**XIII. Torture and Depravity of Mind**

**A. Elements of the Offense**

- Psychological abuse inflicted by the defendant on the victim, where it is shown to have resulted in severe mental anguish in anticipation of physical harm, may amount to torture and depravity of mind.
  - *Presnell v. State*, 551 S.E.2d 723, 728 (Ga. 2001).

**B. Age of the Victim**

- The young age of the victim is relevant to a consideration of torture and depravity of mind.  
– *Presnell v. State*, 551 S.E.2d 723, 728 (Ga. 2001).

**XIV. Transporting a Minor for the Purposes of Prostitution**

No relevant state cases reported.

# GEORGIA

## *Mandatory Reporting*

### **I. Reports of Child Abuse**

- Specified persons, including physicians, having reasonable cause to believe that a child has been abused shall report or cause reports of that abuse to be made.

– *O’Heron v. Blaney*, 583 S.E.2d 834, 836 (Ga. 2003).

#### **A. Required Information**

- The report must include any information that might be helpful in establishing the cause of the injuries and the identity of the perpetrator.

– *O’Heron v. Blaney*, 583 S.E.2d 834, 836 (Ga. 2003).

#### **B. Reports Made to or Discovered by Child-Welfare Agency**

- If a report of child abuse is made to the child-welfare agency or independently discovered by the agency, and the agency has reasonable cause to believe such report is true or the report contains any allegation or evidence of child abuse, then the agency shall immediately notify the appropriate police authority or district attorney. GA. CODE ANN. § 19-7-5(e).

– *Moss v. State*, 535 S.E.2d 292, 294 (Ga. Ct. App. 2000).

### **II. Confidentiality of Child-Abuse Records**

#### **A. General Rule**

- The Department of Family and Children Services (DFACS) records concerning the reports of child abuse are confidential and access to such records is limited.

– *Dunagan v. State*, 565 S.E.2d 526, 529 (Ga. Ct. App. 2002).

– *Honeycutt v. State*, 538 S.E.2d 870, 872 (Ga. Ct. App. 2000).

#### **B. Access to Records**

- The records may be obtained by petitioning the trial court to subpoena the records under the relevant provisions of the Georgia Code, which state that reasonable access be provided to a court, by subpoena, upon its finding that access to such records may be necessary for determination of an issue before such court provided, however, that the court shall examine such record *in camera*, unless the court determines that public disclosure of the information

contained therein is necessary for the resolution of an issue then before it and the record is otherwise admissible under the rules of evidence.

– *Dunagan v. State*, 565 S.E.2d 526, 529 (Ga. Ct. App. 2002).

– *Honeycutt v. State*, 538 S.E.2d 870, 872 (Ga. Ct. App. 2000).

### **III. Immunity**

- Any person who participates in the making of a report is immune from civil or criminal liability that would otherwise be incurred, provided such participation is made in good faith. GA. CODE ANN. § 19-7-5(f).  
– *O’Heron v. Blaney*, 583 S.E.2d 834, 836 (Ga. 2003).
- This immunity also extends to the reporter’s participation in any judicial or other proceeding resulting from the report. GA. CODE ANN. § 19-7-5(f).  
– *O’Heron v. Blaney*, 583 S.E.2d 834, 836 (Ga. 2003).

#### **A. Attachment of Immunity**

- Immunity may attach in two ways: either by showing that reasonable cause exists or by showing good faith.  
– *O’Heron v. Blaney*, 583 S.E.2d 834, 836 (Ga. 2003).

##### **1. Reasonable Cause**

- Once a reporter has reasonable cause to suspect child abuse has occurred, he or she must report it or face criminal penalties.  
– *O’Heron v. Blaney*, 583 S.E.2d 834, 836 (Ga. 2003).
- The trigger for the duty to report is reasonable cause to believe, which requires an objective analysis.  
– *O’Heron v. Blaney*, 583 S.E.2d 834, 836 (Ga. 2003).
- The relevant question is whether the information available at the time would lead a reasonable person in the position of the reporter to suspect abuse.  
– *O’Heron v. Blaney*, 583 S.E.2d 834, 836 (Ga. 2003).
- Once reasonable cause has been established under this standard, a reporter complying with the statutory mandate to make a report is, by definition, operating in good faith; therefore, if the objective analysis supports the reporter’s conclusion that child abuse has occurred, then immunity attaches and there is no need to further examine the reporter’s good faith.  
– *O’Heron v. Blaney*, 583 S.E.2d 834, 836 (Ga. 2003).



## 2. Good Faith

- If under an objective analysis, the information would not lead a reasonable person to suspect child abuse, the reporter may still have immunity if he or she made the report in good faith.  
– *O’Heron v. Blaney*, 583 S.E.2d 834, 836-37 (Ga. 2003).
- The relevant question is whether the reporter honestly believed he or she had a duty to report.  
– *O’Heron v. Blaney*, 583 S.E.2d 834, 836-37 (Ga. 2003).
- A reporter acting in good faith will be immune even if he or she is negligent or exercises bad judgment.  
– *O’Heron v. Blaney*, 583 S.E.2d 834, 836-37 (Ga. 2003).

# GEORGIA

## *Search and Seizure of Electronic Evidence*

### I. Search Warrants

#### A. Probable Cause

##### 1. Determination of Probable Cause

- In determining whether an affidavit provides sufficient probable cause for issuance of a search warrant, a magistrate must make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him or her, including the veracity and basis of the knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

– *Buckley v. State*, 561 S.E.2d 188, 189 (Ga. Ct. App. 2002).

- A search warrant must be supported by probable cause, or reasonable grounds, to believe that evidence of a crime will be found in a particular place. An officer's inference that items sought will be at the place to be searched requires no more than a fair presumption to be reasonable. Where the State fails to show any connection between the items sought and the place to be searched, however, there are no reasonable grounds for the search.

– *Craft v. State*, 558 S.E.2d 18, 28 (Ga. Ct. App. 2001).

– *State v. Staley*, 548 S.E.2d 26, 29 (Ga. Ct. App. 2001).

##### 2. Time

- Time is assuredly an element of the concept of probable cause; however, the precise date of an occurrence is not essential. Rather, the inquiry is as to whether the factual statements within the affidavit are sufficient to create a reasonable belief that the conditions described in the affidavit might yet prevail at the time of issuance of the search warrant.

– *Bayles v. State*, 373 S.E.2d 266, 267 (Ga. Ct. App. 1988).

### **3. Hearsay**

#### **a. Generally**

- Hearsay may serve as the basis for the granting of a search warrant as long as there is a substantial basis for crediting the hearsay.  
– *Buckley v. State*, 561 S.E.2d 188, 190 (Ga. Ct. App. 2002).

#### **b. Reliability**

- When a law-enforcement officer or a government official is the informant, the reliability of the informant is presumed as a matter of law.  
– *Buckley v. State*, 561 S.E.2d 188, 190 (Ga. Ct. App. 2002).
- A search warrant for the home of an alleged child molester based upon similar information from the victim has been upheld, with the court holding that because the non-confidential hearsay informant was the victim of a crime, there was no requirement that her reliability be further corroborated in order to show that probable cause existed.  
– *Miller v. State*, <sup>++</sup> 464 S.E.2d 621, 624 (Ga. Ct. App. 1995).

### **4. Omission of Material Information**

- Where a defendant challenges a warrant based on the alleged omission of material information, the defendant bears the burden of showing not only that the false and omitted information was material to the determination of probable cause, but that any false information given or material information omitted was done so for the purpose of misleading the magistrate.  
– *Watts v. State*, 541 S.E.2d 41, 46 (Ga. Ct. App. 2000).
- In order to force an evidentiary hearing on the accuracy of the affidavit, a defendant must present more than mere conclusions. There must be allegations of deliberate falsehood or reckless disregard for the truth, and these allegations must be accompanied by evidence or an offer of proof of such evidence. Mere allegations of negligence or mistake of fact are not sufficient.  
– *Watts v. State*, 541 S.E.2d 41, 46 (Ga. Ct. App. 2000).

### **5. Appellate Review**

- On appeal, the court gives substantial deference to the magistrate's decision to issue the warrant, and the evidence is construed in favor of

the court's decision that probable cause existed.  
– *Buckley v. State*, 561 S.E.2d 188, 190 (Ga. Ct. App. 2002).  
– *Craft v. State*, 558 S.E.2d 18, 28 (Ga. Ct. App. 2001).  
– *Schwindler v. State*, 563 S.E.2d 154, 159 (Ga. Ct. App. 2002).

- When reviewing an affidavit for a search warrant, the court looks at the totality of the circumstances to determine if there was probable cause to issue the search warrant.  
– *Walsh v. State*, 512 S.E.2d 408, 410 (Ga. Ct. App. 1999).

## **B. Scope of the Search Warrant**

- A search warrant must particularly describe the articles sought.  
– *State v. Kramer*, 580 S.E.2d 314, 316-17 (Ga. Ct. App. 2003).
- While the degree of the description's specificity is flexible and will vary with the circumstances involved, it cannot leave the determination of what articles fall within the warrant's description and are to be seized entirely to the judgment and opinion of the officer executing the warrant. This is especially true where the article or articles described in the warrant are presumptively protected by the First Amendment's guarantee of the freedom of speech.  
– *State v. Kramer*, 580 S.E.2d 314, 316-17 (Ga. Ct. App. 2003).
- A warrant must describe items sought with enough particularity to enable the executing officer to seize those items with reasonable certainty; however, when circumstances make an exact description a virtual impossibility, it is permissible that the warrant describe only the generic class of items sought.  
– *Miller v. State*, <sup>++</sup> 464 S.E.2d 621, 624 (Ga. Ct. App. 1995).  
– *Tyler v. State*, 335 S.E.2d 691, 694 (Ga. Ct. App. 1985).

### **1. First-Amendment Issues**

- A warrant authorizing the seizure of materials presumptively protected by the First Amendment may not issue based solely on the conclusory allegations of a law-enforcement officer that the sought-after materials are obscene, but instead must be supported by affidavits setting forth specific facts in order that the issuing magistrate may focus searchingly on the question of obscenity.  
– *State v. Kramer*, 580 S.E.2d 314, 317 (Ga. Ct. App. 2003).

### **2. Videotapes**

- While the courts recognize that circumstances may make an exact description of instrumentalities a virtual impossibility and that in those circumstances the searching officer can only be expected to describe the generic class of items he or she is seeking, a warrant authorizing

the seizure of videotapes with nothing more does not pass constitutional muster.

– *State v. Kramer*, 580 S.E.2d 314, 317 (Ga. Ct. App. 2003).

### **3. Items Not Listed in the Warrant**

- An officer in the process of executing a lawful search warrant is authorized to seize any stolen property, contraband, or other item, other than private papers, which he or she has probable cause to consider tangible evidence of the commission of a crime, even though the property is not listed in the warrant. GA. CODE ANN. § 17-5-21(b).  
– *Phillips v. State*, 604 S.E.2d 520, 526 (Ga. Ct. App. 2004).

## **C. Staleness**

- In order to determine if the information relied upon in obtaining a search warrant is stale, the court views the totality of the circumstances for indications of the existence of the reasonable probability that the conditions referred to in the sworn testimony would continue to exist at the time of the issuance of the search warrant.  
– *Buckley v. State*, 561 S.E.2d 188, 190 (Ga. Ct. App. 2002).  
– *Craft v. State*, 558 S.E.2d 18, 29 (Ga. Ct. App. 2001).

### **1. Time**

- The mere passage of time does not equate with staleness.  
– *Buckley v. State*, 561 S.E.2d 188, 190 (Ga. Ct. App. 2002).
- Time is an element of probable cause, but the precise date of an occurrence is not essential. Rather, the inquiry is as to whether under the totality of the circumstances the factual statements within the affidavit are sufficient to create a reasonable belief that the conditions described in the affidavit might yet prevail at the time of issuance of the search.  
– *State v. Evans*, 384 S.E.2d 404, 408 (Ga. Ct. App. 1989).

### **2. Good Faith**

- Pretermitted the issue of staleness is the question whether law enforcement relied in good faith on the warrant issued by the magistrate.  
– *State v. Evans*, 384 S.E.2d 404, 408 (Ga. Ct. App. 1989).
- The good-faith inquiry is confined to the objectively ascertainable question: whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization. In

making this determination, all of the circumstances may be considered.  
– *State v. Evans*, 384 S.E.2d 404, 408-09 (Ga. Ct. App. 1989).

- The existence of technical defects in the search warrant issued by the magistrate or judge does not automatically preclude the existence of objective good faith on the part of law enforcement in relying on the validity of the warrant.  
– *State v. Evans*, 384 S.E.2d 404, 409 (Ga. Ct. App. 1989).

## **II. Anticipatory Warrants**

No relevant state cases reported.

## **III. Methods of Searching**

No relevant state cases reported.

## **IV. Types of Searches**

### **A. Employer Searches**

No relevant state cases reported.

### **B. Private Searches**

No relevant state cases reported.

### **C. University-Campus Searches**

No relevant state cases reported.

### **D. Warrantless Searches**

#### **1. Third-Party Consent**

- The authority that justifies the third-party consent does not rest upon the law of property, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his or her own right and that the others have assumed the risk that one of the their number might permit the common area to be searched.  
– *United States v. Matlock*, 415 U.S. 164, 171 (1974)  
– *Presnell v. State*, 551 S.E.2d 723, 731 (Ga. 2001).  
– *Walsh v. State*, 512 S.E.2d 408, 411-12 (Ga. Ct. App. 1999).

- The fact that a defendant’s house is surrounded by law enforcement does not *ipso facto* require a finding of coercion.  
– *Howell v. State*, 324 S.E.2d 754, 756 (Ga. Ct. App. 1984).
- The assumption of the risk taken by the co-inhabitant is limited to “merely an inability to control access to the premises during one’s absence.” Law enforcement officers cannot ignore the objections of the co-inhabitants who are present at the time of the search.  
– *State v. Randolph*, 604 S.E.2d 614 (Ga. 2004)

## 2. Plain-View Searches

- A law-enforcement officer who observes contraband in plain view is entitled to seize it, so long as he or she is at a place where he or she is entitled to be.  
– *Phillips v. State*, 604 S.E.2d 520, 525 (Ga. Ct. App. 2004).
- For the plain-view doctrine to apply, the State must show that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be seen and that the incriminating character of the evidence was immediately apparent.  
– *Phillips v. State*, 604 S.E.2d 520, 526 (Ga. Ct. App. 2004).

## V. Computer-Technician/Repairperson Discoveries

No relevant state cases reported.

## VI. Photo-Development Discoveries

No relevant state cases reported.

## VII. Exclusionary Rule

- The application of the exclusionary rule has never been sanctioned by the federal Supreme Court in any context other than a Fourth Amendment violation by law-enforcement officers.  
– *Joines v. State*, 591 S.E.2d 454, 456 (Ga. Ct. App. 2003).
- School officials are not generally considered to be law-enforcement officers.  
– *Joines v. State*, 591 S.E.2d 454, 456 (Ga. Ct. App. 2003).

## VIII. Criminal Forfeiture

No relevant state cases reported.

**IX. Disciplinary Hearings for Federal and State Officers**

No relevant state cases reported.



# GEORGIA

## *Jurisdiction and Nexus*

### **I. Jurisdictional Nexus**

No relevant state cases reported.

### **II. Internet Nexus**

No relevant state cases reported.

### **III. State Jurisdiction, Federal Jurisdiction, Concurrent Jurisdiction**

#### **A. State: Venue**

##### **1. Determination and Proof of Venue**

- In general, criminal actions are to be tried in the county where the crimes are alleged to have occurred.
  - *Branesky v. State*, 584 S.E.2d 669, 671 (Ga. Ct. App. 2003).
  - *Gearin v. State*, 565 S.E.2d 540, 543-44(Ga. Ct. App. 2002).

##### **2. Jurisdiction Based on Child Residing in State**

- A person is subject to jurisdiction in Georgia when the violation of the statute involves a child who resides in the state or another person believed by such person to be a child residing in the state.
  - *State v. Brown*, 551 S.E.2d 773, 776 (Ga. Ct. App. 2001).

##### **3. Boundary Line of Two Counties**

- If a crime is committed on, or immediately adjacent to, the boundary line between two counties, the crime shall be considered as having been committed in either county. GA. CODE ANN. § 17-2-2(b).
  - *Carswell v. State*, 534 S.E.2d 568, 570 (Ga. Ct. App. 2000).

##### **4. Exclusive Jurisdiction Over Juveniles**

- The superior court shall have exclusive jurisdiction over the trial of any child 13 to 17 years of age who alleged to have committed aggravated sodomy, aggravated child molestation, or aggravated sexual battery. GA. CODE ANN. § 15-11-28(b)(2)(A).
  - *Johnson v. State*, 573 S.E.2d 362, 364 (Ga. 2002).

## **5. Burden of Proof**

- Venue is a jurisdictional fact that must be proved by the prosecution beyond a reasonable doubt.
  - *Branesky v. State*, 584 S.E.2d 669, 671 (Ga. Ct. App. 2003).
  - *Carswell v. State*, 534 S.E.2d 568, 570 (Ga. Ct. App. 2000).
  - *Chalifoux v. State*, 587 S.E.2d 62, 62 (Ga. Ct. App. 2003).
  - *Cox v. State*, 526 S.E.2d 887, 890 (Ga. Ct. App. 1999).
  - *Gearin v. State*, 565 S.E.2d 540, 543-44 (Ga. Ct. App. 2002).
- The State may establish venue by whatever means of proof are available to it, and may use both direct and circumstantial evidence.
  - *Branesky v. State*, 584 S.E.2d 669, 671 (Ga. Ct. App. 2003).
  - *Gearin v. State*, 565 S.E.2d 540, 543-44 (Ga. Ct. App. 2002).

### **B. Federal**

No relevant state cases reported.

### **C. Concurrent**

No relevant state cases reported.

## **IV. Interstate Possession of Child Pornography**

No relevant state cases reported.

# GEORGIA

## *Discovery and Evidence*

### **I. Timely Review of Evidence**

No relevant state cases reported.

### **II. Discovery**

#### **A. Criminal Procedure Discovery Act**

- The Criminal procedure Discovery Act, which applies only to those cases in which the defendant elects by written notice to have it apply, broadens discovery in felony cases by imposing corresponding discovery obligations upon both the defendant and the State. GA. CODE ANN. § 17-16-1.  
– *Downs v. State*, 572 S.E.2d 54, 57 (Ga. Ct. App. 2002).
- The Act requires the State and the defendant to disclose the:
  - (1) identities and addresses of all persons they intend to call as witnesses at trial;
  - (2) relevant written or recorded statements of all witnesses;
  - (3) scientific reports, physical or mental reports; and
  - (4) other evidence intended for use at trial or evidence obtained from or that belongs to the defendant regardless of whether the state intends to use such evidence at trial.– *Downs v. State*, 572 S.E.2d 54, 57 (Ga. Ct. App. 2002).
- The Act also provides for the discovery of a custodial statement and the new requirement that witness statements be provided to the opposing party, as well as notice of an intent to offer an alibi defense and a list of witnesses to be offered to rebut the defense of alibi.  
– *Downs v. State*, 572 S.E.2d 54, 57 (Ga. Ct. App. 2002).

#### **B. Discovery by the Defendant**

##### **1. Defense Requests for Copies of Child Pornography**

No relevant state cases reported.

## **2. Reports of Examinations and Tests**

- The State is required to make available to a defendant only those medical examination reports that it intends to introduce into evidence in its case-in-chief or in rebuttal.  
– *Xulu v. State*, 568 S.E.2d 74, 76 (Ga. Ct. App. 2002).

## **C. Discovery by the Government**

- The defendant shall, within 10 days of timely compliance by the prosecuting attorney but no later than 5 days prior to trial, or as otherwise ordered by the court, permit the prosecuting attorney at a time agreed to by the parties or as ordered by the court to inspect and copy or photograph a report of any physical or mental examinations and of scientific tests or experiments, including a summary of the basis for the expert opinion rendered in the report, or copies thereof, if the defendant intends to introduce in evidence in the defense's case-in chief or rebuttal the results of the physical or mental examination or scientific test or experiment. GA. CODE ANN. § 17-16-4(b)(2).  
– *Beck v. State*, 551 S.E.2d 68, 72 (Ga. Ct. App. 2001).
- The State may discover any written reports of experts that the defendant intends to introduce at trial.  
– *Beck v. State*, 551 S.E.2d 68, 73 (Ga. Ct. App. 2001).
- The defendant is not required to have the opinions of his or her experts reduced to writing nor is he or she required to produce any report that he or will not offer at trial.  
– *Beck v. State*, 551 S.E.2d 68, 73 (Ga. Ct. App. 2001).

## **D. Brady Materials**

### **1. General Inspection by Defense Not Permitted**

- It is well recognized that the *Brady* rule does not require the State or prosecution to open its file for general inspection by the defense for pre-trial discovery.  
– *Boatright v. State*, 385 S.E.2d 298, 300 (Ga. Ct. App. 1989).

### **2. No Affirmative Obligation to Seek Out Information**

- The *Brady* rule does not impose an affirmative obligation on the prosecution to seek out information for the defense, even if such information is more accessible to the prosecution than the defense.  
– *Frei v. State*, 557 S.E.2d 49, 53 (Ga. Ct. App. 2001).

### **3. Fishing Expeditions Not Allowed**

- The defense is not entitled under *Brady* to engage in a mere fishing expedition into the files of the State.  
– *Boatright v. State*, 385 S.E.2d 298, 300 (Ga. Ct. App. 1989).
- There is no general constitutional right to discovery in a criminal case, and the *Brady* rule did not create one.  
– *Boatright v. State*, 385 S.E.2d 298, 300 (Ga. Ct. App. 1989).
- The *Brady* rule cannot be read as requiring that as a matter of constitutional law everything must be disclosed that might influence a jury.  
– *Boatright v. State*, 385 S.E.2d 298, 300 (Ga. Ct. App. 1989).

### **E. Discovery Misconduct**

- When the defendant fails to comply with reciprocal discovery requirements, the trial court may, upon a showing of prejudice and bad faith, prohibit the defendant from introducing the evidence not disclosed or presenting the witness not disclosed. GA. CODE ANN. § 17-16-6.  
– *Beck v. State*, 551 S.E.2d 68, 72 (Ga. Ct. App. 2001).
- An interview of the witness is the remedy for failure to comply with the requirements that a witness must be identified prior to trial.  
– *Beck v. State*, 551 S.E.2d 68, 73 (Ga. Ct. App. 2001).

## **III. Accusatory Instrument: Indictments**

### **A. Requirements**

- Every indictment of the grand jury which states the offense in the terms and language of the Georgia Code or so plainly that the nature of the offense charged may easily be understood by the jury shall be deemed sufficiently technical and correct to withstand a general demurrer. GA. CODE ANN. § 17-7-54.  
– *Williams v. State*, 570 S.E.2d 645, 645-46 (Ga. Ct. App. 2002).
- It is an elementary rule of criminal procedure that an indictment should contain a complete description of the offense charged, and that there can be no conviction unless every essential element thereof is both alleged in the indictment and proved by the evidence.  
– *Bowman v. State*, 490 S.E.2d 163, 166 (Ga. Ct. App. 1997).

#### **1. Sufficiency**

- The true test for the sufficiency of the indictment is not whether it could have been made more definite and certain, but whether it

contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he or she must be prepared to meet, and, in case any other proceedings are taken against him or her for a similar offense, whether the record shows with accuracy to what extent he or she may plead a former acquittal or conviction.

– *Williams v. State*, 570 S.E.2d 645, 646 (Ga. Ct. App. 2002).

## **2. Definiteness of the Indictment**

- The test as to the definiteness of the indictment is whether it contains the elements of the offense intended to be charged and sufficiently apprises the defendant of what he or she must be prepared to meet.  
– *Schwindler v. State*, 563 S.E.2d 154, 161 (Ga. Ct. App. 2002).

## **3. Language**

- An indictment substantially in the language of the Georgia Code is sufficient in form and substance.  
– *Bowman v. State*, 490 S.E.2d 163, 166 (Ga. Ct. App. 1997).  
– *Dennard v. State*, 534 S.E.2d 182, 185 (Ga. Ct. App. 2000).
- Where the indictment alleges an offense, and alleges that the act was unlawfully committed, and that it was contrary to the laws of Georgia, and employs language from which it must necessarily be inferred that the criminal intent existed, it is not void because it fails to expressly allege the criminal intent.  
– *Bowman v. State*, 490 S.E.2d 163, 166 (Ga. Ct. App. 1997).  
– *Dennard v. State*, 534 S.E.2d 182, 185 (Ga. Ct. App. 2000).

## **4. Place of the Crime**

- With regard to identifying the place of the crime, an indictment that charges the crime to have been committed in a particular county is sufficiently certain.  
– *Schwindler v. State*, 563 S.E.2d 154, 161 (Ga. Ct. App. 2002).

## **5. Date of the Crime**

- With regard to identifying the time of the crime, alleging the exact date is not needed unless it is an essential averment of the crime charged.  
– *Schwindler v. State*, 563 S.E.2d 154, 161 (Ga. Ct. App. 2002).
- The general rule is that when the exact date of a crime is not a material allegation of the indictment, the crime may be proved to have taken place on any date prior to the return of the indictment, so long as the

date is within the applicable statute of limitation.

- *Dean v. State*, 555 S.E.2d 868, 872 (Ga. Ct. App. 2001).
- *Grimsley v. State*, 505 S.E.2d 522, 525 (Ga. Ct. App. 1998).
- *Miller v. State*, 486 S.E.2d 911, 913 (Ga. Ct. App. 1997).
- *Tyler v. State*, 596 S.E.2d 651, 653 (Ga. Ct. App. 2004).
- *Wallace v. State*, 558 S.E.2d 773, 775 (Ga. Ct. App. 2002).
- *Wilt v. State*, 592 S.E.2d 925, 928 (Ga. Ct. App. 2004).

- An indictment charging the commission of an offense, without showing that the date alleged therein is an essential averment, covers any offense of the nature charged within the appropriate period of limitation, including the date alleged.

- *Cox v. State*, 526 S.E.2d 887, 890 (Ga. Ct. App. 1999).
- *Miller v. State*, 486 S.E.2d 911, 914 (Ga. Ct. App. 1997).

## **6. Name of the Victim**

- If the gist of the crime is an offense against the public rather than a particular person, it is not necessary to name the victim of such charges in the indictment.

- *Coalson v. State*, 555 S.E.2d 128, 132 (Ga. Ct. App. 2001).
- *Dennard v. State*, 534 S.E.2d 182, 188-90 (Ga. Ct. App. 2000).

- In a prosecution for soliciting prostitution, the court has held that it is not necessary to name the person solicited, as the gist of the offense is the harm done to society by such an act.

- *Coalson v. State*, 555 S.E.2d 128, 132 (Ga. Ct. App. 2001).
- *Dennard v. State*, 534 S.E.2d 182, 188-90 (Ga. Ct. App. 2000).

## **B. Commission of the Crime in More than One Way**

- If a crime may be committed in more than one way, it is sufficient for the State to show that it was committed in any one of the separate ways listed in the indictment, even if the indictment uses the conjunctive rather than disjunctive form.

- *Hostetler v. State*, 582 S.E.2d 197, 200 (Ga. Ct. App. 2003).

## **C. Demurrers**

### **1. Special Demurrers**

- A defendant is entitled to be tried on an indictment that is perfect in form.

- *Wallace v. State*, 558 S.E.2d 773, 776-77 (Ga. Ct. App. 2002).

- If an indictment is imperfect, a defendant may file a special demurrer challenging the form of the indictment.

- *Wallace v. State*, 558 S.E.2d 773, 776-77 (Ga. Ct. App. 2002).

- If no special demurrer is filed, any error in the indictment's form is waived.  
– *Wallace v. State*, 558 S.E.2d 773, 776-77 (Ga. Ct. App. 2002).
- If the demurrer is granted, the trial court quashes the indictment; however, the quashing of an indictment merely bars trial on the flawed indictment. It does not bar the State from re-indicting the defendant.  
– *Wallace v. State*, 558 S.E.2d 773, 776-77 (Ga. Ct. App. 2002).

## 2. General Demurrers

- A defendant also may file a general demurrer, which challenges the very validity of the indictment and may be raised at any time.  
– *Wallace v. State*, 558 S.E.2d 773, 777 (Ga. Ct. App. 2002).

## D. Fatal Variance

### 1. General Rule

- Not every variance between the allegations in an indictment and the evidence presented at trial is fatal.  
– *Nichols v. State*, 473 S.E.2d 491, 493 (Ga. Ct. App. 1996).
- The general rule that allegations and proof must correspond is based upon the following requirements:
  - (1) the accused shall be definitely informed as to the charges against him or her, so that he or she may be enabled to present his or her defense and not be taken by surprise by the evidence offered at trial; and
  - (2) he or she may be protected against another prosecution for the same offense.
 – *Nichols v. State*, 473 S.E.2d 491, 493 (Ga. Ct. App. 1996).  
– *Woods v. State*, 535 S.E.2d 524, 525 (Ga. Ct. App. 2000).

### 2. Proper Inquiry

- The courts no longer employ an overly technical application of the fatal-variance rule, focusing instead on materiality.  
– *Woods v. State*, 535 S.E.2d 524, 525 (Ga. Ct. App. 2000).
- The true inquiry is not whether there has been a variance in proof, but whether there had been such a variance as to affect the substantial rights of the accused.  
– *Woods v. State*, 535 S.E.2d 524, 525 (Ga. Ct. App. 2000).



#### **E. Punishment for More than One Count**

- Where the indictment alleges a different set of facts for each count, the State may, on conviction, punish the defendant for both counts.  
– *Frazier v. State*, 524 S.E.2d 768, 770 (Ga. Ct. App. 1999).

#### **IV. Chain of Custody**

- To show a chain of custody adequate to preserve the identity of fungible evidence, the State has the burden of proving with reasonable certainty that the evidence is the same as that seized and that there has been no tampering or substitution.  
– *Winter v. State*, 557 S.E.2d 436, 438 (Ga. Ct. App. 2001).

##### **A. Tampering**

- The State need not foreclose every possibility of tampering and need only show reasonable assurance of the identity of the evidence.  
– *Winter v. State*, 557 S.E.2d 436, 438 (Ga. Ct. App. 2001).
- In the event no showing of tampering has been made and only a bare speculation of possible tampering exists, the chain of custody is not broken and the evidence is admissible, with any doubts going to its weight.  
– *Winter v. State*, 557 S.E.2d 436, 438 (Ga. Ct. App. 2001).

##### **B. Inapplicability of Chain-of-Custody Requirements**

- The chain-of-custody requirement does not apply to distinct and recognizable physical objects that can be identified upon observation, such as videotapes.  
– *Mobley v. State*, 564 S.E.2d 851, 853 (Ga. Ct. App. 2002).

#### **V. Introduction of E-mails into Evidence**

##### **A. Hearsay/Authentication Issues**

No relevant state cases reported.

##### **B. Circumstantial Evidence**

No relevant state cases reported.

##### **C. Technical Aspects of Electronic Evidence Regarding Admissibility**

No relevant state cases reported.

## **VI. Text-Only Evidence**

### **A. Introduction into Evidence**

No relevant state cases reported.

### **B. Relevance**

No relevant state cases reported.

## **VII. Evidence Obtained from Internet Service Providers**

### **A. Electronic Communications Privacy Act**

No relevant state cases reported.

### **B. Cable Act**

No relevant state cases reported.

### **C. Patriot Act**

#### **1. National Trap and Trace Authority**

No relevant state cases reported.

#### **2. State-Court-Judge Jurisdictional Limits**

No relevant state cases reported.

## **VIII. Wiretapping, Eavesdropping, and Surveillance**

- While Georgia law prohibits the recording or taping of private telephone conversations, it does not prohibit a party to the conversation from recording it. GA. CODE ANN. §§ 16-11-62; 16-11-66(a).  
– *Malone v. State*, 541 S.E.2d 431, 432 (Ga. Ct. App. 2000).

### **A. Child Under 18 Years of Age as a Party**

- After obtaining the required consent required, the telephonic conversations or electronic communications to which a child under the age of 18 years is a party may be recorded and divulged, and such recording and dissemination may be done by a private citizen, law-enforcement agency, or prosecutor's office. GA. CODE ANN. § 16-11-66(b).  
– *Malone v. State*, 541 S.E.2d 431, 432 (Ga. Ct. App. 2000).

## **B. Parental Interception of Conversations**

- Parents, as third parties, are allowed to intercept and tape telephone conversations to which their children are parties upon a reasonable or good faith belief that such conversation is evidence of criminal conduct involving such child as a victim or an attempt, conspiracy, or solicitation to involve such child in criminal activity affecting the welfare or best interest of such child. GA. CODE ANN. § 16-11-66.  
– *Bishop v. State*, 555 S.E.2d 504, 505 (Ga. Ct. App. 2001).
- Parents of minor children under 18 may monitor or intercept the telephone conversations of such children, with or without their consent. GA. CODE ANN. § 16-11-66(d).  
– *Bishop v. State*, 555 S.E.2d 504, 506 (Ga. Ct. App. 2001).

## **IX. Authentication**

- Whether the medium is photo, film, or video, its evidentiary value is that it is a graphic portrayal of oral testimony, and it becomes admissible only when a witness has testified that it is a correct and accurate representation of relevant facts personally observed by the witness.  
– *Phagan v. State*, 486 S.E.2d 876, 883 (Ga. 1997).

### **A. Videotapes**

- In those circumstances not covered by new legislation, a videotape is admissible where the operator of the machine that produced it, or one who personally witnessed the events recorded, testifies that the videotape accurately portrayed what the witnesses saw take place at the time the events occurred.  
– *Mobley v. State*, 564 S.E.2d 851, 853 (Ga. Ct. App. 2002).  
– *Phagan v. State*, 486 S.E.2d 876, 884 (Ga. 1997).

### **B. Unavailability of Authenticating Witness**

- “Unavailability of a witness” includes situations in which the authenticating witness is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of authentication. GA. CODE ANN. § 24-4-48.  
– *Craft v. State*, 558 S.E.2d 18, 27 (Ga. Ct. App. 2001).  
– *Phagan v. State*, 486 S.E.2d 876, 883-84 (Ga. 1997).
- The defendant is deemed unavailable as an authenticating witness because he or she cannot be compelled to testify due to his or her constitutional right against self-incrimination; however, even though the authenticating witness is unavailable, subject to any other valid objection, photographs and videotapes are admissible when the court determines, based on competent evidence

presented to it, that the items tend to show reliably the fact or facts for which they are offered.

– *Craft v. State*, 558 S.E.2d 18, 27 (Ga. Ct. App. 2001).

– *Phagan v. State*, 486 S.E.2d 876, 883-84 (Ga. 1997).

## **X. General Admissibility of Evidence**

### **A. Cardinal Rule of Evidence**

- It is a cardinal rule of evidence that if evidence is duly admissible under any legitimate theory, it should be admitted even though it does not qualify for admission under one or more other evidentiary theories. That is, generally evidence should be admitted if it is admissible for any legitimate purpose.

– *Grimsley v. State*, 505 S.E.2d 522, 525 (Ga. Ct. App. 1998).

### **B. Relevant Evidence**

- The Georgia rule favors the admission of any relevant evidence, no matter how slight its probative value, and evidence is relevant if it renders the desired inference more probable than it would be without the evidence.

– *Phillips v. State*, 604 S.E.2d 520, 527 (Ga. Ct. App. 2004).

## **XI. Types of Evidence**

### **A. Character Evidence**

- Generally, unless a defendant opens the door with evidence of his or her good character, bad character evidence is inadmissible.

– *Smith v. State*, 570 S.E.2d 400, 403 (Ga. Ct. App. 2002).

#### **1. Character Not in Issue**

- Where the defendant testifies and admits prior criminal conduct, he or she has not placed his or her character in issue. Rather, he or she has raised an issue that may be fully explored by the State on cross-examination.

– *Taylor v. State*, 592 S.E.2d 148, 153 (Ga. Ct. App. 2003).

- A witness's non-responsive answer that impacts negatively on a defendant's character does not improperly place the defendant's character at issue.

– *Griffin v. State*, 523 S.E.2d 910, 912 (Ga. Ct. App. 1999).

#### **2. Character in Issue**

- Once a defendant opens the door for character evidence, specific events may be used in testing the extent and foundation of the

witness's knowledge and the correctness of his or her testimony on direct examination.

– *Porter v. State*, 532 S.E.2d 407, 412 (Ga. Ct. App. 2000).

### **3. General Versus Specific Bad Character**

#### **a. General Bad Character**

- A witness may be impeached by a showing of general bad character.

– *Johns v. State*, 558 S.E.2d 426, 429 (Ga. Ct. App. 2001).

#### **b. Specific Acts of Bad Character**

- Impeaching a witness with specific acts of bad character is not permissible.

– *Johns v. State*, 558 S.E.2d 426, 429 (Ga. Ct. App. 2001).

– *Pruitt v. State*, 514 S.E.2d 639, 649 (Ga. 1999).

- Instances of specific misconduct may not be used to impeach a witness' character or veracity unless the misconduct has resulted in the conviction of a crime involving moral turpitude.

– *Johns v. State*, 558 S.E.2d 426, 429 (Ga. Ct. App. 2001).

## **B. Homosexuality and Pederasty**

- While evidence of homosexuality unrelated to the offenses charged is inadmissible, both the prior act and statement in question have a logical connection to the offenses charged in that they illustrate the defendant's preference for a particular victim or type of victim, plus reveal the defendant's bent of mind or his *modus operandi*.

– *Green v. State*, 532 S.E.2d 111, 114 (Ga. Ct. App. 2000).

### **1. Aggravated Sodomy**

- Evidence of homosexuality or pederasty and indications of such sexual preferences are admissible in a trial for aggravated sodomy.

– *Green v. State*, 532 S.E.2d 111, 114 (Ga. Ct. App. 2000).

### **2. Inappropriate Touching of a Male Child**

- Materials involving explicit homosexual activity are admissible when the defendant is charged with the inappropriate touching of a male child.

– *Alvarado v. State*, 547 S.E.2d 616, 618 (Ga. Ct. App. 2001).

## C. Prior Acts, Crimes, and Wrongs

### 1. Inadmissible

#### a. General Rule

- Evidence of the commission of a separate crime is not admissible when the sole purpose is to show that the defendant is guilty of the other crime.  
– *Myrick v. State*, 531 S.E.2d 766, 768 (Ga. Ct. App. 2000).

#### b. Relevance

- The general character of the parties and especially their conduct in other transactions are irrelevant unless the nature of the action involves such character and renders necessary or proper the investigation of such conduct.  
– *Barrett v. State*, 559 S.E.2d 108, 110 (Ga. Ct. App. 2002).

### 2. Admissible

#### a. Sexual Offenses

- The exception to the general rule that evidence of independent crimes is inadmissible has been most liberally extended to the area of sexual offenses.  
– *Barrett v. State*, 559 S.E.2d 108, 110 (Ga. Ct. App. 2002).  
– *Eggleston v. State*, 544 S.E.2d 722, 723 (Ga. Ct. App. 2001).  
– *Peterson v. State*, 559 S.E.2d 126, 129 (Ga. Ct. App. 2002).

#### b. Relevance

- Even where sexual offenses are involved, the evidence should not be admitted unless the prejudice it creates is outweighed by its relevance.  
– *Barrett v. State*, 559 S.E.2d 108, 110 (Ga. Ct. App. 2002).

#### c. Unique Bent of Mind

- It is a well-established rule that when a defendant is charged with any form of sexual abuse of a child, evidence of prior sex crimes against children is admissible because such conduct requires a unique bent of mind.  
– *Turner v. State*, 538 S.E.2d 125, 128 (Ga. Ct. App. 2000).

### 3. Test to Admit Evidence of Prior Crime

- In order for the court to admit evidence of a prior crime, the State must make the following three affirmative showings:
  - (1) that the State intends to introduce evidence of the independent offense for an appropriate purpose;
  - (2) that there is sufficient evidence to establish that the defendant committed the independent offense; and
  - (3) that there is a sufficient similarity between the independent offense and the crime charged so that proof of the former tends to prove the latter.
    - *Barrett v. State*, 559 S.E.2d 108, 110 (Ga. Ct. App. 2002).
    - *Cornelius v. State*, 445 S.E.2d 800, 806 (Ga. Ct. App. 1994).
    - *Eggleston v. State*, 544 S.E.2d 722, 724 (Ga. Ct. App. 2001).
    - *Hoffman v. State*, 576 S.E.2d 102, 104 (Ga. Ct. App. 2003).
    - *Hostetler v. State*, 582 S.E.2d 197, 198-99 (Ga. Ct. App. 2003).
    - *Turner v. State*, 538 S.E.2d 125, 127-28 (Ga. Ct. App. 2000).
    - *Winter v. State*, 557 S.E.2d 436, 438-39 (Ga. Ct. App. 2001).

#### a. Proper Focus

- A transaction does not have to mirror every detail in order to authorize its admission. Rather, the proper focus is upon the similarities between the incidents and not upon the differences.
  - *Mooney v. State*, 597 S.E.2d 589, 594 (Ga. Ct. App. 2004).
- The issue of admissibility of extrinsic transactions has never been one of mere similarity. It is, rather, relevance to the issues in the trial of the case.
  - *Mooney v. State*, 597 S.E.2d 589, 594 (Ga. Ct. App. 2004).

#### b. Hearing

- While a defendant has a right to a hearing on the similarity of other transactions sought to be admitted into evidence, it need not be a full evidentiary hearing and it is sufficient if the prosecutor shows the requisite similarity of the previous transaction by stating in his or her place the nature of the evidence to be given regarding the similar transaction.
  - *Xulu v. State*, 568 S.E.2d 74, 78 (Ga. Ct. App. 2002).

### 4. *Res Gestae* Evidence, Malice, Intent, or Motive

- When the additional crime forms part of the *res gestae* or tends to show malice, intent, motive, or the like, a logical connection exists between two crimes and the evidence of the additional crime is admissible.
  - *Myrick v. State*, 531 S.E.2d 766, 768 (Ga. Ct. App. 2000).

- The State is entitled to inform the jury of all the circumstances surrounding the commission of the crime or crimes charged.  
– *Myrick v. State*, 531 S.E.2d 766, 768 (Ga. Ct. App. 2000).

## **5. Identity, Plan, Scheme, State of Mind, and Course of Conduct**

- While evidence of prior crimes committed by a defendant is generally inadmissible, such evidence may be admitted for limited purposes, such as showing identity, plan, scheme, state of mind, and course of conduct.  
– *Hoffman v. State*, 576 S.E.2d 102, 104 (Ga. Ct. App. 2003).  
– *Hostetler v. State*, 582 S.E.2d 197, 198-99 (Ga. Ct. App. 2003).  
– *Turner v. State*, 538 S.E.2d 125,127 (Ga. Ct. App. 2000).

## **6. State of Mind**

- Evidence of defendant’s molestation of other young children is relevant and admissible to prove his or her state of mind in a child molestation case.  
– *Goins v. State*, 571 S.E.2d 195, 198 (Ga. Ct. App. 2002).

## **7. When the Defendant’s Character Is in Evidence**

- Prior-act evidence will be inadmissible because evidence of the accused’s character is not admissible unless and until the accused puts his or her character in evidence; however, if upon the trial of the case the defense places the defendant’s character in issue, evidence of similar transactions or occurrences, as shall be admissible according to the rules of evidence, shall be admissible.  
– *Miller v. State*, 486 S.E.2d 911, 915 (Ga. Ct. App. 1997).

## **8. Pattern of Sexual Abuse: Generational Abuse**

- Similar transaction evidence that shows a pattern of sexual abuse against several generations of members of the same family is admissible despite the lapse of time between the acts.  
– *Wright v. State*, 576 S.E.2d 64, 66 (Ga. Ct. App. 2003).
- Where different generations are involved, obviously many years are going to lapse between the acts. Under such circumstances, the lapse of time between the independent transactions and the offenses charged goes to the weight and credibility of such testimony, not its admissibility.  
– *Wright v. State*, 576 S.E.2d 64, 66 (Ga. Ct. App. 2003).



## 9. Similar-Transaction Evidence

- The rules regarding the use of similar-transaction evidence are construed most liberally in cases involving sexual offenses.
  - *Beck v. State*, 587 S.E.2d 316, 319 (Ga. Ct. App. 2003).
  - *Condra v. State*, 518 S.E.2d 186, 187 (Ga. Ct. App. 1999).
  - *Duncan v. State*, 584 S.E.2d 681, 683 (Ga. Ct. App. 2003).
  - *Fields v. State*, 504 S.E.2d 777, 778 (Ga. Ct. App. 1998).
  - *Foster v. State*, 562 S.E.2d 191, 194 (Ga. Ct. App. 2002).
  - *Goins v. State*, 571 S.E.2d 195, 198 (Ga. Ct. App. 2002).
  - *Helton v. State*, 602 S.E.2d 198, 200 (Ga. Ct. App. 2004).
  - *Hostetler v. State*, 582 S.E.2d 197, 198 (Ga. Ct. App. 2003).
  - *Johns v. State*, 558 S.E.2d 426, 428 (Ga. Ct. App. 2001).
  - *Nichols v. State*, 473 S.E.2d 491, 493-94 (Ga. Ct. App. 1996).
  - *Pirkle v. State*, 506 S.E.2d 186, 189 (Ga. Ct. App. 1998).
  - *Schwindler v. State*, 563 S.E.2d 154, 163 (Ga. Ct. App. 2002).
  - *Wagner v. State*, 560 S.E.2d 754, 757 (Ga. Ct. App. 2002).

### a. Admissibility of Similar-Transaction Evidence

- The admissibility of similar transaction evidence is contingent upon three affirmative showings. First, the State must demonstrate that the evidence is not brought forth to raise an improper reference to character, but rather, for an appropriate purpose deemed an exception to the general rule prohibiting this type of evidence. Second, the State must show sufficient evidence to establish that the accused committed the independent offense or act. Third, the State must demonstrate a sufficient connection or similarity between the independent offense or act and the crime charged so that proof of the former tends to prove the latter.
  - *Couch v. State*, 545 S.E.2d 685, 687 (Ga. Ct. App. 2001).
  - *Fraday v. State*, 538 S.E.2d 893, 896 (Ga. Ct. App. 2000).
  - *Nelson v. State*, 565 S.E.2d 551, 556 (Ga. Ct. App. 2002).
  - *Winter v. State*, 557 S.E.2d 436, 438 (Ga. Ct. App. 2001).

### b. Must the Crime Be Identical?

- With respect to sexual offenses and similar-transaction evidence, the crime need not be identical to the charged crime to be admissible.
  - *Foster v. State*, 562 S.E.2d 191, 194 (Ga. Ct. App. 2002).
  - *Johns v. State*, 558 S.E.2d 426, 428 (Ga. Ct. App. 2001).
  - *Mills v. State*, 553 S.E.2d 353, 356 (Ga. Ct. App. 2001).
  - *Wagner v. State*, 560 S.E.2d 754, 757 (Ga. Ct. App. 2002).

**c. Difference in Victims' Ages**

- When the crimes are similar, the difference in the victims' ages need not render the similar transaction inadmissible.
  - *Satterwhite v. State*, 551 S.E.2d 428, 431 (Ga. Ct. App. 2001).
  - *Wagner v. State*, 560 S.E.2d 754, 757 (Ga. Ct. App. 2002).

**d. Proof of Similarity, Lustful Intent, and Bent of Mind, and Corroboration of the Victim's Testimony**

- In cases involving sexual abuse, similar-transaction evidence can be admissible to show similarity, lustful intent, and bent of mind of the accused and to corroborate the victim's testimony.
  - *Condra v. State*, 518 S.E.2d 186, 187 (Ga. Ct. App. 1999).
  - *Eggleston v. State*, 544 S.E.2d 722, 723 (Ga. Ct. App. 2001).
  - *Frazier v. State*, 583 S.E.2d 188, 190 (Ga. Ct. App. 2003).
  - *Hardeman v. State*, 544 S.E.2d 481, 485 (Ga. Ct. App. 2001).
  - *Hoffman v. State*, 576 S.E.2d 102, 105 (Ga. Ct. App. 2003).
  - *Hostetler v. State*, 582 S.E.2d 197, 199 (Ga. Ct. App. 2003).
  - *Mackler v. State*, 298 S.E.2d 589, 591-92 (Ga. Ct. App. 1982).
  - *Peterson v. State*, 559 S.E.2d 126, 129 (Ga. Ct. App. 2002).
  - *Schneider v. State*, 603 S.E.2d 663, 665 (Ga. Ct. App. 2004).
  - *Xulu v. State*, 568 S.E.2d 74, 77 (Ga. Ct. App. 2002).
- There need only be evidence that the defendant was the perpetrator of both crimes and sufficient similarity or connection between the independent crime and the offenses charged.
  - *Condra v. State*, 518 S.E.2d 186, 187 (Ga. Ct. App. 1999).
  - *Frazier v. State*, 583 S.E.2d 188, 190 (Ga. Ct. App. 2003).
  - *Mackler v. State*, 298 S.E.2d 589, 591-92 (Ga. Ct. App. 1982).
  - *Schneider v. State*, 603 S.E.2d 663, 665 (Ga. Ct. App. 2004).

**i. Child-Molestation Cases**

- In child-molestation cases, evidence of other similar offenses against children is admissible to show the lustful disposition of the defendant and to corroborate the victim's testimony.
  - *Baker v. State*, 527 S.E.2d 266, 269 (Ga. Ct. App. 1999).
  - *Craft v. State*, 558 S.E.2d 18, 27 (Ga. Ct. App. 2001).
  - *Duncan v. State*, 584 S.E.2d 681, 683 (Ga. Ct. App. 2003).
  - *Hostetler v. State*, 582 S.E.2d 197, 198 (Ga. Ct. App. 2003).
  - *Mackler v. State*, 298 S.E.2d 589, 591-92 (Ga. Ct. App. 1982).
  - *Schneider v. State*, 603 S.E.2d 663, 665 (Ga. Ct. App. 2004).

**ii. Consideration of the Defendant's Youth**

- A defendant's youth at the time of the similar transaction should be considered when deciding if the testimony should be admitted to show lustful disposition and inclination (*i.e.*, bent of mind).  
– *Condra v. State*, 518 S.E.2d 186, 188 (Ga. Ct. App. 1999).

**e. Masking Evidence of Good Character**

- Child molestation, child abuse, and family violence are uniquely those cases in which the victim or victims are repeatedly and secretly the subject of criminal conduct over long periods of time, and the accused may maintain a public façade of “good character,” which can be used to defend against such charges; therefore, when an accused seeks to hide behind the masking evidence of “good character,” evidence of prior similar acts of abuse against family members may be used to strip away the mask.  
– *Miller v. State*, 486 S.E.2d 911, 916 (Ga. Ct. App. 1997).

**f. Forcible Sexual Assaults**

- When forcible sexual assaults are involved, there is at least much sociological evidence to support the conclusion that this type of deviant sexual behavior is a sufficiently isolated abnormality so that proof of the propensity of the defendant to engage in it is at least admissible, and to this extent proof of the one tends to establish the other.  
– *Wagner v. State*, 560 S.E.2d 754, 757 (Ga. Ct. App. 2002).

**g. Sufficient Similarity: Sexual Abuse and Child Molestation**

- Sexual abuse of young children or teenagers, regardless of the sex of the victims, or the nomenclature or type of acts perpetrated, is of sufficient similarity to make the evidence admissible; therefore, in a child-molestation case, similar-transaction evidence involving the molestation of another child is usually sufficiently similar to be admissible, regardless of the gender of the child involved or the exact act perpetrated upon the child.  
– *Baker v. State*, 527 S.E.2d 266, 269 (Ga. Ct. App. 1999).  
– *Beck v. State*, 587 S.E.2d 316, 319 (Ga. Ct. App. 2003).  
– *Condra v. State*, 518 S.E.2d 186, 189 (Ga. Ct. App. 1999).  
– *Couch v. State*, 545 S.E.2d 685, 687 (Ga. Ct. App. 2001).  
– *Foster v. State*, 562 S.E.2d 191, 194 (Ga. Ct. App. 2002).  
– *Fraday v. State*, 538 S.E.2d 893, 896 (Ga. Ct. App. 2000).

- *Godbey v. State*, 526 S.E.2d 415, 417 (Ga. Ct. App. 1999).
- *Goins v. State*, 571 S.E.2d 195, 198 (Ga. Ct. App. 2002).
- *Hardeman v. State*, 544 S.E.2d 481, 485 (Ga. Ct. App. 2001).
- *Hostetler v. State*, 582 S.E.2d 197, 199 (Ga. Ct. App. 2003).
- *Myrick v. State*, 531 S.E.2d 766, 768 (Ga. Ct. App. 2000).
- *Nelson v. State*, 565 S.E.2d 551, 556 (Ga. Ct. App. 2002).
- *Schwindler v. State*, 563 S.E.2d 154, 163 (Ga. Ct. App. 2002).
- *Trammell v. State*, 560 S.E.2d 312, 315 (Ga. Ct. App. 2002).
- *Xulu v. State*, 568 S.E.2d 74, 78 (Ga. Ct. App. 2002).

#### **h. Not Limited to Illegal Conduct**

- Similar-transaction evidence is not limited to a defendant’s previous illegal conduct.
  - *Mills v. State*, 553 S.E.2d 353, 356 (Ga. Ct. App. 2001).
  - *Phagan v. State*, 486 S.E.2d 876, 882 (Ga. 1997).

#### **i. Lapse of Time/Remoteness**

- The lapse of time between the charged offense and the similar transaction must be considered when deciding whether to admit evidence of independent crimes; however, particularly in cases involving the sexual exploitation of young family members over generations, the remoteness in time is not wholly determinative, but goes to weight and credibility.
  - *Condra v. State*, 518 S.E.2d 186, 187 (Ga. Ct. App. 1999).
  - *Godbey v. State*, 526 S.E.2d 415, 417 (Ga. Ct. App. 1999).
  - *Johnson v. State*, 475 S.E.2d 918, 921 (Ga. Ct. App. 1996).
  - *Nichols v. State*, 473 S.E.2d 491, 493-94 (Ga. Ct. App. 1996).
  - *Schneider v. State*, 603 S.E.2d 663, 665-66 (Ga. Ct. App. 2004).
  - *Turner v. State*, 536 S.E.2d 814, 816 (Ga. Ct. App. 2000).

#### **j. Repeated Sexual Abuse**

- Where molestation, incest, or even rape occurs repeatedly over the period of the statute of limitation against the same victim in the same way, proof of such occurrence is not a prior similar offense but constitutes proof of the offense charged, and thus excludes such acts from the ambit of the rules governing the admission of similar transaction evidence.
  - *Cox v. State*, 526 S.E.2d 887, 890 (Ga. Ct. App. 1999).

#### **k. Use of Similar Transactions Despite Severed Offenses**

- Because of the liberal extension of the rule allowing similar-transaction evidence in sexual-offense cases, the molestation of each victim is admissible as a similar transaction at the trial of the other even had the offenses been severed.
  - *Corn v. State*, 568 S.E.2d 583, 585 (Ga. Ct. App. 2002).

## **I. Appellate Review**

- The court will not disturb a trial court's determination that similar transaction evidence is admissible absent an abuse of discretion.
  - *Condra v. State*, 518 S.E.2d 186, 187 (Ga. Ct. App. 1999).
  - *Duncan v. State*, 584 S.E.2d 681, 683 (Ga. Ct. App. 2003).
  - *Helton v. State*, 602 S.E.2d 198, 200 (Ga. Ct. App. 2004).
  - *Hostetler v. State*, 582 S.E.2d 197, 198 (Ga. Ct. App. 2003).
  - *Phillips v. State*, 604 S.E.2d 520, 529 (Ga. Ct. App. 2004).

## **10. Prior Acts Toward the Victim**

- Evidence of the defendant's prior acts toward the victim, be it a prior assault, a quarrel, or a threat, is admissible when the defendant is accused of a criminal act against the victim, as the prior acts are evidence of the relationship between the victim and the defendant and may show the defendant's motive, intent, and bent of mind in committing the act against the victim which results in the charges for which the defendant is being prosecuted.
  - *Goins v. State*, 571 S.E.2d 195, 197 (Ga. Ct. App. 2002).
  - *McCrickard v. State*, 549 S.E.2d 505, 507 (Ga. Ct. App. 2001).
  - *Myrick v. State*, 531 S.E.2d 766, 768 (Ga. Ct. App. 2000).

## **11. Prior-Difficulties Evidence**

### **a. Generally**

- Evidence of a prior difficulty is admissible when an instruction is given by the court, which limits the use of the evidence to show the defendant's motive, intent, and bent of mind. Testimony regarding instances of prior difficulties may be construed more broadly than evidence of similar transaction.
  - *Hall v. State*, 566 S.E.2d 374, 379 (Ga. Ct. App. 2002).
- Evidence of previous difficulties between a defendant and a victim is admissible to show the defendant's intent, bent of mind, and course of conduct.
  - *Hall v. State*, 566 S.E.2d 374, 379 (Ga. Ct. App. 2002).
- Such evidence may be admitted to show a continuing pattern of conduct in committing battery upon the victim.
  - *Hall v. State*, 566 S.E.2d 374, 379 (Ga. Ct. App. 2002).

## **b. Limiting Instruction**

- Prior-difficulties evidence should be accompanied by an instruction from the trial judge explaining the limited use to which the jury may put such evidence; however, this principle does not mandate that the trial court give a limiting charge, in the absence of a request, when evidence of prior difficulties is admitted, although it would be better practice for the trial court to do so.
  - *Cobb v. State*, 561 S.E.2d 124, 128 (Ga. Ct. App. 2002).
  - *Myrick v. State*, 531 S.E.2d 766, 768 (Ga. Ct. App. 2000).
- Because testimony of prior difficulties has considerably more relevance than evidence of similar transactions, the appropriate jury instruction is correspondingly broader in scope.
  - *Hall v. State*, 566 S.E.2d 374, 379 (Ga. Ct. App. 2002).
- The trial court may instruct the jury that such evidence may be considered for a limited purpose on the question of the defendant's conduct, bent of mind, motive, scheme, purpose, or intent to commit the crime with which he was charged.
  - *Hall v. State*, 566 S.E.2d 374, 379 (Ga. Ct. App. 2002).

## **12. Sexual Offense Involving Adult Victim**

- There is not a *per se* rule whereby evidence of a sexual offense involving an adult victim is always inadmissible in cases in which the sexual offense was perpetrated on a minor.
  - *Barrett v. State*, 559 S.E.2d 108, 110 (Ga. Ct. App. 2002).
  - *Helton v. State*, 602 S.E.2d 198, 201 (Ga. Ct. App. 2004).

## **13. Sexual Paraphernalia and Sexually-Explicit Material**

- In a prosecution for sexual offenses, sexually explicit material is inadmissible merely to show defendant's interest in sexual activity.
  - *Smith v. State*, 570 S.E.2d 400, 403 (Ga. Ct. App. 2002).
- In a prosecution for a sexual offense, evidence of sexual paraphernalia found in the defendant's possession is inadmissible unless it shows the defendant's lustful disposition toward the sexual activity with which he or she is charged or his or her bent of mind to engage in that activity.
  - *Alvarado v. State*, 547 S.E.2d 616, 618 (Ga. Ct. App. 2001).
  - *Beck v. State*, 551 S.E.2d 68, 71 (Ga. Ct. App. 2001).
  - *Bryan v. State*, 541 S.E.2d 97, 98 (Ga. Ct. App. 2000).
  - *Corn v. State*, 568 S.E.2d 583, 585 (Ga. Ct. App. 2002).
  - *Ferrell v. State*, 569 S.E.2d 899, 901 (Ga. Ct. App. 2002).
  - *Frazier v. State*, 524 S.E.2d 768, 769 (Ga. Ct. App. 1999).

- *Gatewood v. State*, 559 S.E.2d 81, 84 (Ga. Ct. App. 2002).
  - *Greulich v. State*, 588 S.E.2d 450, 451 (Ga. Ct. App. 2003).
  - *Groves v. State*, 590 S.E.2d 136, 139 (Ga. Ct. App. 2003).
  - *Hoffman v. State*, 576 S.E.2d 102, 105 (Ga. Ct. App. 2003).
  - *Lunsford v. State*, 581 S.E.2d 638, 643 (Ga. Ct. App. 2003).
  - *McDonald v. State*, 548 S.E.2d 361, 362 (Ga. Ct. App. 2001).
  - *Mooney v. State*, 597 S.E.2d 589, 593 (Ga. Ct. App. 2004).
  - *Phillips v. State*, 604 S.E.2d 520, 528 (Ga. Ct. App. 2004).
  - *Ragan v. State*, 550 S.E.2d 476, 478 (Ga. Ct. App. 2001).
  - *Summage v. State*, 546 S.E.2d 910, 913 (Ga. Ct. App. 2001).
- Sexually-explicit material cannot be introduced merely to show a defendant’s interest in sexual activity. It can only be admitted if it can be linked to the crime charged.
    - *Alvarado v. State*, 547 S.E.2d 616, 618 (Ga. Ct. App. 2001).
    - *Beck v. State*, 551 S.E.2d 68, 71 (Ga. Ct. App. 2001).
    - *Bryan v. State*, 541 S.E.2d 97, 98 (Ga. Ct. App. 2000).
    - *Corn v. State*, 568 S.E.2d 583, 585 (Ga. Ct. App. 2002).
    - *Ferrell v. State*, 569 S.E.2d 899, 901 (Ga. Ct. App. 2002).
    - *Frazier v. State*, 524 S.E.2d 768, 769 (Ga. Ct. App. 1999).
    - *Gatewood v. State*, 559 S.E.2d 81, 84 (Ga. Ct. App. 2002).
    - *Greulich v. State*, 588 S.E.2d 450, 451 (Ga. Ct. App. 2003).
    - *Groves v. State*, 590 S.E.2d 136, 139 (Ga. Ct. App. 2003).
    - *Hoffman v. State*, 576 S.E.2d 102, 105 (Ga. Ct. App. 2003).
    - *Lunsford v. State*, 581 S.E.2d 638, 643 (Ga. Ct. App. 2003).
    - *McDonald v. State*, 548 S.E.2d 361, 362 (Ga. Ct. App. 2001).
    - *Mooney v. State*, 597 S.E.2d 589, 593 (Ga. Ct. App. 2004).
    - *Phillips v. State*, 604 S.E.2d 520, 528 (Ga. Ct. App. 2004).
    - *Ragan v. State*, 550 S.E.2d 476, 478 (Ga. Ct. App. 2001).
    - *Summage v. State*, 546 S.E.2d 910, 913 (Ga. Ct. App. 2001).
  - The preferred sexual position with one’s spouse is not necessarily evidence designed to show lustful disposition of a defendant who has been charged with a sex offense.
    - *Beck v. State*, 551 S.E.2d 68, 72 (Ga. Ct. App. 2001).
  - Materials depicting explicit sexual activity between children, not between an adult and child, still evidences a defendant’s unique bent of mind favoring sexual conduct with children.
    - *Hoffman v. State*, 576 S.E.2d 102, 105 (Ga. Ct. App. 2003).

#### 14. Relevance

- A trial court’s finding that other-transactions evidence is relevant necessarily constitutes an implicit finding that the probative value of that evidence outweighs its prejudicial impact.
  - *Helton v. State*, 602 S.E.2d 198, 201 (Ga. Ct. App. 2004).

- Such evidence should be admitted and the prejudicial impact of the otherwise relevant evidence is matter for jury instruction, and is not a factor in its admissibility *vel non*.  
– *Helton v. State*, 602 S.E.2d 198, 201 (Ga. Ct. App. 2004).

## 15. Proof of Prior Conviction

- In child-sexual-abuse cases, a certified copy of a prior conviction for a sex crime against a child may, with no other evidence, sufficiently prove that the prior crime is similar to the current crime.  
– *Turner v. State*, 538 S.E.2d 125, 128 (Ga. Ct. App. 2000).

## D. Real and Demonstrative Evidence

### 1. Anatomically Correct Drawings

- It is not error to allow anatomically correct drawings to go out with the jury because they have no testimonial value in themselves but are merely tools to explain testimony given at trial.  
– *Edwards v. State*, 559 S.E.2d 506, 509 (Ga. Ct. App. 2002).

### 2. Juror Use of Transcript

- It is not error to allow jurors to use a transcript as a tool to assist them in listening to an audiotape if: a proper foundation is laid for admission of the tape, and proper cautionary instructions are given.  
– *Edwards v. State*, 559 S.E.2d 506, 508 (Ga. Ct. App. 2002).

### 3. Photographs and Videotapes

- Even though the authenticating witness is unavailable, subject to any other valid objection, photographs and videotapes are admissible when the court determines, based on competent evidence presented to it, that the items tend to show reliability the fact or facts for which they are offered.  
– *Craft v. State*, 558 S.E.2d 18, 27 (Ga. Ct. App. 2001).

### 4. *Res Gestae* Evidence

- The State is entitled to present evidence of the entire *res gestae* of the crime.  
– *Altman v. State*, 495 S.E.2d 106, 108 (Ga. Ct. App. 1997).  
– *Brooks v. State*, 501 S.E.2d 286, 290 (Ga. Ct. App. 1998).
- Even though a defendant is not charged with every crime committed during a criminal transaction, every aspect of it relevant to the crime



charged may be presented at trial. This is true even if the defendant's character is incidentally placed in issue.

– *Altman v. State*, 495 S.E.2d 106, 108 (Ga. Ct. App. 1997).

– *Brooks v. State*, 501 S.E.2d 286, 290 (Ga. Ct. App. 1998).

- Acts are pertinent as part of the *res gestae* if they are done pending the hostile enterprise and, if they bear upon it, are performed while it is in continuous progress to its catastrophe, and are of a nature to promote or obstruct, advance or retard it, or to evince essential motive or purpose in reference to it.

– *Berry v. State*, 508 S.E.2d 435, 437 (Ga. Ct. App. 1998).

- A trial court's determination that evidence offered as part of the *res gestae* is sufficiently informative and reliable as to warrant being considered by the jury will not be considered on appeal unless that determination is clearly erroneous.

– *Berry v. State*, 508 S.E.2d 435, 437 (Ga. Ct. App. 1998).

## **F. Scierter Evidence**

### **1. Intent**

- Intent, which is a mental attitude, is commonly detectable only inferentially, and the law accommodates this.

– *Arnold v. State*, 545 S.E.2d 312, 315 (Ga. Ct. App. 2001).

– *Collins v. State*, 560 S.E.2d 767, 768 (Ga. Ct. App. 2002).

– *Gearin v. State*, 565 S.E.2d 540, 542 (Ga. Ct. App. 2002).

– *Seidenfaden v. State*, 547 S.E.2d 578, 582 (Ga. Ct. App. 2001).

- Whether the defendant had the requisite intent is a question of fact for the jury after considering all the circumstances surrounding the acts of which the accused is charged, including words, conduct, demeanor, and motive.

– *Gore v. State*, 554 S.E.2d 598, 600 (Ga. Ct. App. 2001).

– *Kidd v. State*, 572 S.E.2d 80, 82 (Ga. Ct. App. 2002).

– *McEntyre v. State*, 545 S.E.2d 391, 392 (Ga. Ct. App. 2001).

- Criminal intent may be inferred from conduct before, during and after the commission of the crime.

– *Gore v. State*, 554 S.E.2d 598, 600 (Ga. Ct. App. 2001).

– *McEntyre v. State*, 545 S.E.2d 391, 392 (Ga. Ct. App. 2001).

- A reviewing court will not disturb a factual determination by the jury on intent unless it is contrary to the evidence and clearly erroneous. The intent with which an act is done is peculiarly a question of fact for determination by the jury and even when a finding that the accused had the intent to commit the crime charged is supported by evidence

which is exceedingly weak and unsatisfactory the verdict will not be set aside on that ground.

– *Gearin v. State*, 565 S.E.2d 540, 542-43 (Ga. Ct. App. 2002).

## **G. Scientific Evidence**

### **1. Determination of Verifiable Certainty**

- In its role as gatekeeper, a trial court must decide whether the procedure or technique at issue has reached a scientific stage of verifiable certainty. In making this determination, the trial court may take judicial notice that the scientific procedure has been recognized in other jurisdictions as being established with verifiable certainty.

– *Leftwich v. State*, 538 S.E.2d 779, 780 (Ga. Ct. App. 2000).

- Based on evidence presented to the trial court by the parties, including expert testimony, the court may also decide that a procedure or technique has reached a “scientific stage of verifiable certainty.”

– *Leftwich v. State*, 538 S.E.2d 779, 780 (Ga. Ct. App. 2000).

- The decision as to whether a procedure has reached the requisite standard of verifiable certainty and scientific reliability is a matter within the discretion of the trial court.

– *Leftwich v. State*, 538 S.E.2d 779, 780 (Ga. Ct. App. 2000).

### **2. Polygraphs**

- Polygraph tests are not a reliable source of evidence and due to this fact, the law only allows them in evidence when both parties stipulate to the admission of such evidence.

– *Lockett v. State*, 573 S.E.2d 437, 440 (Ga. Ct. App. 2002).

– *Thompson v. State*, 571 S.E.2d 158, 160 (Ga. Ct. App. 2002).

- When polygraph results are admitted at trial, either party is entitled upon request, to have the jury charged concerning the meaning of this evidence. In giving the charge the court should state that the examiner’s opinions may only be used to indicate whether at the time of the polygraph examination the person examined believed that he or she was telling the whole truth; that the jury is not bound by the polygraph examiner’s conclusions and his or her testimony is not controlling on the issues and may even be entirely disregarded; and that it is for the jury to decide what weight should be given this evidence.

– *Lockett v. State*, 573 S.E.2d 437, 441 (Ga. Ct. App. 2002).

- Through cross-examination, counsel may show any vagueness of the electronic indications or any subjectiveness of the examiner’s

interpretations, as well as exploring conditions other than the subject's untruthfulness which could have produced such responses.

– *Thompson v. State*, 571 S.E.2d 158, 160 (Ga. Ct. App. 2002).

## **XII. Rape-Shield Statute**

- The rape-shield statute prohibits all evidence relating to the past sexual behavior of the complaining witness, including marital history, mode of dress, general reputation for promiscuity, non-chastity or sexual mores contrary to community standards. GA. CODE ANN. § 24-2-3.
  - *Callahan v. State*, 568 S.E.2d 780, 783 (Ga. Ct. App. 2002).
  - *Carson v. State*, 576 S.E.2d 12, 15 (Ga. Ct. App. 2002).
  - *Eggleston v. State*, 544 S.E.2d 722, 725 (Ga. Ct. App. 2001).
  - *Flowers v. State*, 566 S.E.2d 339, 341 (Ga. Ct. App. 2002).
  - *Jarvis v. State*, 560 S.E.2d 29, 31 (Ga. Ct. App. 2002).
  - *Mooney v. State*, 597 S.E.2d 589, 595 (Ga. Ct. App. 2004).
  - *Rocha v. State*, 545 S.E.2d 173, 176 (Ga. Ct. App. 2001).
  - *Williams v. State*, 588 S.E.2d 790, 792 (Ga. Ct. App. 2003).
  
- Even evidence about another incident of molestation is generally not admissible in a child-molestation case.
  - *Abdulkadir v. State*, 592 S.E.2d 433, 435 (Ga. Ct. App. 2003).
  - *Berry v. State*, 508 S.E.2d 435, 437 (Ga. Ct. App. 1998).
  - *Bishop v. State*, 555 S.E.2d 504, 506 (Ga. Ct. App. 2001).
  - *Brooks v. State*, 500 S.E.2d 11, 14 (Ga. Ct. App. 1998).
  - *Callahan v. State*, 568 S.E.2d 780, 784 (Ga. Ct. App. 2002).
  - *Carson v. State*, 576 S.E.2d 12, 15 (Ga. Ct. App. 2002).
  - *Cobb v. State*, 561 S.E.2d 124, 126 (Ga. Ct. App. 2002).
  - *Cox v. State*, 526 S.E.2d 887, 888 (Ga. Ct. App. 1999).
  - *Jarvis v. State*, 560 S.E.2d 29, 31-32 (Ga. Ct. App. 2002).
  - *Pollard v. State*, 580 S.E.2d 337, 339 (Ga. Ct. App. 2003).
  - *Rocha v. State*, 545 S.E.2d 173, 176 (Ga. Ct. App. 2001).
  - *Slack v. State*, 593 S.E.2d 664, 666-67 (Ga. Ct. App. 2004).
  - *Williams v. State*, 553 S.E.2d 823, 826 (Ga. Ct. App. 2001).
  - *Williams v. State*, 588 S.E.2d 790, 791-92 (Ga. Ct. App. 2003).
  
- The defendant is not prohibited from cross-examining the victim about the nonsexual nature of former relationships.
  - *Abdulkadir v. State*, 592 S.E.2d 433, 437 (Ga. Ct. App. 2003).
  
- Evidence of past sexual behavior includes evidence of any sexual behavior by the victim before trial.
  - *Williams v. State*, 588 S.E.2d 790, 792 (Ga. Ct. App. 2003).
  
- Behavior is not synonymous with experience.
  - *Callahan v. State*, 568 S.E.2d 780, 783 (Ga. Ct. App. 2002).

**A. Child’s Past Sexual History**

- Absent a showing of relevance, evidence of a child’s past sexual history, including sexual activity involving a person other than the defendant, is inadmissible.  
– *Rocha v. State*, 545 S.E.2d 173, 176 (Ga. Ct. App. 2001).

**B. Consent**

- A defendant cannot introduce evidence that a victim actually consented to a previous sexual encounter he or she alleged was forcible in order to infer that the victim consented to the encounter at issue.  
– *Williams v. State*, 553 S.E.2d 823, 826 (Ga. Ct. App. 2001).

**C. Reputation for Non-Chastity or Preoccupation With Sex**

- Generally, evidence of prior molestation or previous sexual activity on the part of the victim is not admissible in a child molestation case to show either the victim’s reputation for non-chastity or preoccupation with sex.  
– *Abdulkadir v. State*, 592 S.E.2d 433, 435 (Ga. Ct. App. 2003).  
– *Berry v. State*, 508 S.E.2d 435, 437 (Ga. Ct. App. 1998).  
– *Bishop v. State*, 555 S.E.2d 504, 506 (Ga. Ct. App. 2001).  
– *Brooks v. State*, 500 S.E.2d 11, 14 (Ga. Ct. App. 1998).  
– *Callahan v. State*, 568 S.E.2d 780, 784 (Ga. Ct. App. 2002).  
– *Carson v. State*, 576 S.E.2d 12, 15 (Ga. Ct. App. 2002).  
– *Cobb v. State*, 561 S.E.2d 124, 126 (Ga. Ct. App. 2002).  
– *Cox v. State*, 526 S.E.2d 887, 888 (Ga. Ct. App. 1999).  
– *Jarvis v. State*, 560 S.E.2d 29, 31-32 (Ga. Ct. App. 2002).  
– *Pollard v. State*, 580 S.E.2d 337, 339 (Ga. Ct. App. 2003).  
– *Slack v. State*, 593 S.E.2d 664, 666-67 (Ga. Ct. App. 2004).  
– *Williams v. State*, 553 S.E.2d 823, 826 (Ga. Ct. App. 2001).  
– *Williams v. State*, 588 S.E.2d 790, 791-92 (Ga. Ct. App. 2003).

**D. Victim Confusion**

- Evidence of prior unrelated molestations is not admissible to show that the victim was confused.  
– *Williams v. State*, 553 S.E.2d 823, 826 (Ga. Ct. App. 2001).

**E. Admissibility of Past Sexual Behavior**

- The rape-shield statute bars the admission of evidence relating to the victim’s past sexual behavior unless it directly involves the accused’s participation and supports an inference that the accused could have reasonably believed that the victim consented to the conduct at issue.  
– *Bing v. State*, 567 S.E.2d 731, 732 (Ga. Ct. App. 2002).  
– *Williams v. State*, 588 S.E.2d 790, 791 (Ga. Ct. App. 2003).

- The evidence may also be admitted on a finding that it is so highly material that it will substantially support a conclusion that the accused reasonably believed that the complaining witness consented to the conduct complained of and that justice mandates the admission of such evidence.
  - *Bing v. State*, 567 S.E.2d 731, 732 (Ga. Ct. App. 2002).
  - *Williams v. State*, 588 S.E.2d 790, 791 (Ga. Ct. App. 2003).
- Evidence relating to the past sexual behavior of the complaining witness is admissible to show:
  - (1) that someone other than the defendant caused the injuries to the child;
  - (2) lack of victim credibility if the victim’s prior allegations of molestation were false; and
  - (3) other possible causes for the symptoms exhibited.
  - *Taylor v. State*, 601 S.E.2d 815, 817 (Ga. Ct. App. 2004).
  - *Wilt v. State*, 592 S.E.2d 925, 928-29 (Ga. Ct. App. 2004).

#### **1. Consent Is at Issue**

- The rape-shield statute expressly provides for an exception where consent is at issue.
  - *Mooney v. State*, 597 S.E.2d 589, 595 (Ga. Ct. App. 2004).

#### **2. Rebuttal Evidence**

- Courts have allowed admission of evidence reflecting on the victim’s sexual behavior where such evidence rebutted some aspect of the State’s case.
  - *Mooney v. State*, 597 S.E.2d 589, 595 (Ga. Ct. App. 2004).

#### **3. Impeachment: Lack of Sexual Experience**

- If the victim states at trial that he or she was a virgin prior to his or her encounter with the defendant, evidence of his or her prior sexual activity would be admissible for impeachment.
  - *Wagner v. State*, 560 S.E.2d 754, 759 (Ga. Ct. App. 2002).
- When a victim voluntarily testifies to his or her lack of sexual experience, he or she waives his or her protection under the shield and may be impeached with proof of prior sexual acts.
  - *Wagner v. State*, 560 S.E.2d 754, 759 (Ga. Ct. App. 2002).

#### **4. Child-Abuse Syndrome**

- An exception to the exclusion of evidence is when the State introduces evidence of the child-abuse syndrome.
  - *Flowers v. State*, 566 S.E.2d 339, 341 (Ga. Ct. App. 2002).

## 5. Behavioral Symptoms or Medical Testimony

- This type of evidence may be admissible for the limited purpose of establishing other possible causes for behavioral symptoms typical of the child-sexual-abuse-accommodation syndrome or to explain certain medical testimony introduced at trial.
  - *Berry v. State*, 508 S.E.2d 435, 437 (Ga. Ct. App. 1998).
  - *Bishop v. State*, 555 S.E.2d 504, 506 (Ga. Ct. App. 2001).
  - *Pollard v. State*, 580 S.E.2d 337, 339 (Ga. Ct. App. 2003).
  - *Rocha v. State*, 545 S.E.2d 173, 176 (Ga. Ct. App. 2001).
  - *Williams v. State*, 553 S.E.2d 823, 826 (Ga. Ct. App. 2001).
  - *Williams v. State*, 588 S.E.2d 790, 792 (Ga. Ct. App. 2003).

## 6. Prior False Accusations

- Prior false accusations of sexual misconduct is an exception to the rule that the victim's character cannot be attacked by proof of specific bad acts, but must be challenged by evidence of the victim's general reputation for veracity.
  - *Cobb v. State*, 561 S.E.2d 124, 126 (Ga. Ct. App. 2002).
  - *Long v. State*, 526 S.E.2d 875, 878 (Ga. Ct. App. 1999).
  - *Wagner v. State*, 560 S.E.2d 754, 758 (Ga. Ct. App. 2002).
  - *Williams v. State*, 597 S.E.2d 621, 624 (Ga. Ct. App. 2004).

### a. Attack on Credibility

- Evidence of prior false accusations of sexual misconduct is admissible to attack the credibility of the prosecutrix and as substantive evidence tending to prove that the instant offense did not occur.
  - *Berry v. State*, 508 S.E.2d 435, 437 (Ga. Ct. App. 1998).
  - *Bishop v. State*, 555 S.E.2d 504, 506 (Ga. Ct. App. 2001).
  - *Long v. State*, 526 S.E.2d 875, 878 (Ga. Ct. App. 1999).

### b. Reasonable Probability of Falsity

- Before such evidence can be admitted the trial court must make a threshold determination, outside the presence of the jury that a reasonable probability of falsity exists.
  - *Cheek v. State*, 593 S.E.2d 55, 57 (Ga. Ct. App. 2003).
  - *Cobb v. State*, 561 S.E.2d 124, 126 (Ga. Ct. App. 2002).
  - *Eley v. State*, 596 S.E.2d 660, 662 (Ga. Ct. App. 2004).
  - *Holmes v. State*, 588 S.E.2d 825, 826 (Ga. Ct. App. 2003).
  - *Palmer v. State*, 546 S.E.2d 886, 888 (Ga. Ct. App. 2001).
  - *Wagner v. State*, 560 S.E.2d 754, 758 (Ga. Ct. App. 2002).
  - *Williams v. State*, 597 S.E.2d 621, 624 (Ga. Ct. App. 2004).

- The defendant has the burden of coming forward with evidence establishing a reasonable probability that the victim made a prior false allegation of molestation.
  - *Cheek v. State*, 593 S.E.2d 55, 57 (Ga. Ct. App. 2003).
  - *Cobb v. State*, 561 S.E.2d 124, 126 (Ga. Ct. App. 2002).
  - *Eley v. State*, 596 S.E.2d 660, 662 (Ga. Ct. App. 2004).
  - *Holmes v. State*, 588 S.E.2d 825, 826 (Ga. Ct. App. 2003).
  - *Palmer v. State*, 546 S.E.2d 886, 888 (Ga. Ct. App. 2001).
  - *Wagner v. State*, 560 S.E.2d 754, 758 (Ga. Ct. App. 2002).
  - *Williams v. State*, 597 S.E.2d 621, 624 (Ga. Ct. App. 2004).

## **F. Previous Accusations of Sexual Misconduct**

### **1. Inadmissible**

- Evidence that the victim previously accused someone other than the defendant of sexual misconduct is generally not admissible.
  - *Johns v. State*, 558 S.E.2d 426, 428 (Ga. Ct. App. 2001).

### **2. Admissible**

- It is admissible only under certain limited circumstances, including to show:
  - (1) that someone other than the defendant caused the victim’s injuries;
  - (2) that the victim lacks credibility if the victim’s prior allegations were false; and
  - (3) other possible causes for the victim’s symptoms.
  - *Johns v. State*, 558 S.E.2d 426, 428 (Ga. Ct. App. 2001).

## **G. Evidentiary Exceptions**

- The rape-shield statute supersedes all evidentiary exceptions, including the *res gestae* rule.
  - *Mooney v. State*, 597 S.E.2d 589, 595 (Ga. Ct. App. 2004).

## **H. Impeachment Evidence**

- In cases involving rape or molestation, where the victim does not personally provide testimony that the victim is a virgin, information about the victim’s sexual history is not permitted to be used to impeach the witness’s testimony.
  - *Jenkins v. State*, 539 S.E.2d 542, 543 (Ga. Ct. App. 2000).

## **I. Judicial Discretion**

- In a proper case a trial court may, in its discretion, apply the rape-shield principle even where the exclusion is not mandated.
  - *Abdulkadir v. State*, 592 S.E.2d 433, 436 (Ga. Ct. App. 2003).

### **XIII. Witnesses and Testimony**

#### **A. Pretrial Interviews**

- A witness cannot be compelled to submit to a pretrial interview.  
– *Abernathy v. State*, 536 S.E.2d 289, 290 (Ga. Ct. App. 2000).
- When the witness is a child, the Department of Family and Children’s Services (DFACS), acting as the child’s legal custodian, may make this decision.  
– *Abernathy v. State*, 536 S.E.2d 289, 290 (Ga. Ct. App. 2000).
- Where DFACS has a conflict of interest and appoints a guardian *ad litem* to decide whether the defense should be given access to the child, this procedure is not mandated.  
– *Abernathy v. State*, 536 S.E.2d 289, 290 (Ga. Ct. App. 2000).

#### **B. Competence**

##### **1. Presumption of Competence**

- Everyone is presumed competent to testify, even people who have been shown to have mental disabilities.  
– *Pollard v. State*, 580 S.E.2d 337, 342 (Ga. Ct. App. 2003).
- Witnesses are presumed competent to testify and may be excluded only on grounds of idiocy, lunacy, insanity, drunkenness, or infancy.  
– *Smith v. State*, 547 S.E.2d 598, 603 (Ga. Ct. App. 2001).

##### **2. Competency of a Child Witness**

###### **a. Judicial Discretion**

- The competency of a child as a witness is within the sound discretion of the court and its ruling will not be disturbed unless there is a manifest abuse of discretion.  
– *Conejo v. State*, 374 S.E.2d 826, 827 (Ga. Ct. App. 1988).  
– *Hunter v. State*, 391 S.E.2d 695, 696 (Ga. Ct. App. 1990).  
– *Pollard v. State*, 580 S.E.2d 337, 342 (Ga. Ct. App. 2003).

###### **b. Test to Establish Competency of a Child Witness**

- The statutory test of the competency of a child to testify as a witness in a court of justice is that he or she understands the nature of an oath. GA. CODE ANN. § 36-1607.  
– *Mackler v. State*, 298 S.E.2d 589, 591 (Ga. Ct. App. 1982).



- The standard of intelligence required to qualify a child as a witness is not that he or she be able to define the meaning of an oath, nor that he or she understand the process under which the oath is administered, but rather that he or she know and appreciate the fact that as a witness he or she assumes a solemn and binding obligation to tell the truth relative to the case and concerning such matters as he or she may be interrogated on, and that if he or she violates the obligation he or she is subject to be punished by the court.  
– *Mackler v. State*, 298 S.E.2d 589, 591 (Ga. Ct. App. 1982).
- The totality of the testimony given by the witness before he or she was sworn may authorize the court to find that he or she understands the nature of an oath, thereby eliminating him or her from the list of incompetent witnesses. GA. CODE ANN. § 24-9-5(a).  
– *Ochoa v. State*, 555 S.E.2d 857, 859 (Ga. Ct. App. 2001).
- Obtaining testimony from a child witness that he or she understands the distinction between the truth and a lie and that he or she also understands that lying is wrong and has consequences is necessary because ultimately the jury must decide what credit to place on that testimony. To this end, evidence concerning the child’s understanding of the oath, intellectual maturity or any other factor affecting his or her capacity to testify is to be developed from the examination of the child him- or herself.  
– *Ferrell v. State*, 569 S.E.2d 899, 901-02 (Ga. Ct. App. 2002).

**c. Availability of a Child Witness**

- A child is considered available to testify only if he or she is competent to testify.  
– *Woodruff v. Woodruff*, 531 S.E.2d 714, 716 (Ga. 2000).
- While the concepts of availability and competency do not overlap entirely, it is quite clear that an incompetent child is not available.  
– *Woodruff v. Woodruff*, 531 S.E.2d 714, 715 (Ga. 2000).
- The term “available” denotes a witness who can be confronted and cross-examined.  
– *Woodruff v. Woodruff*, 531 S.E.2d 714, 715 (Ga. 2000).
- A child unable to take the stand obviously cannot respond to opposing counsel’s questions.  
– *Woodruff v. Woodruff*, 531 S.E.2d 714, 715 (Ga. 2000).

#### **d. Inconsistencies in Child’s Testimony**

- Any inconsistency in the child’s testimony goes towards the child’s credibility, not his or her competency.  
– *Conejo v. State*, 374 S.E.2d 826, 827 (Ga. Ct. App. 1988).

### **C. Credibility**

#### **1. Province of the Jury**

- The credibility of witnesses and the resolution of such conflicts are for the jury. GA. CODE ANN. § 24-9-80.
  - *Atkins v. State*, 533 S.E.2d 152, 154 (Ga. Ct. App. 2000).
  - *Baker v. State*, 527 S.E.2d 266, 269 (Ga. Ct. App. 1999).
  - *Branesky v. State*, 584 S.E.2d 669, 672 (Ga. Ct. App. 2003).
  - *Brown v. State*, 600 S.E.2d 774, 775 (Ga. Ct. App. 2004).
  - *Cheek v. State*, 593 S.E.2d 55, 57 (Ga. Ct. App. 2003).
  - *Coalson v. State*, 555 S.E.2d 128, 130 (Ga. Ct. App. 2001).
  - *Dorsey v. State*, 593 S.E.2d 945, 947 (Ga. Ct. App. 2004).
  - *Dowd v. State*, 582 S.E.2d 235, 236 (Ga. Ct. App. 2003).
  - *Duncan v. State*, 584 S.E.2d 681, 682 (Ga. Ct. App. 2003).
  - *Falak v. State*, 583 S.E.2d 146, 148 (Ga. Ct. App. 2003).
  - *Fiek v. State*, 597 S.E.2d 585, 587 (Ga. Ct. App. 2004).
  - *Fields v. State*, 504 S.E.2d 777, 778 (Ga. Ct. App. 1998).
  - *Frazier v. State*, 583 S.E.2d 188, 189 (Ga. Ct. App. 2003).
  - *Godbey v. State*, 526 S.E.2d 415, 419 (Ga. Ct. App. 1999).
  - *Grooms v. State*, 583 S.E.2d 216, 219 (Ga. Ct. App. 2003).
  - *Holloway v. State*, 601 S.E.2d 753, 754 (Ga. Ct. App. 2004).
  - *Hopper v. State*, 598 S.E.2d 926, 929 (Ga. Ct. App. 2004).
  - *In the interest of A.M.*, 578 S.E.2d 226, 239 (Ga. Ct. App. 2003).
  - *McMillian v. State*, 589 S.E.2d 335, 337 (Ga. Ct. App. 2003).
  - *Nichols v. State*, 473 S.E.2d 491, 494 (Ga. Ct. App. 1996).
  - *Odett v. State*, 541 S.E.2d 29, 30 (Ga. 2001).
  - *Roberson v. State*, 526 S.E.2d 428, 431 (Ga. Ct. App. 1999).
  - *Schwindler v. State*, 563 S.E.2d 154, 162 (Ga. Ct. App. 2002).
  - *Smith v. State*, 578 S.E.2d 295, 296 (Ga. Ct. App. 2003).
  - *Turner v. State*, 536 S.E.2d 814, 816 (Ga. Ct. App. 2000).
  - *Vickers v. State*, 527 S.E.2d 217, 218 (Ga. Ct. App. 1999).
  - *Williams v. State*, 597 S.E.2d 621, 625 (Ga. Ct. App. 2004).
  - *Wilson v. State*, 526 S.E.2d 381, 385 (Ga. Ct. App. 1999).
  - *Winter v. State*, 557 S.E.2d 436, 439 (Ga. Ct. App. 2001).

#### **2. Victim’s Inability to Describe Acts**

- The inability of a young victim of sexual abuse to anatomically describe acts about which he or she could not, and should not, have knowledge will not inure to the benefit of the abuser.
  - *Helton v. State*, 602 S.E.2d 198, 199 (Ga. Ct. App. 2004).

### **3. Prior Consistent Statements**

- A witness's prior consistent statements are admissible where the:
  - (1) veracity of a witness's trial testimony has been placed in issue at trial;
  - (2) witness is present at trial; and
  - (3) witness is available for cross-examination.

– *Phillips v. State*, 527 S.E.2d 604, 606-07 (Ga. Ct. App. 2000).
- Only if affirmative charges of recent fabrication, improper influence, or improper motive are raised during cross-examination is a witness's veracity placed in issue so as to permit the introduction of a prior consistent statement. Even then, the prior consistent statement may be admitted as non-hearsay only if it was made before the motive or influence came into existence or before the time of the alleged recent fabrication. Otherwise, it is pure hearsay, which cannot be admitted merely to bolster the witness's credibility.

– *Phillips v. State*, 527 S.E.2d 604, 607 (Ga. Ct. App. 2000).

### **4. Reliability of Testimony**

- Such factors as atmosphere, circumstances, spontaneity, and demeanor should be considered in determining reliability.

– *Hunter v. State*, 391 S.E.2d 695, 696 (Ga. Ct. App. 1990).

### **5. Bolstering Witness Credibility**

#### **a. Truthfulness**

- A witness's credibility simply cannot be bolstered by the opinion of another, even an expert, that the witness is telling the truth.

– *Branesky v. State*, 584 S.E.2d 669, 672 (Ga. Ct. App. 2003).  
– *Godbey v. State*, 526 S.E.2d 415, 419 (Ga. Ct. App. 1999).  
– *Morris v. State*, 601 S.E.2d 804, 807 (Ga. Ct. App. 2004).  
– *Pollard v. State*, 580 S.E.2d 337, 339 (Ga. Ct. App. 2003).  
– *Roberson v. State*, 526 S.E.2d 428, 430 (Ga. Ct. App. 1999).  
– *Williams v. State*, 597 S.E.2d 621, 625 (Ga. Ct. App. 2004).

#### **b. Prior Consistent Statements**

- Prior consistent statements are not admissible to bolster general credibility.

– *Joines v. State*, 591 S.E.2d 454, 458 (Ga. Ct. App. 2003).

## **6. Impeachment of Witness Testimony**

### **a. Contradictory Statements**

- A witness may be impeached by contradictory statements previously made by him or her as to matters relevant to his or her testimony and to the case.  
– *Robinson v. State*, 594 S.E.2d 696, 697 (Ga. Ct. App. 2004).
- Before contradictory statements may be proved against him or her, the time, place, person, and circumstances attending the former statements shall be called to his or her mind with as much certainty as possible.  
– *Robinson v. State*, 594 S.E.2d 696, 697 (Ga. Ct. App. 2004).
- If the contradictory statements are in writing and in existence, they shall be shown to him or her or read in his or her hearing.  
– *Robinson v. State*, 594 S.E.2d 696, 697 (Ga. Ct. App. 2004).

### **b. Previous Accusations of Sexual Misconduct**

#### **i. Inadmissible**

- Evidence that the victim previously accused someone other than the defendant of sexual misconduct is generally not admissible.  
– *Hardeman v. State*, 544 S.E.2d 481, 484 (Ga. Ct. App. 2001).

#### **ii. Admissible**

- Evidence that the victim previously accused someone other than the defendant of sexual misconduct is admissible under certain limited circumstances. Those exceptions are to show:
  - (1) that someone other than the defendant caused the victim's injuries;
  - (2) the victim lacks credibility if the victim's prior allegations were false; and
  - (3) other possible causes for the victim's symptoms.– *Hardeman v. State*, 544 S.E.2d 481, 484 (Ga. Ct. App. 2001).

### **c. Prior False Accusations**

- Evidence that a victim in a sex offense case has made prior false accusations of sexual misconduct against others is admissible to attack the victim's credibility and as substantive

evidence tending to prove that the charged offense did not occur.

– *Hall v. State*, 561 S.E.2d 464, 466 (Ga. Ct. App. 2002).

- Before admitting proof of a victim’s false allegation of sexual misconduct by another, the trial court must determine whether a reasonable probability of falsehood exists. This threshold determination exists in order to protect the victim from unfounded allegations that he or she has made false accusations in the past.

– *Hardeman v. State*, 544 S.E.2d 481, 484 (Ga. Ct. App. 2001).

- Before admitting such evidence the trial court must make a threshold determination outside the presence of the jury that there is a reasonable probability the prior accusations were false.

– *Hall v. State*, 561 S.E.2d 464, 466 (Ga. Ct. App. 2002).

- A reasonable probability is defined as one sufficient to undermine confidence in the outcome.

– *Hall v. State*, 561 S.E.2d 464, 466 (Ga. Ct. App. 2002).

**d. Bias: Prior Act of Molestation**

- A prior act of molestation committed against the child of a witness is relevant to show any possible bias against an accused child molester that the witness may entertain, unconsciously or deliberately.

– *Beck v. State*, 551 S.E.2d 68, 74 (Ga. Ct. App. 2001).

**D. Victim Testimony: Sufficiency of Victim Testimony Alone**

- The testimony of a single witness is generally sufficient to establish a fact.

– *Dowd v. State*, 582 S.E.2d 235, 237 (Ga. Ct. App. 2003).

– *Grooms v. State*, 583 S.E.2d 216, 218 (Ga. Ct. App. 2003).

– *Kidd v. State*, 572 S.E.2d 80, 81 (Ga. Ct. App. 2002).

– *Slack v. State*, 593 S.E.2d 664, 666 (Ga. Ct. App. 2004).

– *Wilkerson v. State*, 600 S.E.2d 677, 679 (Ga. Ct. App. 2004).

– *Winter v. State*, 557 S.E.2d 436, 439 (Ga. Ct. App. 2001).

- The victim’s testimony is sufficient to establish the elements of the offense as indicted.

– *Roberts v. State*, 572 S.E.2d 744, 746 (Ga. Ct. App. 2002).

## 1. Child Molestation, Incest, and Rape

- The testimony of the victim alone can authorize the jury to find a defendant guilty of child molestation, incest, or rape.
  - *Atkins v. State*, 533 S.E.2d 152, 154 (Ga. Ct. App. 2000).
  - *Dorsey v. State*, 593 S.E.2d 945, 947 (Ga. Ct. App. 2004).
  - *Eley v. State*, 596 S.E.2d 660, 663 (Ga. Ct. App. 2004).
  - *Greulich v. State*, 588 S.E.2d 450, 452 (Ga. Ct. App. 2003).
  - *Siharath v. State*, 541 S.E.2d 71, 74 (Ga. Ct. App. 2000).
- The testimony of a victim of child molestation or aggravated child molestation need not be corroborated.
  - *Abdulkadir v. State*, 592 S.E.2d 433, 435 (Ga. Ct. App. 2003).
  - *Callahan v. State*, 568 S.E.2d 780, 785 (Ga. Ct. App. 2002).
  - *Dorsey v. State*, 593 S.E.2d 945, 947 (Ga. Ct. App. 2004).
  - *Greulich v. State*, 588 S.E.2d 450, 452 (Ga. Ct. App. 2003).
  - *Ingram v. State*, 585 S.E.2d 211, 215 (Ga. Ct. App. 2003).
  - *Ferrell v. State*, 569 S.E.2d 899, 901 (Ga. Ct. App. 2002).
  - *Perdue v. State*, 551 S.E.2d 65, 67 (Ga. Ct. App. 2001).

## 2. Statutory Rape

- A conviction for statutory rape requires corroboration. GA. CODE ANN. § 16-6-3(a).
  - *Eley v. State*, 596 S.E.2d 660, 663 (Ga. Ct. App. 2004).

## E. Child Witnesses

- Before the State rests, the court shall, at the request of either party, cause the alleged victim to take the stand. The court shall then inform the jury that it is the court who has called the child as a witness, and that both parties have the opportunity to examine the child.
  - *Beck v. State*, 551 S.E.2d 68, 74 (Ga. Ct. App. 2001).
- It is not error to allow the foster parent of the children, who is not a witness in the case subject to sequestration, to stand behind the children during their testimony.
  - *Boatright v. State*, 385 S.E.2d 298, 301 (Ga. Ct. App. 1989).
- It is not error to allow the children to sit at the small table in front of the jury.
  - *Boatright v. State*, 385 S.E.2d 298, 301 (Ga. Ct. App. 1989).

## **F. Experts**

### **1. Judicial Discretion**

- The granting or denial of a motion for appointment of expert witnesses lies within the sound discretion of the trial court.
  - *Brooks v. State*, 501 S.E.2d 286, 289 (Ga. Ct. App. 1998).
  - *Pruitt v. State*, 514 S.E.2d 639, 646 (Ga. 1999).
- Unless there has been an abuse of discretion, the trial court’s ruling will be upheld.
  - *Brooks v. State*, 501 S.E.2d 286, 289 (Ga. Ct. App. 1998).
  - *Pruitt v. State*, 514 S.E.2d 639, 646 (Ga. 1999).

### **2. Qualification of an Expert**

- It is a matter within the sound discretion of the trial judge as to whether a witness has such learning and experience in a particular profession as to entitle him or her to be deemed *prima facie* an expert.
  - *Siharath v. State*, 541 S.E.2d 71, 73 (Ga. Ct. App. 2000).

### **3. Inadmissible Expert Testimony**

#### **a. Addressing Credibility of Victim and Ultimate Issues**

- What is forbidden is expert opinion testimony that directly addresses the credibility of the victim (*i.e.*, “I believe the victim; I think the victim is telling the truth”) or expert testimony that implicitly goes to the ultimate issue to be decided by the jury, when such issue is not beyond the “ken” of the average juror (*i.e.*, “In my opinion, the victim was sexually abused”).
  - *Brownlow v. State*, 544 S.E.2d 472, 474 (Ga. Ct. App. 2001).
  - *Bruce v. State*, 603 S.E.2d 33, 37-38 (Ga. Ct. App. 2004).
  - *Gosnell v. State*, 544 S.E.2d 477, 479 (Ga. Ct. App. 2001).
  - *Odom v. State*, 531 S.E.2d 207, 209 (Ga. Ct. App. 2000).
- Although the distinction may seem fine to a layman, there is a world of legal difference between expert testimony that “in my opinion, the victim’s psychological exam was consistent with sexual abuse,” and expert testimony that “in my opinion, the victim was sexually abused.” In the first situation, the expert leaves the ultimate issue/conclusion for the jury to decide; in the second, the weight of the expert is put behind a factual conclusion which invades the province of the jury by providing

a direct answer to the ultimate issue: was the victim sexually abused?

– *Brownlow v. State*, 544 S.E.2d 472, 474-75 (Ga. Ct. App. 2001)

– *Odom v. State*, 531 S.E.2d 207, 209 (Ga. Ct. App. 2000).

- Expert opinion testimony that directly addresses the child’s credibility is inadmissible, but the fact that such testimony indirectly though necessarily involves the child’s credibility does not render it inadmissible.

– *Summage v. State*, 546 S.E.2d 910, 914 (Ga. Ct. App. 2001).

#### **i. Truthfulness of a Victim**

- An expert witness may not testify as to his or her opinion of the victim’s truthfulness.

– *Long v. State*, 526 S.E.2d 875, 878 (Ga. Ct. App. 1999).

– *Pollard v. State*, 580 S.E.2d 337, 339 (Ga. Ct. App. 2003).

- An expert witness may not put his or her stamp of believability on the victim’s story.

– *Long v. State*, 526 S.E.2d 875, 878 (Ga. Ct. App. 1999).

– *Pollard v. State*, 580 S.E.2d 337, 339 (Ga. Ct. App. 2003).

- Victim credibility is a matter exclusively for determination by the jury.

– *Long v. State*, 526 S.E.2d 875, 878 (Ga. Ct. App. 1999).

– *Pollard v. State*, 580 S.E.2d 337, 339 (Ga. Ct. App. 2003).

#### **ii. Ultimate Issue**

- The general rule concerning the admissibility of expert testimony as to the ultimate issue that an expert may not testify as to his or her opinion as to the existence *vel non* of a fact (*i.e.*, whether the child had been abused sexually) unless the inference to be drawn from facts in evidence is beyond the ken of the jurors.

– *Atkins v. State*, 533 S.E.2d 152, 154 (Ga. Ct. App. 2000).

#### **b. Facts Not within Personal Knowledge**

- Generally expert witnesses may not base their opinions on facts not within the expert’s personal knowledge and not otherwise admitted into evidence; however, it is recognized that a number of exceptions exist to this rule, including those for scientific works and other learned sources of information pertaining to the expert’s profession.

– *Porter v. State*, 532 S.E.2d 407, 413-14 (Ga. Ct. App. 2000).



**c. Occurrence of Abuse/Molestation**

- A witness, including an expert witness, may not express his or her opinion as to whether a child has been molested.  
– *Gosnell v. State*, 544 S.E.2d 477, 479 (Ga. Ct. App. 2001).
- A pediatrician, based on his or her physical examination of the child as well as on the history related to him or her by the child, may no longer opine directly that an act of abuse actually occurred; therefore, where evidence of an abuse syndrome is admitted and no tangible physical evidence of abuse is present, an expert cannot testify that abuse actually took place. The expert can testify, though, that the victim's symptoms are consistent with a determination that the victim is suffering from an abuse syndrome.  
– *Atkins v. State*, 533 S.E.2d 152, 156 (Ga. Ct. App. 2000).

**d. Dangerous of Defendant**

- There is considerable doubt whether medical opinion that a particular defendant is more dangerous than a mere pedophile is admissible in a criminal proceeding, unless and until the defendant has put his or her character on issue.  
– *Cornelius v. State*, 445 S.E.2d 800, 807 (Ga. Ct. App. 1994).

**4. Admissibility of Expert Testimony**

**a. Qualifications**

- An expert witness is anyone who, through training, education, skill, or experience has peculiar knowledge that the average juror would not possess as to any question of science, skill, trade, or like questions.  
– *Hall v. State*, 566 S.E.2d 374, 379-80 (Ga. Ct. App. 2002).
- The expert witness may render an expert opinion within the witness' area of expertise after the qualifications have been proven to the trial court.  
– *Hall v. State*, 566 S.E.2d 374, 379-80 (Ga. Ct. App. 2002).
- The requirements for qualification as an expert witness are minimal. Generally, nothing more is required to qualify an expert than evidence that the person has been educated in a particular trade, science, or profession.  
– *Hall v. State*, 566 S.E.2d 374, 379-80 (Ga. Ct. App. 2002).

- It is the possession of special knowledge derived either from experience, study, or both in a field of expertise that makes one an expert.  
– *Hall v. State*, 566 S.E.2d 374, 379-80 (Ga. Ct. App. 2002).
- It is well established that a witness may be qualified as an expert based upon knowledge gained through study or experience.  
– *Siharath v. State*, 541 S.E.2d 71, 73 (Ga. Ct. App. 2000).
- To qualify as an expert, generally all that is required is that a person be knowledgeable in a particular matter.  
– *Godbey v. State*, 526 S.E.2d 415, 418 (Ga. Ct. App. 1999).  
– *McCrickard v. State*, 549 S.E.2d 505, 508 (Ga. Ct. App. 2001).
- Special knowledge may be derived from experience as well as study, and formal education in the subject is not a requisite for expert status.  
– *Godbey v. State*, 526 S.E.2d 415, 418 (Ga. Ct. App. 1999).  
– *McCrickard v. State*, 549 S.E.2d 505, 508 (Ga. Ct. App. 2001).

**b. Conclusion Beyond Ken of Average Laymen**

- Expert opinion testimony on issues to be decided by the jury, even the ultimate issue, is admissible where the conclusion of the expert is one which the jurors would not ordinarily be able to draw for themselves (*i.e.*, the conclusion is beyond the ken of the average layman).  
– *Eley v. State*, 596 S.E.2d 660, 663 (Ga. Ct. App. 2004).  
– *Porter v. State*, 532 S.E.2d 407, 414 (Ga. Ct. App. 2000).
- Although it may be beyond the ken of the jury to determine whether certain physical and psychological symptoms were consistent with abuse, it would not be beyond their ken to determine whether an expert’s opinion that the symptoms were consistent with abuse in conjunction with all the other evidence elicited at trial proves that the victim was both molested and molested by the defendant.  
– *Atkins v. State*, 533 S.E.2d 152, 157 (Ga. Ct. App. 2000).

**c. Symptoms and History Consistent with Molestation**

- An expert should be allowed to testify that the symptoms and history described by a child are consistent with the occurrence of molestation. While this evidence might indirectly reflect on the victim’s credibility, it would nonetheless be admissible, as would any relevant evidence linking any defendant to any crime.

- *Atkins v. State*, 533 S.E.2d 152, 157 (Ga. Ct. App. 2000).
- *Gosnell v. State*, 544 S.E.2d 477, 479 (Ga. Ct. App. 2001).
- *Mills v. State*, 553 S.E.2d 353, 357 (Ga. Ct. App. 2001).
- *Rogers v. State*, 560 S.E.2d 286, 288 (Ga. Ct. App. 2002).
- *Williams v. State*, 597 S.E.2d 621, 625 (Ga. Ct. App. 2004).

**d. Creation of False Memories**

- Expert testimony regarding the creation of false memories in minors may be permissible, provided that the party seeking to present the testimony shows that the expert’s opinion is based on facts within his or her personal knowledge or other facts admitted into evidence.  
– *McDonald v. State*, 548 S.E.2d 361, 363-64 (Ga. Ct. App. 2001).

**e. Bolstering Credibility**

- There is absolutely nothing wrong with expert-opinion testimony that bolsters the credibility of the indicated allegations of sexual abuse (*e.g.*, “the victim’s physical examination showed injury consistent with sexual abuse,” or “the victim’s psychological evaluation was consistent with sexual abuse”).  
– *Bruce v. State*, 603 S.E.2d 33, 37-38 (Ga. Ct. App. 2004).  
– *Odom v. State*, 531 S.E.2d 207, 208-09 (Ga. Ct. App. 2000).
- Establishing the credibility of the indicated acts of sexual abuse is what the State’s case is all about and is the purpose for such expert testimony in the first place. The fact that such testimony may also indirectly, though necessarily, involve the child’s credibility does not render it inadmissible.  
– *Bruce v. State*, 603 S.E.2d 33, 37-38 (Ga. Ct. App. 2004).  
– *Odom v. State*, 531 S.E.2d 207, 208-09 (Ga. Ct. App. 2000).

**f. Interview Techniques**

- Exclusion of expert testimony on the techniques used to interview children can be reversible error.  
– *Hall v. State*, 566 S.E.2d 374, 378 (Ga. Ct. App. 2002).

**G. Use of Identification Procedures**

- Where the witness is laboring under some impairment due to age or infirmity, circumstances may necessitate use of identification procedures not permissible with other witnesses.  
– *Croy v. State*, 545 S.E.2d 80, 82 (Ga. Ct. App. 2001).

## **XIV. Hearsay**

### **A. Inadmissible**

#### **1. Child Who Witnesses an Act of Sexual Abuse**

- Hearsay statements made by a child who witnesses an act of sexual abuse are not admissible at trial, and it is error for the trial court to admit this evidence.  
– *Hanson v. State*, 587 S.E.2d 200, 202 (Ga. Ct. App. 2003).

#### **2. Statement Against Interest**

- It is the long standing rule in Georgia that declarations to third persons against the declarant's penal interest, to the effect that the declarant, and not the accused was the actual perpetrator of the offense, are not admissible in favor of the accused at his or her trial.  
– *Corn v. State*, 568 S.E.2d 583, 585 (Ga. Ct. App. 2002).

### **B. Admissible**

#### **1. Child-Hearsay Statute**

##### **a. Application**

##### **i. Acts of Sexual Contact or Physical Abuse**

- The child-hearsay Statute allows admission of hearsay statements of a child relating to acts of sexual contact or physical abuse. GA. CODE ANN. § 24-3-16.  
– *Mayo v. State*, 582 S.E.2d 482, 484 (Ga. Ct. App. 2003).  
– *Watts v. State*, 541 S.E.2d 41, 45 (Ga. Ct. App. 2000).

##### **ii. Testimony Contemplated under Statute**

- The child-hearsay statute actually contemplates testimony from both the child and those witnessing the child's later reaction, even if the hearsay may be bolstering.  
– *Howard v. State*, 556 S.E.2d 536, 540 (Ga. Ct. App. 2001).
- Any bolstering can be explored by defendant in cross-examination.  
– *Howard v. State*, 556 S.E.2d 536, 540 (Ga. Ct. App. 2001).

## **b. Requirements**

- The child-hearsay statute provides that a statement made by a child under the age of 14 describing any act of sexual contact or physical abuse performed with or on the child by another is admissible in evidence by the testimony of the person or persons to whom made if the child is available to testify in the proceedings and the court finds that the circumstances of the statement provide sufficient indicia of reliability. GA. CODE ANN. § 24-3-16.
  - *Baker v. State*, 555 S.E.2d 899, 901 (Ga. Ct. App. 2001).
  - *Bell v. State*, 589 S.E.2d 653, 655 (Ga. Ct. App. 2003).
  - *Berry v. State*, 508 S.E.2d 435, 437 (Ga. Ct. App. 1998).
  - *Cimildoro v. State*, 387 S.E.2d 335, 336 (Ga. 1990).
  - *Deal v. State*, 528 S.E.2d 289, 291 (Ga. Ct. App. 2000).
  - *Flowers v. State*, 566 S.E.2d 339, 341 (Ga. Ct. App. 2002).
  - *Fraday v. State*, 538 S.E.2d 893, 895 (Ga. Ct. App. 2000).
  - *Hayes v. State*, 557 S.E.2d 468, 469 (Ga. Ct. App. 2001).
  - *Howard v. State*, 556 S.E.2d 536, 538 (Ga. Ct. App. 2001).
  - *In the Interest of A.H.*, 578 S.E.2d 247, 249 (Ga. Ct. App. 2003).
  - *In the Interest of J.D.*, 534 S.E.2d 112, 113 (Ga. Ct. App. 2000).
  - *In the Interest of K.C.*, 574 S.E.2d 413, 415 (Ga. Ct. App. 2002).
  - *Ingram v. State*, 585 S.E.2d 211, 214 (Ga. Ct. App. 2003).
  - *Ivey v. State*, 574 S.E.2d 908, 909 (Ga. Ct. App. 2002).
  - *Kight v. State*, 528 S.E.2d 542, 545 (Ga. Ct. App. 2000).
  - *Nelson v. State*, 565 S.E.2d 551, 554 (Ga. Ct. App. 2002).
  - *Phillips v. State*, 604 S.E.2d 520, 525 (Ga. Ct. App. 2004).
  - *Trew v. State*, 534 S.E.2d 804, 806-07 (Ga. Ct. App. 2000).
  - *Woodruff v. Woodruff*, 531 S.E.2d 714, 715 (Ga. 2000).
  - *Wright v. State*, 576 S.E.2d 64, 68 (Ga. Ct. App. 2003).

## **i. No Requirement of In-Person Testimony**

- There is no legal requirement that a child victim testify in person. In fact, the purposes of the child-hearsay statute include the presentation of evidence without the in-person testimony of the child victim.
  - *Fowler v. State*, 554 S.E.2d 808, 809 (Ga. Ct. App. 2001).

## **ii. Videotaped Statements**

- A videotaped statement made by a child under the age of 14 years describing any act of sexual contact or physical abuse performed with or on him or her by a defendant is admissible in evidence if the child is available to testify in the proceedings and the court

finds that the circumstances of the statement provide sufficient indicia of reliability. GA. CODE ANN. § 24-3-16.  
–*Frazier v. State*, 557 S.E.2d 12, 15 (Ga. Ct. App. 2001).

### **iii. No Corroboration Required**

- The law requires only that the child be available to testify. It does not require the child to corroborate the hearsay testimony.  
–*Bell v. State*, 589 S.E.2d 653, 655 (Ga. Ct. App. 2003).  
–*In the Interest of K.C.*, 574 S.E.2d 413, 416 (Ga. Ct. App. 2002).

### **c. Trial-Court Discretion**

- The trial court has broad discretion in determining the admissibility of child hearsay evidence.  
–*Fiek v. State*, 597 S.E.2d 585, 587 (Ga. Ct. App. 2004).  
–*Howard v. State*, 556 S.E.2d 536, 539 (Ga. Ct. App. 2001).  
–*In the Interest of K.C.*, 574 S.E.2d 413, 415 (Ga. Ct. App. 2002).  
–*Kight v. State*, 528 S.E.2d 542, 545 (Ga. Ct. App. 2000).  
–*Nelson v. State*, 565 S.E.2d 551, 554-55 (Ga. Ct. App. 2002).  
–*Putnam v. State*, 592 S.E.2d 462, 464 (Ga. Ct. App. 2003).

### **d. Procedure**

- Before the State rests, the court shall, at the request of either party, cause the alleged victim to take the stand.  
–*Baker v. State*, 555 S.E.2d 899, 901 (Ga. Ct. App. 2001).
- The court shall then inform the jury that it is the court who has called the child as a witness, and that both parties have the opportunity to examine the child.  
–*Baker v. State*, 555 S.E.2d 899, 901 (Ga. Ct. App. 2001).
- The court shall then allow both parties to examine and cross-examine the child as though the child-hearsay statute has not been invoked.  
–*Baker v. State*, 555 S.E.2d 899, 901 (Ga. Ct. App. 2001).

### **e. Dual Burden**

- The child-hearsay statute imposes a dual burden on the trial court and the proponent of child hearsay testimony.  
–*Ferreri v. State*, 600 S.E.2d 793, 795 (Ga. Ct. App. 2004).  
–*Roberson v. State*, 526 S.E.2d 428, 431 (Ga. Ct. App. 1999).
- The State must present evidence proving the child's reliability, and the court must assess that evidence.

- *Ferreri v. State*, 600 S.E.2d 793, 795 (Ga. Ct. App. 2004).
- *Roberson v. State*, 526 S.E.2d 428, 431 (Ga. Ct. App. 1999).

- The statute does not authorize the State to eviscerate the rule against improper bolstering.
  - *Ferreri v. State*, 600 S.E.2d 793, 795 (Ga. Ct. App. 2004).
  - *Roberson v. State*, 526 S.E.2d 428, 431 (Ga. Ct. App. 1999).

**f. Pretrial Hearing: *Gregg* Hearing**

- When considering child-hearsay testimony, it may be advisable in some situations to hold such a hearing outside the presence of the jury (*Gregg* hearing).
  - *Ferreri v. State*, 600 S.E.2d 793, 795 (Ga. Ct. App. 2004).
  - *Roberson v. State*, 526 S.E.2d 428, 430 (Ga. Ct. App. 1999).
- The purpose of a *Gregg* hearing is to allow the decision on admissibility to be made outside the hearing of the jury, so that improperly admitted hearsay evidence does not contaminate the remainder of the trial.
  - *Ferreri v. State*, 600 S.E.2d 793, 795 (Ga. Ct. App. 2004).

**g. Limitations of Statute: Availability and Reliability**

- The only limits set forth in the statute are that the child be available to testify and that the circumstances of the statement show sufficient indicia of reliability.
  - *Trew v. State*, 534 S.E.2d 804, 807 (Ga. Ct. App. 2000).

**i. Availability**

- So long as the witness is made available for confrontation and cross-examination, the defendant's rights are protected, even if the witness is uncommunicative or unresponsive.
  - *Bell v. State*, 589 S.E.2d 653, 655 (Ga. Ct. App. 2003).
  - *Hines v. State*, 548 S.E.2d 642, 644 (Ga. Ct. App. 2001).
- The thrust of the child-witness statute is to allow the jury, which must be convinced of guilt beyond a reasonable doubt, to judge the credibility of a child's accusations.
  - *Bell v. State*, 589 S.E.2d 653, 655 (Ga. Ct. App. 2003).
  - *Hines v. State*, 548 S.E.2d 642, 644 (Ga. Ct. App. 2001).
- If a child, who has reported child molestation to an adult permitted to testify to the out-of-court statement at

trial, is incapable of reiterating the accusation at trial, the jury must decide the child's credibility.

– *Bell v. State*, 589 S.E.2d 653, 655 (Ga. Ct. App. 2003).

– *Hines v. State*, 548 S.E.2d 642, 644 (Ga. Ct. App. 2001).

- A child who is unable to take the stand obviously cannot respond to opposing counsel's questions and is unavailable within the meaning of the statute.  
– *Hines v. State*, 548 S.E.2d 642, 644 (Ga. Ct. App. 2001).
- The law requires only that the child be available to testify. It does not require the child to corroborate the hearsay testimony.  
– *Bell v. State*, 589 S.E.2d 653, 655 (Ga. Ct. App. 2003).

## ii. **Indicia of Reliability**

- Indicia of reliability must come from the circumstances of the statement. The court may consider factors such as the:
  - (1) atmosphere and circumstances under which the statement was made, including the time, place, and the people present;
  - (2) spontaneity of the child's statement to the persons present;
  - (3) child's age;
  - (4) child's general demeanor;
  - (5) child's physical or emotional condition;
  - (6) presence or absence of threats or promise of benefits;
  - (7) presence or absence of drugs or alcohol;
  - (8) child's general credibility;
  - (9) presence or absence of any coaching by parents or other third parties before or at the time of the child's statement, and the type of coaching and circumstances surrounding the same; and the nature of the child's statement and type of language used therein;
  - (10) consistency between repeated out-of-court statements by the child;
  - (11) consistency with known facts;
  - (12) repeated questioning or counseling by several people during the interview period; and
  - (13) whether the interviews were conducted by law enforcement personnel with the intention of gathering evidence against he accused.– *Campos v. State*, 587 S.E.2d 264, 267 (Ga. Ct. App. 2003).



- *Ferreri v. State*, 600 S.E.2d 793, 793 (Ga. Ct. App. 2004).
- *Flowers v. State*, 566 S.E.2d 339, 341-42 (Ga. Ct. App. 2002).
- *Hayes v. State*, 557 S.E.2d 468, 469-70 (Ga. Ct. App. 2001).
- *Howard v. State*, 556 S.E.2d 536, 539 (Ga. Ct. App. 2001).
- *In the Interest of A.H.*, 578 S.E.2d 247, 249 (Ga. Ct. App. 2003).
- *In the Interest of K.C.*, 574 S.E.2d 413, 415 (Ga. Ct. App. 2002).
- *Kight v. State*, 528 S.E.2d 542, 545 (Ga. Ct. App. 2000).
- *Nelson v. State*, 565 S.E.2d 551, 555 (Ga. Ct. App. 2002).
- *Roberson v. State*, 526 S.E.2d 428, 431 (Ga. Ct. App. 1999).

- The purpose of these factors is to determine whether the child’s statement shows inherent reliability and particularized guarantees of trustworthiness so that cross-examination would be of marginal utility.
  - *Ferreri v. State*, 600 S.E.2d 793, 793 (Ga. Ct. App. 2004).
- Because indicia of reliability must spring from the circumstances of the statement, the above referenced-factors are certainly not exhaustive.
  - *Frazier v. State*, 557 S.E.2d 12, 15 (Ga. Ct. App. 2001).
- There may be other relevant aspects of a child’s statement that demonstrate reliability in a fashion unique to that child under the circumstances.
  - *Frazier v. State*, 557 S.E.2d 12, 15 (Ga. Ct. App. 2001).
- Each factor does not have to be present as some may not be applicable in any given circumstance.
  - *Frazier v. State*, 557 S.E.2d 12, 15 (Ga. Ct. App. 2001).
- These factors are to be applied neither in a mechanical nor mathematical fashion, but in that manner best calculated to facilitate determination of the existence or absence of the requisite degree of trustworthiness.
  - *Ferreri v. State*, 600 S.E.2d 793, 793 (Ga. Ct. App. 2004).
  - *Fiek v. State*, 597 S.E.2d 585, 587 (Ga. Ct. App. 2004).
  - *Howard v. State*, 556 S.E.2d 536, 539 (Ga. Ct. App. 2001).
  - *In the Interest of A.H.*, 578 S.E.2d 247, 249 (Ga. Ct. App. 2003).
  - *In the Interest of K.C.*, 574 S.E.2d 413, 415 (Ga. Ct. App. 2002).
  - *Kight v. State*, 528 S.E.2d 542, 545 (Ga. Ct. App. 2000).
  - *Myrick v. State*, 531 S.E.2d 766, 769 (Ga. Ct. App. 2000).
  - *Nelson v. State*, 565 S.E.2d 551, 555 (Ga. Ct. App. 2002).

**(a) Remoteness**

- The fact that the statement is made days, weeks, or even several months after the alleged incident, does not in and of itself make the statement unreliable.  
– *Kight v. State*, 528 S.E.2d 542, 545 (Ga. Ct. App. 2000).

**(b) Specific Findings of Reliability**

- There is no requirement that the trial court make a specific finding of sufficient indicia of reliability for out-of-court statements of a child victim to be admissible.  
– *Flowers v. State*, 566 S.E.2d 339, 341 (Ga. Ct. App. 2002).  
– *Ingram v. State*, 585 S.E.2d 211, 215 (Ga. Ct. App. 2003).  
– *Ivey v. State*, 574 S.E.2d 908, 909 (Ga. Ct. App. 2002).  
– *Xulu v. State*, 568 S.E.2d 74, 78 (Ga. Ct. App. 2002).

**(i) Not a Condition Precedent**

- While the trial court must find that the circumstances of the child hearsay statement provide sufficient indicia of reliability, such finding is not a condition precedent to the admissibility of the statement.  
– *Baker v. State*, 555 S.E.2d 899, 901 (Ga. Ct. App. 2001).  
– *In the Interest of K.C.*, 574 S.E.2d 413, 415 (Ga. Ct. App. 2002).  
– *Nelson v. State*, 565 S.E.2d 551, 555 (Ga. Ct. App. 2002).

**(ii) Satisfaction of Statutory Requirement**

- The statutory requirement is met if, after both parties have rested, the record contains evidence, which would support such a finding.  
– *Baker v. State*, 555 S.E.2d 899, 901 (Ga. Ct. App. 2001).  
– *Flowers v. State*, 566 S.E.2d 339, 341 (Ga. Ct. App. 2002).  
– *Nelson v. State*, 565 S.E.2d 551, 555 (Ga. Ct. App. 2002).

- *In the Interest of K.C.*, 574 S.E.2d 413, 415 (Ga. Ct. App. 2002).
- *Ivey v. State*, 574 S.E.2d 908, 909 (Ga. Ct. App. 2002).

**c. Hearing**

- The child-hearsay statute does not require a hearing to determine indicia of reliability be held prior to receiving the testimony.
  - *Baker v. State*, 555 S.E.2d 899, 901-02 (Ga. Ct. App. 2001).
  - *Xulu v. State*, 568 S.E.2d 74, 78 (Ga. Ct. App. 2002).

**h. Bolstering of Hearsay Statements**

- The court has held that the statute actually contemplates testimony from both the child and those witnessing the child’s later reaction, even if the hearsay may be bolstering.
  - *Trew v. State*, 534 S.E.2d 804, 807 (Ga. Ct. App. 2000).
- Any bolstering can be explored by defendant in cross-examination.
  - *Trew v. State*, 534 S.E.2d 804, 807 (Ga. Ct. App. 2000).

**i. Conflict with Evidentiary Rules: Requirement of Separate Hearing**

- When evidentiary rules conflict with the provisions of the child-hearsay statute, a separate hearing may be necessary to avoid the presentation of inadmissible matter to the jury.
  - *Roberson v. State*, 526 S.E.2d 428, 430-31 (Ga. Ct. App. 1999).

**2. Necessity**

- Hearsay evidence is admitted in specified cases from necessity. GA. CODE ANN. § 24-3-1.
  - *Booth v. State*, 590 S.E.2d 789, 791 (Ga. Ct. App. 2003).
- There are three prerequisites for admission of hearsay because of necessity:
  - (1) necessity;
  - (2) particularized guarantees of trustworthiness; and
  - (3) the evidence must be relevant to a material fact and more probative on that material fact than other evidence than may be procured or offered.
    - *Baker v. State*, 527 S.E.2d 266, 268 (Ga. Ct. App. 1999).
    - *Booth v. State*, 590 S.E.2d 789, 791 (Ga. Ct. App. 2003).

**a. Guarantee of Trustworthiness**

- Whether a proponent of a hearsay statement can show a guarantee of trustworthiness is based upon a consideration of the totality of the circumstances surrounding the making of the statement.  
– *Booth v. State*, 590 S.E.2d 789, 791 (Ga. Ct. App. 2003).

**b. Unavailability**

- For the purpose of demonstrating necessity, unavailability depends upon a showing that the party seeking admission of the hearsay made diligent efforts to find the absent witness and bring the witness to court.  
– *Baker v. State*, 527 S.E.2d 266, 268 (Ga. Ct. App. 1999).
- Once the proponent of the hearsay establishes the declarant's unavailability, he or she must also demonstrate that the evidence is relevant to a material fact and that the statement is more probative on that material fact than other evidence that may be procured and offered.  
– *Baker v. State*, 527 S.E.2d 266, 268 (Ga. Ct. App. 1999).

**3. Prior Statement by a Witness**

- If the defense counsel had the opportunity to confront and cross-examine the witness who made the out-of-court statement, the statement is admissible in court.  
– *Croy v. State*, 545 S.E.2d 80, 82 (Ga. Ct. App. 2001).  
– *In the Interest of K.C.*, 574 S.E.2d 413, 416 (Ga. Ct. App. 2002).

**a. Prior Consistent Statement**

- A prior consistent statement is properly admitted as substantive evidence when the veracity of the witness's trial testimony has been placed in issue at trial, the witness is present at trial, and the witness is available for cross-examination.  
– *Joines v. State*, 591 S.E.2d 454, 457-58 (Ga. Ct. App. 2003).  
– *Shamsuddeen v. State*, 565 S.E.2d 544, 545 (Ga. Ct. App. 2002).
- A witness's veracity is placed in issue only if affirmative charges of recent fabrication, improper influence, or improper motive are raised during cross-examination.  
– *Joines v. State*, 591 S.E.2d 454, 457-58 (Ga. Ct. App. 2003).  
– *Shamsuddeen v. State*, 565 S.E.2d 544, 545 (Ga. Ct. App. 2002).

**b. Prior Inconsistent Statement**

- A prior inconsistent statement of a witness who takes the stand and is subject to cross-examination is admissible as substantive evidence, and is not limited in value only to impeachment purposes.
  - *Condra v. State*, 518 S.E.2d 186, 187 (Ga. Ct. App. 1999).
  - *Robinson v. State*, 594 S.E.2d 696, 698 (Ga. Ct. App. 2004).

**XV. Privileges**

**A. Attorney-Client Privilege**

- Communications to any attorney pending his or her employment or in anticipation thereof shall never be heard by the court.
  - *Johnson v. State*, 475 S.E.2d 918, 921 (Ga. Ct. App. 1996).
- One cannot render privileged that which is not privileged merely by placing it in the hands of his attorney.
  - *Johnson v. State*, 475 S.E.2d 918, 921 (Ga. Ct. App. 1996).

**B. Psychotherapist-Patient Privilege**

**1. Communications**

- Communications between a licensed psychologist and client are placed upon the same basis as those provided by law between attorney and client. GA. CODE ANN. § 43-39-16.
  - *Gore v. State*, 554 S.E.2d 598, 601 (Ga. Ct. App. 2001).

**2. Records**

- The records of psychologists and psychiatrists are subject to similar privileges.
  - *Herendeen v. State*, 601 S.E.2d 372, 373 (Ga. Ct. App. 2004).

**3. Invocation of Privilege**

- Before a person can invoke the confidentiality privilege, he or she must show that the requisite psychologist-patient or psychiatrist-patient relationship existed to the extent that treatment was given or contemplated.
  - *Herendeen v. State*, 601 S.E.2d 372, 373 (Ga. Ct. App. 2004).

**a. Creation of a Confidential Relationship**

- One who visits a psychiatrist on his or her own volition for the purpose of gaining professional psychiatric assistance creates the requisite confidential relationship of psychiatrist and patient.  
– *Herendeen v. State*, 601 S.E.2d 372, 374 (Ga. Ct. App. 2004).
- In contrast, where the psychiatrist or psychologist is appointed by the court to conduct a preliminary examination of the defendant, the psychiatrist or psychologist is a witness for the court, and the privilege does not apply.  
– *Herendeen v. State*, 601 S.E.2d 372, 374 (Ga. Ct. App. 2004).

**b. Voluntariness**

- Voluntariness is not relevant to a consideration of the privilege.  
– *Herendeen v. State*, 601 S.E.2d 372, 374 (Ga. Ct. App. 2004).
- The only question is whether the records were prepared in the course of treatment, whether voluntary or not.  
– *Herendeen v. State*, 601 S.E.2d 372, 374 (Ga. Ct. App. 2004).

**C. Spousal Privilege**

**1. Availability of Privilege**

- The court has no obligation to inform the spouse of a defendant whether the spousal privilege is available.  
– *Ingram v. State*, 585 S.E.2d 211, 215 (Ga. Ct. App. 2003).
- The spousal privilege shall not apply in proceedings in which the husband or wife is charged with a crime against the person of a minor child with respect to testimony regarding the specific acts charged against the defendant. GA. CODE ANN. § 24-9-23(b).  
– *Beck v. State*, 587 S.E.2d 316, 319 (Ga. Ct. App. 2003).

**2. Waiver of the Privilege**

- Where a spouse takes the stand and testifies voluntarily, it is presumed that he or she has waived the spousal privilege.  
– *Ingram v. State*, 585 S.E.2d 211, 215 (Ga. Ct. App. 2003).

## **XVI. Appellate Review of Evidence**

### **A. Admission of Evidence**

- The admission of evidence lies within the sound discretion of the trial judge and will not be disturbed absent an abuse of discretion.
  - *Craft v. State*, 558 S.E.2d 18, 27 (Ga. Ct. App. 2001).
  - *Fields v. State*, 504 S.E.2d 777, 778 (Ga. Ct. App. 1998).
  - *Howell v. State*, 324 S.E.2d 754, 756 (Ga. Ct. App. 1984).
  - *Phillips v. State*, 604 S.E.2d 520, 525 (Ga. Ct. App. 2004).
  - *Tyler v. State*, 335 S.E.2d 691, 695 (Ga. Ct. App. 1985).

### **B. Denial of Motion for New Trial and Sufficiency of Evidence**

- On appeal for the denial of a motion for new trial or challenging the sufficiency of the evidence, the evidence must be viewed in the light most favorable to support the verdict, and the appellant no longer enjoys a presumption of innocence.
  - *Abdulkadir v. State*, 592 S.E.2d 433, 434 (Ga. Ct. App. 2003).
  - *Altman v. State*, 495 S.E.2d 106, 108 (Ga. Ct. App. 1997).
  - *Akins v. State*, 526 S.E.2d 157, 158 (Ga. Ct. App. 1999).
  - *Atkins v. State*, 533 S.E.2d 152, 153 (Ga. Ct. App. 2000).
  - *Baker v. State*, 527 S.E.2d 266, 269 (Ga. Ct. App. 1999).
  - *Bell v. State*, 589 S.E.2d 653, 654 (Ga. Ct. App. 2003).
  - *Brinson v. State*, 530 S.E.2d 798, 800 (Ga. Ct. App. 2000).
  - *Brown v. State*, 600 S.E.2d 774, 775 (Ga. Ct. App. 2004).
  - *Coalson v. State*, 555 S.E.2d 128, 130 (Ga. Ct. App. 2001).
  - *Cox v. State*, 526 S.E.2d 887, 888 (Ga. Ct. App. 1999).
  - *Craft v. State*, 558 S.E.2d 18, 22 (Ga. Ct. App. 2001).
  - *Deal v. State*, 528 S.E.2d 289, 290 (Ga. Ct. App. 2000).
  - *Dowd v. State*, 582 S.E.2d 235, 236 (Ga. Ct. App. 2003).
  - *Falak v. State*, 583 S.E.2d 146, 147-48 (Ga. Ct. App. 2003).
  - *Frazier v. State*, 583 S.E.2d 188, 189 (Ga. Ct. App. 2003).
  - *Grimsley v. State*, 505 S.E.2d 522, 526 (Ga. Ct. App. 1998).
  - *Grooms v. State*, 583 S.E.2d 216, 218 (Ga. Ct. App. 2003).
  - *Groves v. State*, 590 S.E.2d 136, 139 (Ga. Ct. App. 2003).
  - *Hopper v. State*, 598 S.E.2d 926, 927 (Ga. Ct. App. 2004).
  - *Hostetler v. State*, 582 S.E.2d 197, 198 (Ga. Ct. App. 2003).
  - *Kight v. State*, 528 S.E.2d 542, 544 (Ga. Ct. App. 2000).
  - *Loveless v. State*, 538 S.E.2d 464, 465 (Ga. Ct. App. 2000).
  - *Phillips v. State*, 604 S.E.2d 520, 525 (Ga. Ct. App. 2004).
  - *Pierce v. State*, 554 S.E.2d 787, 790 (Ga. Ct. App. 2001).
  - *Walker v. State*, 506 S.E.2d 179, 180 (Ga. Ct. App. 1998).

- An appellate court determines evidence sufficiency and does not weigh the evidence or determine witness credibility, but only decides if the evidence was sufficient for a rational trier of fact to find the defendant guilty of the charged offense beyond a reasonable doubt.
  - *Abdulkadir v. State*, 592 S.E.2d 433, 434 (Ga. Ct. App. 2003).
  - *Altman v. State*, 495 S.E.2d 106, 108 (Ga. Ct. App. 1997).
  - *Akins v. State*, 526 S.E.2d 157, 158 (Ga. Ct. App. 1999).
  - *Atkins v. State*, 533 S.E.2d 152, 153 (Ga. Ct. App. 2000).
  - *Baker v. State*, 527 S.E.2d 266, 269 (Ga. Ct. App. 1999).
  - *Bell v. State*, 589 S.E.2d 653, 654 (Ga. Ct. App. 2003).
  - *Brinson v. State*, 530 S.E.2d 798, 800 (Ga. Ct. App. 2000).
  - *Brown v. State*, 600 S.E.2d 774, 775 (Ga. Ct. App. 2004).
  - *Coalson v. State*, 555 S.E.2d 128, 130 (Ga. Ct. App. 2001).
  - *Cox v. State*, 526 S.E.2d 887, 888 (Ga. Ct. App. 1999).
  - *Craft v. State*, 558 S.E.2d 18, 22 (Ga. Ct. App. 2001).
  - *Deal v. State*, 528 S.E.2d 289, 290 (Ga. Ct. App. 2000).
  - *Dowd v. State*, 582 S.E.2d 235, 236 (Ga. Ct. App. 2003).
  - *Falak v. State*, 583 S.E.2d 146, 147-48 (Ga. Ct. App. 2003).
  - *Frazier v. State*, 583 S.E.2d 188, 189 (Ga. Ct. App. 2003).
  - *Grimsley v. State*, 505 S.E.2d 522, 526 (Ga. Ct. App. 1998).
  - *Grooms v. State*, 583 S.E.2d 216, 218 (Ga. Ct. App. 2003).
  - *Groves v. State*, 590 S.E.2d 136, 139 (Ga. Ct. App. 2003).
  - *Hopper v. State*, 598 S.E.2d 926, 927 (Ga. Ct. App. 2004).
  - *Hostetler v. State*, 582 S.E.2d 197, 198 (Ga. Ct. App. 2003).
  - *Kight v. State*, 528 S.E.2d 542, 544 (Ga. Ct. App. 2000).
  - *Loveless v. State*, 538 S.E.2d 464, 465 (Ga. Ct. App. 2000).
  - *Phillips v. State*, 604 S.E.2d 520, 525 (Ga. Ct. App. 2004).
  - *Pierce v. State*, 554 S.E.2d 787, 790 (Ga. Ct. App. 2001).
  - *Walker v. State*, 506 S.E.2d 179, 180 (Ga. Ct. App. 1998).

### C. Sufficiency of Evidence and Motions for Directed Verdict or New Trial

- The standard of review for the sufficiency of evidence, in reviewing either a motion for a directed verdict of acquittal or a motion for new trial is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
  - *Akins v. State*, 526 S.E.2d 157, 159 (Ga. Ct. App. 1999).
  - *Atkins v. State*, 533 S.E.2d 152, 153 (Ga. Ct. App. 2000).
  - *Baker v. State*, 527 S.E.2d 266, 269 (Ga. Ct. App. 1999).
  - *Blansit v. State*, 546 S.E.2d 81, 82 (Ga. Ct. App. 2001).
  - *Cheek v. State*, 593 S.E.2d 55, 56 (Ga. Ct. App. 2003).
  - *Dorsey v. State*, 595 S.E.2d 106, 109 (Ga. Ct. App. 2004).
  - *Duncan v. State*, 584 S.E.2d 681, 682 (Ga. Ct. App. 2003).
  - *Griffin v. State*, 523 S.E.2d 910, 911 (Ga. Ct. App. 1999).
  - *Grooms v. State*, 583 S.E.2d 216, 218 (Ga. Ct. App. 2003).
  - *Phillips v. State*, 604 S.E.2d 520, 530 (Ga. Ct. App. 2004).
  - *Rudisail v. State*, 593 S.E.2d 747, 749 (Ga. Ct. App. 2004).
  - *Winter v. State*, 557 S.E.2d 436, 439 (Ga. Ct. App. 2001).



## **D. Motions to Suppress**

- When reviewing a trial court's ruling on a motion to suppress, the appellate court construes the evidence most favorably to upholding the findings and judgment of the trial court.
  - *Buckley v. State*, 561 S.E.2d 188, 189 (Ga. Ct. App. 2002).
  - *Howell v. State*, 324 S.E.2d 754, 756 (Ga. Ct. App. 1984).
  - *Lay v. State*, 591 S.E.2d 427, 428 (Ga. Ct. App. 2003).
  - *Moss v. State*, 535 S.E.2d 292, 293 (Ga. Ct. App. 2000).
  - *Phillips v. State*, 604 S.E.2d 520, 525 (Ga. Ct. App. 2004).
  - *State v. Kramer*, 580 S.E.2d 314, 315 (Ga. Ct. App. 2003).
  - *Walsh v. State*, 512 S.E.2d 408, 410 (Ga. Ct. App. 1999).
- The trial court's findings on disputed facts and credibility are adopted unless they are clearly erroneous and will not be disturbed if there is any evidence to support them.
  - *Buckley v. State*, 561 S.E.2d 188, 189 (Ga. Ct. App. 2002).
  - *Howell v. State*, 324 S.E.2d 754, 756 (Ga. Ct. App. 1984).
  - *Lay v. State*, 591 S.E.2d 427, 428 (Ga. Ct. App. 2003).
  - *Moss v. State*, 535 S.E.2d 292, 293 (Ga. Ct. App. 2000).
  - *Phillips v. State*, 604 S.E.2d 520, 525 (Ga. Ct. App. 2004).
  - *State v. Kramer*, 580 S.E.2d 314, 315 (Ga. Ct. App. 2003).
  - *Walsh v. State*, 512 S.E.2d 408, 410 (Ga. Ct. App. 1999).
- On appeal from a trial court's ruling on a motion to suppress, if the evidence is uncontroverted and no question regarding the credibility of witnesses is presented, the trial court's application of the law to undisputed facts is subject to de novo review.
  - *Craft v. State*, 558 S.E.2d 18, 28 (Ga. Ct. App. 2001).
  - *Malone v. State*, 541 S.E.2d 431, 432 (Ga. Ct. App. 2000).
  - *Phillips v. State*, 604 S.E.2d 520, 530 (Ga. Ct. App. 2004).

## **E. Upholding of Jury Verdict**

- As long as there is some competent evidence, even though contradicted, to support each fact necessary to make out the State's case, the jury's verdict will be upheld.
  - *Baker v. State*, 527 S.E.2d 266, 269 (Ga. Ct. App. 1999).
  - *Dorsey v. State*, 593 S.E.2d 945, 947 (Ga. Ct. App. 2004).
  - *Dowd v. State*, 582 S.E.2d 235, 236 (Ga. Ct. App. 2003).
  - *Pittman v. State*, 533 S.E.2d 769, 770 (Ga. Ct. App. 2000).
  - *Rudisail v. State*, 593 S.E.2d 747, 749 (Ga. Ct. App. 2004).

# GEORGIA

*Age of Child Victim*

**I. Proving the Age of the Child Depicted**

No relevant state cases reported.

**II. The Defendant's Knowledge of the Age of the Child Depicted**

No relevant state cases reported.

# GEORGIA

## *Multiple Counts*

### **I. What Constitutes an Item in Child Pornography?**

No relevant state cases reported.

### **II. Merger**

#### **A. Matter of Fact**

##### **1. Generally**

- Offenses merge as a matter of fact only if one of them is established by proof of the same or less than all of the facts used to prove the other.  
GA. CODE ANN. § 16-1-6(1).  
– *Childers v. State*, 571 S.E.2d 420, 422 (Ga. Ct. App. 2002).  
– *Seidenfaden v. State*, 547 S.E.2d 578, 583 (Ga. Ct. App. 2001).  
– *Shamsuddeen v. State*, 565 S.E.2d 544, 546 (Ga. Ct. App. 2002).  
– *Turner v. State*, 560 S.E.2d 539, 542 (Ga. Ct. App. 2002).
- If the State uses up all the evidence that the defendant committed one crime in establishing another crime, the former crime is included in the latter as a matter of fact.  
– *Shamsuddeen v. State*, 565 S.E.2d 544, 546 (Ga. Ct. App. 2002).
- Only where the same facts are used to prove both offenses, do the offenses merge.  
– *Johnson v. State*, 573 S.E.2d 362, 364 (Ga. 2002).

##### **2. Child Molestation and Child Enticement**

- The offenses of child molestation and child enticement do not merge as a matter of law or fact.  
– *Hicks v. State*, 563 S.E.2d 897, 899 (Ga. Ct. App. 2002).  
– *Wittschen v. State*, 383 S.E.2d 885, 887 (Ga. Ct. App. 1989).

#### **B. Crime Committed in More than One Way**

- When an indictment charges a crime was committed in more than one way, proof that it was committed in one of the separate ways or methods alleged in

the indictment makes a *prima facie* case for jury determination as to guilt or innocence.

– *Brewer v. State*, 553 S.E.2d 363, 364 (Ga. Ct. App. 2001).

- It is sufficient for the State to show that a crime was committed in any one of the separate ways listed in the indictment, even if the indictment uses the conjunctive rather than disjunctive form.

– *Brewer v. State*, 553 S.E.2d 363, 364 (Ga. Ct. App. 2001).

### **C. Multiple Punishment**

- Under Georgia Law, offenses merge and multiple punishment is prohibited if one offense is included in the other as a matter of law or fact.

– *Dorsey v. State*, 593 S.E.2d 945, 947 (Ga. Ct. App. 2004).

### **D. Conviction for Greater Offense and Merger of Lesser Offenses**

- When the jury by its verdict finds the defendant guilty of multiple offenses arising from the same conduct, the court does not err in convicting and sentencing the defendant for the greater offense after merging the lesser offenses into it.

– *Dorsey v. State*, 595 S.E.2d 106, 110 (Ga. App. 2004).

## **III. Joinder**

### **A. Generally**

- The Supreme Court of Georgia has held that two or more offenses may be joined in one charge, with each offense stated in a separate count, when the offenses are:

(1) of the same or similar character, even if not part of a single scheme or plan; or

(2) based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

– *Bolton v. State*, 574 S.E.2d 659, 661 (Ga. Ct. App. 2002).

– *Schwindler v. State*, 563 S.E.2d 154, 161 (Ga. Ct. App. 2002).

### **B. Modus Operandi**

- Where the *modus operandi* of the perpetrator is so strikingly alike that the totality of the facts unerringly demonstrate and designate the defendant as the common perpetrator, the offenses may be joined, subject to the right of the defendant to severance in the interests of justice.

– *Wright v. State*, 576 S.E.2d 64, 67 (Ga. Ct. App. 2003).

- Severance in this particular kind of circumstance lies within the sound discretion of the trial judge.  
– *Wright v. State*, 576 S.E.2d 64, 67 (Ga. Ct. App. 2003).

#### **IV. Severance of Offenses**

##### **A. When Is Severance Required?**

- Severance is required if offenses are joined solely because they are similar in nature.  
– *Wright v. State*, 576 S.E.2d 64, 67 (Ga. Ct. App. 2003).
- If the offenses are joined for trial solely on the ground that they were of the same or similar character, the defendant has the right to their severance. Otherwise, the court has the discretion to grant or deny severance based on what is necessary to achieve a fair determination of the defendant's guilt or innocence of each offense. The court should consider whether the jury would be able to distinguish the evidence and apply the law intelligently as to each offense.  
– *Bolton v. State*, 574 S.E.2d 659, 661 (Ga. Ct. App. 2002).
- If offenses have been joined for trial on grounds that they are of the same or similar character, and are part of a single scheme or plan, or are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, the trial court, in its discretion, should grant a severance of offenses if it is deemed appropriate to promote a fair determination of the defendant's guilt or innocence of each charge.  
– *Smith v. State*, 547 S.E.2d 598, 601 (Ga. Ct. App. 2001).

##### **B. When Is Severance Not Mandated?**

- Severance is not mandated where the similarity of the offenses is coupled with evidence of a pattern that shows a common motive, plan, scheme, or bent of mind.  
– *Wright v. State*, 576 S.E.2d 64, 67 (Ga. Ct. App. 2003).
- Where the counts are based on a series of acts connected together or constituting parts of a single scheme or plan, the trial court could properly deny severance based on the interests of justice. Other cases have held that where the evidence of one crime would be admissible as a similar transaction in the trial of the other crime, or where the similarity of the offenses manifests a pattern, the trial court does not abuse its discretion in denying the motion for severance; therefore, the trial court may deny a motion to sever where the offenses involve an ongoing scheme involving the same type of crime against the same victim.  
– *Bolton v. State*, 574 S.E.2d 659, 661 (Ga. Ct. App. 2002).

- Various sexual molestations of the same child would be sufficiently connected to withstand a motion to sever.  
– *Bolton v. State*, 574 S.E.2d 659, 661 (Ga. Ct. App. 2002).
- The trial court does not abuse its discretion by denying a motion to sever if the evidence of one offense would be admissible as a similar act in the trial of the other offense.  
– *Smith v. State*, 547 S.E.2d 598, 601 (Ga. Ct. App. 2001).

#### **IV. Issues of Double Jeopardy**

- The primary purpose of the Double-Jeopardy Clause is to prohibit the retrial of a criminal defendant where, at the initial trial, the prosecution failed to introduce sufficient evidence to sustain a conviction.  
– *State v. Heggs*, 558 S.E.2d 41, 42 (Ga. Ct. App. 2001).
- Retrial generally is not prohibited where reversal is due to trial error rather than the sufficiency of the evidence.  
– *State v. Heggs*, 558 S.E.2d 41, 42 (Ga. Ct. App. 2001).

##### **A. Determining the Number of Offenses**

- Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact that the other does not. If two or more offenses are the same under this test they necessarily will be the same for purposes of barring successive prosecutions. But a single act may be an offense against two statutes and if each statute requires proof of an additional fact that the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.  
– *State v. Evans*, 384 S.E.2d 404, 405-06 (Ga. Ct. App. 1989).

##### **B. Continuous Character of an Offense**

- In dealing with the question as to whether the offense is of continuous character, it is sometimes necessary to distinguish between one continuous, uninterrupted single act and a series of distinct and separate acts. It is also true that the question of identity in fact may be involved in that class of cases where the State, by the generality of the indictment, may not be confined to proof of any specific date or transaction within the period of limitation, with the result that a prosecution for a particular crime will usually operate as a bar for any such offense committed within the period of limitation previously to the indictment.  
– *State v. Evans*, 384 S.E.2d 404, 406 (Ga. Ct. App. 1989).

### **C. Crimes Based on Same Criminal Conduct**

- Georgia law bars conviction and punishment of all crimes that arise from the same criminal conduct and are, as a matter of law or a matter of fact, included in the major crime for which the defendant has been convicted.  
– *Rudisail v. State*, 593 S.E.2d 747, 750 (Ga. Ct. App. 2004).
- The judgment of conviction and the sentence imposed for offenses included as a matter of fact or law in another offense arising out of the same facts for which the defendant has been found guilty and been sentenced are vacated by operation of law.  
– *Rudisail v. State*, 593 S.E.2d 747, 750 (Ga. Ct. App. 2004).
- When the same conduct of an accused may establish the commission of more than one crime, the accused may be prosecuted for each crime.  
– *Hunter v. State*, 589 S.E.2d 306, 308-09 (Ga. Ct. App. 2003).  
– *Lunsford v. State*, 581 S.E.2d 638, 641 (Ga. Ct. App. 2003).

### **D. Lesser-Included Offenses**

- Under Georgia law, a crime is an included crime and multiple punishment therefore is barred if it is the same as a matter of fact or as a matter of law. A crime is so included when it is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish the commission of the crime charged.  
– *Damare v. State*, 571 S.E.2d 507, 510 (Ga. Ct. App. 2002).  
– *Lay v. State*, 591 S.E.2d 427, 429 (Ga. Ct. App. 2003).
- Even if a lesser offense is not included in a charged offense as a general matter because the two offenses have different elements, the lesser offense may be an included offense in a particular case if the facts alleged in the indictment and the evidence presented at trial to establish the charged offense are sufficient to establish the lesser offense as well; therefore, whether a lesser offense is included in a greater offense as a matter of fact must be determined on a case-by-case basis, depending upon the facts alleged in the indictment and the evidence presented at trial.  
– *Damare v. State*, 571 S.E.2d 507, 510 (Ga. Ct. App. 2002).
- For a crime to be considered a lesser-included offense as a matter of fact, it must be supported by evidence at trial and be adequately averred in the indictment.  
– *Damare v. State*, 571 S.E.2d 507, 510 (Ga. Ct. App. 2002).

## 1. Determination of a Lesser-Included Offense

- Georgia law provides that a lesser offense can be included in a greater offense either as a matter of law or as a matter of fact.  
– *Damare v. State*, 571 S.E.2d 507, 510 (Ga. Ct. App. 2002).
- In determining whether a crime is established by proof of the same or less than all the facts required to establish the commission of another crime, a court looks to the actual evidence introduced at trial.  
– *Morris v. State*, 345 S.E.2d 686, 688 (Ga. Ct. App. 1986).
- If the State uses up all the evidence that the defendant committed one crime in establishing another crime, the former crime is included in the latter as a matter of fact under the statute.  
– *Morris v. State*, 345 S.E.2d 686, 688 (Ga. Ct. App. 1986).
- The State is not required to prosecute only a lesser offense committed. It may prosecute the defendant under any or all statutes that fit the defendant's conduct.  
– *Hunter v. State*, 589 S.E.2d 306, 309 (Ga. Ct. App. 2003).

## 2. Sexual Offenses

### a. Child Molestation and Rape

- Child molestation is not included within rape as a matter of law because, unlike rape, child molestation requires proof that the victim is under the age of 16; however, child molestation is included as a matter of fact if the victim is under the age of 16.  
– *Heggs v. State*, 540 S.E.2d 643, 644 (Ga. Ct. App. 2000).  
– *Lay v. State*, 591 S.E.2d 427, 429 (Ga. Ct. App. 2003).

### b. Child Molestation and Aggravated Child Molestation

- Child molestation is a lesser-included offense of aggravated child molestation.  
– *Brownlow v. State*, 544 S.E.2d 472, 475 (Ga. Ct. App. 2001).

### c. Contributing to Delinquency of Minor and Child Molestation

- Contributing to the delinquency of a minor is not included in the offense of child molestation as a matter of law or fact since the two offenses share no essential elements and are directed to different acts. Consequently, proof of one offense would not serve to prevent conviction on the other.  
– *Slack v. State*, 593 S.E.2d 664, 667 (Ga. Ct. App. 2004).



**d. Public Indecency or Assault and Child Molestation**

- A charge on public indecency or assault as a lesser-included offense of child molestation is required when the indictment puts the defendant on notice that he or she could be convicted of the lesser-included offense and the evidence presented at trial is sufficient to establish the lesser-included offense consistent with the averments.  
– *Damare v. State*, 571 S.E.2d 507, 510 (Ga. Ct. App. 2002).

**3. Jury Charges**

- Where the State’s evidence establishes all of the elements of an offense and there is no evidence raising the lesser offense, there is no error in failing to give a charge on the lesser offense; however, where a case contains some evidence, no matter how slight, that shows that the defendant committed a lesser offense, then the court should charge the jury on that offense.  
– *Damare v. State*, 571 S.E.2d 507, 510 (Ga. Ct. App. 2002).  
– *Heggs v. State*, 540 S.E.2d 643, 645 (Ga. Ct. App. 2000).
- A written request to charge a lesser-included offense must always be given if there is any evidence that the defendant is guilty of the lesser-included offense; however, when the evidence shows completion only of the greater offense, it is unnecessary for the trial court to charge on the lesser offense.  
– *Rainey v. State*, 584 S.E.2d 13, 15 (Ga. Ct. App. 2003).  
– *Wright v. State*, 576 S.E.2d 64, 66 (Ga. Ct. App. 2003).
- The failure to give a requested charge on a lesser-included offense when the evidence warrants it is error; however, where the State’s evidence establishes all of the elements of an offense and there is no evidence raising the lesser offense, there is no error in failing to give a charge on the lesser offense.  
– *Damare v. State*, 571 S.E.2d 507, 510 (Ga. Ct. App. 2002).  
– *Wright v. State*, 576 S.E.2d 64, 66 (Ga. Ct. App. 2003).
- If the evidence supports a verdict of guilty in the more serious offense, and if there is a slight evidence of the lesser-included offense, a defendant who requests a charge on and is convicted of the lesser offense may not successfully urge the general grounds on appeal.  
– *Conejo v. State*, 374 S.E.2d 826, 828 (Ga. Ct. App. 1988).

**4. Conviction of a Lesser Crime Warranted**

- In order for a conviction of a lesser crime to be warranted, the greater must either necessarily include within itself all of the essential

ingredients of the lesser or, if not necessarily included, may or may not be involved according to the circumstances of the particular case, the indictment must itself, in describing the manner in which the higher offense was committed, contain all of the averments necessary to constitute the lower.

– *Heggs v. State*, 540 S.E.2d 643, 644 (Ga. Ct. App. 2000).

## **5. Retrial of the Greater Offense**

- A conviction on a lesser-included offense does not necessarily foreclose a retrial on the greater offense.  
– *Collins v. State*, 601 S.E.2d 111, 114 (Ga. Ct. App. 2004).
- Retrial on the greater offense is not barred unless two prerequisites are established:  
(1) an unambiguous conviction on the lesser included offense; and  
(2) a full opportunity for the jury to consider the greater offense.  
– *Collins v. State*, 601 S.E.2d 111, 114 (Ga. Ct. App. 2004).  
– *State v. Heggs*, 558 S.E.2d 41, 43 (Ga. Ct. App. 2001).

## **E. Improper Termination of a Former Prosecution**

- One may not be prosecuted for offenses for which one was tried in a former prosecution if the former prosecution was terminated improperly after the jury was impaneled and sworn. GA. CODE ANN. § 16-1-8(a)(2).  
– *Putnam v. State*, 537 S.E.2d 384, 385 (Ga. Ct. App. 2000).
- A trial is improperly terminated if there was no manifest necessity for declaring a mistrial.  
– *Putnam v. State*, 537 S.E.2d 384, 385 (Ga. Ct. App. 2000).

### **1. Existence of Manifest Necessity**

- Manifest necessity exists only under urgent circumstances.  
– *Putnam v. State*, 537 S.E.2d 384, 385 (Ga. Ct. App. 2000).
- The existence of manifest necessity is to be determined by weighing the defendant’s right to have his or her trial completed before the particular tribunal against the interest of the public in having fair trials designed to end in judgments.  
– *Putnam v. State*, 537 S.E.2d 384, 386 (Ga. Ct. App. 2000).

### **2. Judicial Deference**

- A trial court’s judgment about whether there was manifest necessity to grant a mistrial is entitled to great deference.  
– *Putnam v. State*, 537 S.E.2d 384, 388 (Ga. Ct. App. 2000).

**F. Set Aside Conviction**

- A subsequent prosecution is not barred when a conviction is set aside, unless the accused was thereby adjudged not guilty or unless there was a finding that the evidence did not authorize the verdict. GA. CODE ANN. § 16-1-8(d).  
– *State v. Heggs*, 558 S.E.2d 41, 43 (Ga. Ct. App. 2001).

**G. Subsequent Proceedings**

- Prosecution is not barred if subsequent proceedings resulted in the invalidation, setting aside, reversal, or vacating of the conviction, unless the accused was thereby adjudged not guilty or unless there was a finding that the evidence did not authorize the verdict. GA. CODE ANN. § 16-1-8(d).  
– *State v. Heggs*, 558 S.E.2d 41, 43 (Ga. Ct. App. 2001).

# GEORGIA

## *Defenses*

### **I. Consent**

- Consent is not a defense to child molestation or statutory rape.
  - *Coalson v. State*, 555 S.E.2d 128, 134 (Ga. Ct. App. 2001).
  - *Phagan v. State*, 486 S.E.2d 876, 881-82 (Ga. 1997).
  - *Slack v. State*, 593 S.E.2d 664, 666 (Ga. Ct. App. 2004).

### **II. Diminished Capacity**

#### **A. Addiction to the Internet**

No relevant state cases reported.

#### **B. Insanity: Notice of Intent**

- A defendant to file a notice of his or her intent to raise the issue of insanity or mental illness at least 10 days before trial unless that time period is lengthened or shortened by the trial judge. UNIF. SUPER. CT. R. 31.1.
  - *Jackson v. State*, 570 S.E.2d 40, 41 (Ga. Ct. App. 2002).
- The purpose of this notice is to give the State the opportunity to obtain independent expert mental-health evaluations of the defendant and to prepare rebuttal evidence. UNIF. SUPER. CT. R. 31.1.
  - *Jackson v. State*, 570 S.E.2d 40, 41 (Ga. Ct. App. 2002).

### **III. First Amendment**

No relevant state cases reported.

### **IV. Impossibility**

#### **A. Factual**

No relevant state cases reported.

#### **B. Legal**

No relevant state cases reported.

## **V. Manufacturing Jurisdiction**

No relevant state cases reported.

## **VI. Mistake**

### **A. Of Fact**

#### **1. Generally**

- Mistake of fact is a defense to a crime to the extent that ignorance of some fact negates the existence of the mental state required to establish a material element of the crime.  
– *Schultz v. State*, 599 S.E.2d 247, 248 (Ga. Ct. App. 2004).

#### **2. The Victim's Age**

- Under Georgia law, a mistaken belief regarding a child victim's age is not a defense.  
– *Allen v. State*, 533 S.E.2d 401, 403 (Ga. Ct. App. 2000).
- A mistaken belief as to the victim's age does not justify the act of child molestation or aggravated child molestation.  
– *Schultz v. State*, 599 S.E.2d 247, 248 (Ga. Ct. App. 2004).  
– *Veasey v. State*, 507 S.E.2d 799, 800 (Ga. Ct. App. 1998).

### **B. Of Law**

No relevant state cases reported.

## **VII. Outrageous Conduct**

No relevant state cases reported.

## **VIII. Researcher**

No relevant state cases reported.

## **IX. Sexual Orientation**

No relevant state cases reported.

# GEORGIA

## *Pleas*

### **I. Factual Basis for a Plea**

- Notwithstanding the acceptance of a plea of guilty, judgment should not be entered upon such a plea without such inquiry on the record as may satisfy the judge that there is a factual basis for the plea.  
– *Johanson v. State*, 581 S.E.2d 564, 566 (Ga. Ct. App. 2003).
- The record of the plea hearing must reveal the factual basis relied on so that a reviewing court may determine whether an abuse of discretion occurred; however, there is no requirement that the elements of the crime be proven beyond a reasonable doubt. Rather, the court must satisfy itself subjectively that the pleader knows both what he or she has done and that those acts constitute the crime with which he or she is charged.  
– *Johanson v. State*, 581 S.E.2d 564, 566 (Ga. Ct. App. 2003).
- The factual basis may be demonstrated from the record of the guilty-plea hearing itself or other portions of the record such as a bond hearing, or the indictment alone may contain sufficient information to show that the facts alleged by the State satisfy all the elements of the charge to which the defendant plead guilty.  
– *Johanson v. State*, 581 S.E.2d 564, 566 (Ga. Ct. App. 2003).

### **II. No Requirement of Corroboration**

- A guilty plea does not require corroboration.  
– *Johanson v. State*, 581 S.E.2d 564, 566 (Ga. Ct. App. 2003).
- Like an out-of-court confession, a guilty plea ought to be scanned with care and received with caution.  
– *Johanson v. State*, 581 S.E.2d 564, 566 (Ga. Ct. App. 2003).

### **III. Alford Pleas**

- A claim of innocence coupled with a guilty plea does not necessarily demonstrate that the plea was not free and voluntary.  
– *Thomas v. State*, 598 S.E.2d 882, 883 (Ga. Ct. App. 2004).
- No constitutional error exists in accepting such a plea when the defendant intelligently concludes it is in his or her best interest, and the judge has inquired into

the factual basis for the plea, and sought to resolve the conflict between the plea and the claim of innocence.

– *Thomas v. State*, 598 S.E.2d 882, 883 (Ga. Ct. App. 2004).

#### **IV. Waiver**

##### **A. Appeal Rights**

- When a person knowingly and voluntarily enters into a negotiated plea agreement and accepts the conditions of his or her probation in open court, he or she waives the right to challenge the issue on appeal.

– *Phillips v. State*, 512 S.E.2d 32, 33 (Ga. Ct. App. 1999).

##### **B. Admissibility of Evidence**

- A defendant's guilty plea waives any issue as to the admissibility of such evidence as it bears on defendant's conviction; however, it does not waive the use of inadmissible evidence at sentencing.

– *Gilbert v. State*, 538 S.E.2d 104, 106 (Ga. Ct. App. 2000).

#### **V. Challenging Validity of Guilty Plea: Burden of Proof**

- When a defendant enters a plea of guilty, and subsequently challenges the validity of the guilty plea, the State may meet its burden of demonstrating that either:
  - (1) the plea was intelligently and voluntarily entered by showing on the record of the guilty plea hearing that the defendant was cognizant of all of the rights he was waiving and the possible consequences of his plea; or
  - (2) fill a silent record by use of extrinsic evidence that affirmatively shows that the guilty plea was knowing and voluntary.

– *Harland v. State*, 586 S.E.2d 705, 706 (Ga. Ct. App. 2003).

- The trial court is the final arbiter of all factual issues raised by the evidence, and after sentence is pronounced a guilty plea may be withdrawn only to correct a manifest injustice.

– *Harland v. State*, 586 S.E.2d 705, 706 (Ga. Ct. App. 2003).

#### **VI. Promises or Agreements of the Prosecutor**

- When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

– *Phillips v. State*, 512 S.E.2d 32, 34 (Ga. Ct. App. 1999).

## VII. Withdrawal of a Guilty Plea

- After sentence has been pronounced, a defendant may withdraw a guilty plea only upon a showing by the defendant that withdrawal is necessary to correct a manifest injustice.  
– *Johanson v. State*, 581 S.E.2d 564, 565 (Ga. Ct. App. 2003).
- A criminal defendant may withdraw his or her guilty plea at any time before judgment is pronounced. GA. CODE ANN. § 17-7-93(b).  
– *Johanson v. State*, 581 S.E.2d 564, 565 (Ga. Ct. App. 2003).
- A trial judge who elects to give a defendant first-offender status does so without entering a judgment of guilty and the defendant is entitled as a matter of right to withdraw his guilty plea. GA. CODE ANN. § 42-8-60(a).  
– *Johanson v. State*, 581 S.E.2d 564, 565 (Ga. Ct. App. 2003).



# GEORGIA

## *Sentencing Issues*

### **I. Pre-Sentencing Reports**

- If a pre-sentence report contains any matter adverse to the defendant and likely to influence the decision to suspend or probate the sentence, it should be revealed to defense counsel by the trial judge in advance of the pre-sentencing hearing.  
– *Palmer v. State*, 546 S.E.2d 886, 889 (Ga. Ct. App. 2001).
- Although a pre-sentencing report cannot be used in aggravation in determining the sentence, where the transcript does not affirmatively show that the trial court used the pre-sentencing report for the unlawful purpose of increasing the sentence, rather than for the lawful purpose of determining whether to grant probation, no cause for reversal is shown.  
– *Palmer v. State*, 546 S.E.2d 886, 889 (Ga. Ct. App. 2001).
- If a defendant fails to object at the pre-sentencing hearing to the use of evidence in aggravation of punishment, such is a waiver of his or her right to notice.  
– *Ingram v. State*, 585 S.E.2d 211, 216 (Ga. Ct. App. 2003).

### **II. Evidence**

- In determining what sentence to impose upon a defendant, a trial court may consider any evidence that was properly admitted during the guilt-innocence phase of the trial.  
– *Ingram v. State*, 585 S.E.2d 211, 216 (Ga. Ct. App. 2003).

#### **A. Victim Statements**

- Evidence of the impact of the crime upon the victim is admissible only during the sentencing phase of trial.  
– *Taylor v. State*, 592 S.E.2d 148, 152 (Ga. Ct. App. 2003).

#### **B. Evidence in Aggravation of Punishment**

##### **1. Admissibility**

- Upon the return of a verdict of guilty by the jury in any felony case, the judge shall hear additional evidence in aggravation of punishment, provided that only such evidence in aggravation as the State has made known to the defendant prior to the defendant's trial shall be admissible. GA. CODE ANN. § 17-10-2(a).  
– *Autry v. State*, 549 S.E.2d 769, 770 (Ga. Ct. App. 2001).

## **2. Aggravating Factors**

### **a. Age of Victim**

No relevant state cases reported.

### **b. Distribution/Intent to Traffic**

No relevant state cases reported.

### **c. Motive, Lack of Remorse, Moral Character, Predisposition**

- Sentencing courts are authorized to consider in aggravation any lawful evidence that tends to show the motive of the defendant, his or her lack of remorse, his or her general moral character, and his or her predisposition to commit other crimes.  
– *Ingram v. State*, 585 S.E.2d 211, 216 (Ga. Ct. App. 2003).  
– *Pearce v. State*, 570 S.E.2d 74, 76 (Ga. Ct. App. 2002).

### **c. Number of Images**

No relevant state cases reported.

### **d. Pattern of Activity for Sexual Exploitation**

No relevant state cases reported.

### **e. Prior Convictions**

- At a sentencing hearing, the State can introduce evidence in aggravation of punishment including the record of any prior criminal convictions and pleas of guilty or *nolo contendere* of the defendant.  
– *Pearce v. State*, 570 S.E.2d 74, 76 (Ga. Ct. App. 2002).

### **f. Sadistic, Masochistic, or Violent Material**

No relevant state cases reported.

### **g. Use of a Computer**

No relevant state cases reported.

### **III. Serious Violent Felonies**

#### **A. Mandatory Minimum Term of Imprisonment**

- A trial court must sentence a person convicted of a serious violent felony (including aggravated child molestation) to a mandatory minimum term of imprisonment of 10 years and no portion of the mandatory minimum sentence imposed shall be suspended, stayed, probated, deferred, or withheld by the sentencing court and shall not be reduced by any form of pardon, parole, or commutation of sentence by the State Board of Pardons and Paroles. GA. CODE ANN. § 17-10-6.1.  
– *Johnson v. State*, 573 S.E.2d 362, 364 (Ga. 2002).  
– *Rolader v. State*, 547 S.E.2d 778, 779 (Ga. Ct. App. 2001).

#### **B. Life Imprisonment Without Parole**

- Any person who is convicted of a serious violent felony and subsequently commits and is convicted of a second serious violent felony shall be sentenced to life imprisonment without parole. GA. CODE ANN. § 17-10-7(b)(2).  
– *Gosnell v. State*, 586 S.E.2d 350, 351 (Ga. Ct. App. 2003).
- A determination that a defendant should be sentenced to life imprisonment without possibility of parole does not require a consideration of mitigating factors.  
– *Gosnell v. State*, 586 S.E.2d 350, 351 (Ga. Ct. App. 2003).
- The State must serve notice of intent to seek life imprisonment in the case of a conviction for a second offense of child molestation.  
– *Webb v. State*, 608 S.E.2d 241, 245 (Ga. Ct. App. 2004).

### **IV. Criminal History: Punishment for Subsequent Offenses**

#### **A. First Reoffense**

- Any person convicted of a felony offense in Georgia or having been convicted under the laws of any other state or of the United States of a crime that, if committed in Georgia, would be a felony and sentenced to confinement in a penal institution, who shall afterwards commit a felony punishable by confinement in a penal institution, shall be sentenced to undergo the longest period of time prescribed for the punishment of the subsequent offense of which he or she stands convicted, provided that, unless otherwise provided by law, the trial judge may, in his or her discretion, probate or suspend the maximum sentence prescribed for the offense. GA. CODE ANN. § 17-10-7(a).  
– *State v. Jones*, 560 S.E.2d 112, 112-13 (Ga. Ct. App. 2002).

## **B. Third Reoffense**

- Any person who, after having been convicted under the laws of Georgia for three felonies or having been convicted under the laws of any other state or of the United States of three crimes that, if committed in Georgia, would be felonies, commits a felony in Georgia other than a capital felony must, upon conviction for such fourth offense or for subsequent offenses, serve the maximum time provided in the sentence of the judge based upon such conviction and shall not be eligible for parole until the maximum sentence has been served. GA. CODE ANN. § 17-10-7(c).  
– *State v. Jones*, 560 S.E.2d 112, 113 (Ga. Ct. App. 2002).

## **IV. Conversion of Concurrent Sentence**

- A trial court does not impose a more severe sentence when it converts a concurrent sentence into a consecutive one.  
– *Alvarado v. State*, 547 S.E.2d 616, 617 (Ga. Ct. App. 2001).

## **V. Cruel and Unusual Punishment**

- Where the sentences imposed are within the statutory limits, they are not unconstitutional.  
– *Schwindler v. State*, 563 S.E.2d 154, 165 (Ga. App. 2002).
- A presumption arises when a defendant is sentenced within the statutory limits set by the legislature that such sentence does not violate the Eighth Amendment's guarantee against cruel and unusual punishment. Such presumption remains until a defendant sets forth a factual predicate showing that such legislatively authorized punishment was so overly severe or excessive in proportion to the offense as to shock the conscience.  
– *Couch v. State*, 545 S.E.2d 685, 687 (Ga. Ct. App. 2001).

# GEORGIA

## *Supervised Release: Probation*

### **I. Conditions**

#### **A. Imposition of Conditions Reasonably Related**

- A trial court has broad discretion in sentencing to impose conditions reasonably related to the nature and circumstances of the offense and the rehabilitative goals of probation.  
– *Harrell v. State*, 559 S.E.2d 155, 157 (Ga. Ct. App. 2002).

#### **B. Restriction on Presence at Certain Locations**

- Probation conditions prohibiting the defendant from being present at certain locations where children are present and from associating with groups dealing with children must be stated with reasonable specificity to afford the probationer notice of the groups and places he or she must avoid.  
– *Harrell v. State*, 559 S.E.2d 155, 157 (Ga. Ct. App. 2002).
- The conditions must not be so broadly worded as to encompass groups and places not rationally related to the purpose of the sentencing objective.  
– *Harrell v. State*, 559 S.E.2d 155, 157 (Ga. Ct. App. 2002).

#### **C. Counseling for Child Molesters**

- Upon a first conviction for the offense of child molestation, the judge may probate the sentence and such probation may be upon the special condition that the defendant undergo a mandatory period of counseling administered by a licensed psychiatrist or a licensed psychologist.  
– *Couch v. State*, 545 S.E.2d 685, 687 (Ga. Ct. App. 2001).

### **II. Prior Convictions**

No relevant state cases reported.

### **III. Reasonable Grounds for a Warrantless Search of a Probationer**

- Regardless of whether Fourth-Amendment rights have been validly waived, if the search of a probationer is reasonable under the circumstances, it is not prohibited even if warrantless. This is so because the supervision necessary to operate a probation system presents special needs that may justify departures from the usual

warrant and probable-cause requirements.

– *Harrell v. State*, 559 S.E.2d 155, 158 (Ga. Ct. App. 2002).

- If a warrantless search has occurred pursuant to a special condition of probation, a reviewing court is able to analyze the facts and circumstances to determine whether the search was based upon reasonable grounds, balancing the government’s need to search against the invasion caused by the warrantless search.

– *Harrell v. State*, 559 S.E.2d 155, 158 (Ga. Ct. App. 2002).

- The appellate court of Georgia does not presume that any search that may take place in the future under the authority of a probation officer will be unreasonable, even if it is warrantless.

– *Harrell v. State*, 559 S.E.2d 155, 158 (Ga. Ct. App. 2002).