PODCAST NOTES-TAKING A GUILTY PLEA

* Welcome everyone to another session of The Good Judge-Ment Podcast
* We really do read the comments and emails that you send and this episode is the product of a couple of requests
* Some of you have asked for an episode on the best practices associated with taking a guilty plea and others have asked for “hot topics” or for review of “the latest new decisions from the appellate courts.”
* Well, this episode is a good hybrid of both of those suggested topics.
* (are we breaking this into 2 episodes? or more?)
* Every year, during NJO, we provide all of the new judges with a plea outline and this episode will generally follow that outline.
* You can find our episode notes on our website, goodjudgepod.com
* But much of our outline comes from U.S.C.R. 33.6
* As you all know, there is no single correct way to create a proper record during a guilty plea but we are going to generally follow the outline to ensure we address most of the topics that need to be covered during the process
* Tain, we have colleagues who do not go through all that we are about to discuss with the defendant in every case
	+ Thoughts?
		- I would hate to be reversed on a guilty plea because of impact on victims, officers, etc.
* DIVISION OF THE PROCESS FOR THE PURPOSES OF THIS EPISODE
	+ We are going to attempt to break this episode up into clear divisions:
		- Initial Portion of Plea Hearing
		- Covering Rights Being Waived
		- Conclusion and Sentencing
	+ COUPLE OF WARNINGS CONCERNING THIS EPISODE!
		- We are going to discuss some issues repeatedly as they arise in different contexts during a plea hearing.
		- For example, a defendant must be advised of “direct consequences” that flow from his/her entry of a guilty plea
		- But the defendant does not have to be advised of “collateral consequences” that flow from entry of the plea
			* This concept will arise when we discuss the obligation to clarify on the record whether recidivist notice is being waived, when a non-citizen defendant must be advised of the impact the plea will have on his/her immigration status and whether the plea would cause the defendant to register as a sex offender.
		- Similarly, many of the issues that we discuss are not actually legal obligations placed on the trial judge
			* But if the judge does not put them on the record, it may give rise to a claim of ineffective assistance of counsel in perpetuity—so we will suggest that it is a best practice for the trial judge to address these issues during the plea colloquy.
1. INITIAL PORTION OF PLEA HEARING
	* During this initial portion of the plea hearing, I may not even receive any information from the defendant. We are trying to memorialize the plea agreement and take clarify some of the issues that might impact the effect of the plea agreement
* FACTUAL BASIS FOR THE PLEA
	+ I frequently ask the parties to stipulate that there is a factual basis for the plea.
		- I do that to ensure that if the lawyers involved “gloss over” a required element that such an oversight does not lead to an overturned plea
		- “But it is not required that the accused or his counsel state a factual basis for the crime on the record. What is required is that the trial court make itself aware of the factual basis for the plea.” *Giddens v. State*, 349 Ga. App. 392 (2019).
		- U.S.C.R. 33.9
	+ If there is a sentence recommendation (or if there is no recommendation), that is put on the record
		- We call a plea where there is no sentence recommendation an “open plea”
* Not sure exactly where we should address this issue, but judges simply cannot be involved with plea negotiations
	+ - U.S.C.R. 33.5(A) - “The trial judge should not participate in plea discussions.”
* And the judge should never intimate that there is a “trial tax”
	+ - U.S.C.R. 33.6(B) - “ The judge should not impose upon a defendant any sentence in excess of that which would be justified by any of the rehabilitative, protective, deterrent or other purposes of the criminal law merely because the defendant has chosen to require the prosecution to prove the defendant's guilt at trial rather than to enter a plea of guilty or nolo contendere.”
* RECIDIVIST NOTICE/WAIVER
	+ If there is recidivist notice, clarify whether it is being waived or not
		- Recidivism under §17-10-7(a) and (c)
		- If under (c), any time in confinement must be served without parole
			* “to the door”
			* *Alexander v. State*, 297 Ga. 59 (2015) – plea was reversed and remanded for a hearing under *Strickland* (Ineffective Assistance of Counsel) because recidivist notice under §17-10-7(c) was not waived by the State and neither the trial judge nor trial counsel advised the defendant that he would not be eligible for parole
* WAIVER OF OBJECTIONS TO CHARGING INSTRUMENT
	+ Occasionally, defendants enter a plea to reduced charges
		- If the crime they are pleading to is clearly a lesser included offense of the crime charged in the indictment, there really is no issue
			* Other than to clarify exactly what the defendant is pleading to
		- But a more problematic situation where a defendant is entering a plea to a crime that is not really a lesser included offense
			* For example, a drug possession crime being reduced to disorderly conduct
			* Or a burglary being reduced to theft by taking
		- If the crime the defendant is pleading to is not clearly a lesser included offense in my opinion, I ensure that the defendant and counsel waive their right to a new indictment or accusation
	+ On a related point, if the defendant is entering a plea early in the process and has not been arraigned before the date of sentencing, I also put on the record a waiver from counsel and defendant to their rights to have 10 days from arraignment to file discovery requests/motions
		- Probably not necessary, but it feels better
* MERGER
	+ We have recorded entire episodes on merger but remember that a guilty plea cannot include a waiver of merger. *Bradley v. State*, 305 Ga. 857 (2019)
	+ A defendant simply cannot waive merger at any point in the proceedings
	+ Without reopening an entire discussion on merger, just know that the prosecutor can charge several different crimes stemming from one act but a “conviction” cannot be entered if the crimes merge.
		- Please check out our merger episode if you find yourself involved with a merger issue.
1. COVERING RIGHTS BEING WAIVED
* Administer Oath to Defendant
	+ In *Sweeting v. State*, 291 Ga. App. 693 (2008), a case that was ultimately overruled by *Collier*, Judge Ruffin noted in his concurring opinion:
		- “Under OCGA § 15–1–3(5) , a trial court has the power to administer oaths “when it may be necessary.” However, there does not appear to be any specific legal requirement that a defendant be placed under oath during a guilty plea hearing.~~1~~ I nonetheless believe it is prudent for a trial court to administer an oath to a defendant during a plea hearing as it makes the record clearer that the defendant's plea was voluntary.”
		- A few subsequent decisions address whether a defendant waives any objection to being placed under oath during the plea hearing—and most acknowledge that while placing defendant under oath is not required, it is a better practice
* Tain, I generally engage the defendant in questions that are not required but which show that the defendant is lucid and mentally engaged in the process:
	+ - How old are you
		- Do you work?
	+ Do you do the same?
		- This process also helps establish whether the defendant has difficulty understanding the English language, mental issues, etc.
* I always ask the defendant whether he is satisfied with his attorney’s representation
	+ Several appellate decisions where guilty pleas were challenged noted that the defendant was asked whether he/she was satisfied with the representation they received and the defendant responded “yes.”
		- This really helps if ineffective assistance is claimed
* Then ensure the defendant admits that he/she is guilty of the offenses he/she is pleading to and if he is in agreement with the plea negotiation (assuming there is one)
	+ In *Nero v. State*, 338 Ga. App. 512 (2016), (Wade’s case), defendant argued that she should be allowed to withdraw her guilty plea because nobody explained the concept of being a party to a crime to her (relying upon decision in *Henderson v. Morgan*, 426 U.S. 637 (1976))
		- Ct of Appeals noted that *Henderson* is a unique decision because the concept of intent was never discussed during the plea hearing—in *Nero*, the Ct of Appeals noted that the trial judge is not required to personally instruct the defendant of the elements of the crime. *Nero*, at 513.
* On TV, you see a process called an allocution—where the defendant is expected to recite what he did that caused him to be charged
	+ We simply do not do that—for obvious reasons
		- Instead, we have the lawyers put the facts on the record and then ask the defendant if he admits that he committed the crimes he is pleading to
* We are required to put maximum and minimum sentence on the record. U.S.C.R. 33.8
	+ You could accomplish this when discussing the plea agreement or with the defendant.
* Ask defendant if plea has been entered as a result of any promises or threats
	+ U.S.C.R. 33.7
		- U.S.C.R. 33.8 specifically provides that “this information may be developed by questions from the judge, the prosecuting attorney or the defense attorney or a combination of these.”
	+ Frankly, there are times when I forget the maximum and minimums
		- * And they change sometimes too!
		- I think it is vitally important that you get this correct, especially in an “open plea” See *Gay v. State*, 342 Ga. App. 242 (2017) where trial judge advised defendant the sentence range for armed robbery was 10-20 years. And then sentenced him to life in prison for Armed Robbery.
			* There are a line of cases which have held that a mere misstatement of the potential sentencing range was not reversible error—but in those cases, there was some other evidence that the defendant was aware of the potential sentence (i.e. forms completed by defendant, testimony of defense counsel, etc.) *Adams v. State*, 285 Ga. 744 (2009); *Arnold v. State*, 292 Ga. 95, 97 (2012); *Hill v. Hopper*, 233 Ga. 633, 634 (1975)
* FIRST OFFENDER/CONDITIONAL DISCHARGE
	+ O.C.G.A. §42-8-61
		- Defense counsel is required to discuss eligibility for first offender with defendant
			* But you never know whether it was done—just easier to ask on the record
		- If defendant is *pro se*, obligation to ask on the judge—again, just easier for the judge to ask whether the defendant is asking for first offender
			* And I include Conditional Discharge if the crime has a “drug element” to it
		- Judge should then ask prosecutor or probation official if defendant is eligible
	+ BUT, nothing in this code section requires the judge to GRANT First Offender—it remains discretionary. *Welborn v. State*, 166 Ga. App. 214 (1983); *Collins v. State*, 281 Ga. App. 240 (2006).
		- Remember, a defendant must consent to a First Offender sentence. O.C.G.A. §42-8-60(a); *Griffin v. State*, 244 Ga. App. 447 (2000).
* IMMIGRATION STATUS
	+ As a general rule, the judge is expected to advise the defendant of all the direct consequences of a defendant’s plea. *Gay v. State*, 342 Ga. App. 242 (2017)
		- So we generally do not have to discuss the impact the plea may have on a defendant’s driver’s license status, insurance costs, voting rights, etc. etc.
		- But, some recent cases have made it clear that the judge DOES have to advise the defendant of potential impact the plea may have on a defendant’s immigration status
	+ *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Encarnacion v. State*, 295 Ga. 660 (2014) make it clear judges are required to inform defendants of potential impact that plea may have on the defendant’s immigration status
		- When these cases were first decided, most judges thought that it was sufficient to tell a non-citizen that the plea “may” have an impact on the defendant’s immigration status
		- In fact, U.S.C.R. 33.8 still says the judge should advise a non-citizen defendant that the plea “may” have an impact on the defendant’s immigration status
			* The subsequent cases say that advising the defendant that the plea “may” have an impact on the defendant’s immigration status is probably not sufficient if the crime is clearly a “deportation offense”
	+ *State v. Addaquay*, 302 Ga. 412 (2017) noted that the US Supreme Court decision in *Padilla* and *Encarnacion* included following language:
		- “a defendant establishes *Strickland’s* deficient performance prong by showing that counsel failed to accurately advise the defendant when the immigration consequences of a guilty plea ‘could be easily determined from reading the removal statute [8 USC § 1227].’”
		- and
		- “The Supreme Court acknowledged that immigration law can be ‘complex,’ and that where the law is unclear or discretionary, it may be sufficient to advise a client that he ‘may’ face deportation. The *Padilla* Court emphasized, however, that where the deportation consequences of a plea are ‘truly clear ... the duty to give correct advice is equally clear.’”
	+ So if the offense is a deportation offense where the defendant will be deported instead of merely possibly be deported, the duty on defense counsel is to so advise his/her client
	+ Now, you will note that this entire conversation concerning immigration status is really an obligation on defense counsel and not the trial judge
		- As noted above, judge merely is required to point out that the plea may impact the immigration status of a non-citizen defendant
		- But, you really do not want to be reversed on a plea!
	+ In our plea outline, there are references in the endnotes to the applicable federal statutes dealing with immigration and deportation
* WEAPONS CARRY LICENSES (“WCL”)
	+ O.C.G.A. § 16-11-129(e)(2) requires judge of Superior or State Court to inquire whether such person is holder of weapons carry license
		- If so, the judge is required to notify the judge of the Probate Court where the license was issued of the plea
	+ In Augusta, we have a form that we use to notify the issuing Probate Court judge of the plea/sentence
		- I really do not get into the weeds on this—if the offense is one that requires suspension of the WCL, I leave that to the Probate Judge
	+ One of our recent NJO grads contacted me as asked an interesting question:
		- If the defendant receives a First Offender sentence on an offense that would otherwise cause suspenstion or loss of the WCL, do we have to notify the Probate Judge
			* I told him what I will repeat here: I have enough to worry about in dealing with the issues I am supposed to address. If the defendant has a WCL and is sentenced on a felony or a family violence misdemeanor, I send the form and let the Probate Judge do what is necessary under the facts.
			* Probate Judges are the experts on WCL’s and I simply am required to send the notice.
* *BOYKIN* RIGHTS
	+ U.S.C.R. 33.8 sets forth the specific trial rights we are required to advise the defendant that he/she is waiving by entering a plea
		- These are similar but different from what has come to be known as the defendant’s *Boykin* rights. *Boykin v. Alabama*, 395 U.S. 238, 242-43 (89 S. Ct. 1709) (1969).
			* right to trial by jury
			* presumption of innocence
			* confront witnesses
			* right to subpoena
			* right to testify
			* right to counsel
			* right to remain silent
				+ (only those in bold are actually *Boykin* rights)
		- We are expected (required) to actually advise of more than the rights set forth in *Boykin*
* WRITTEN FORMS
	+ It would be incorrect to solely rely upon written forms that include waiver of rights to make the record in a plea hearing
		- But they do not hurt!
	+ “[Defendant] correctly notes that the transcript of his plea proceeding does not itself show that the plea judge—or anyone else—specifically advised [Defendant] in connection with his plea of the privilege against self-incrimination or the right of confrontation. Even so, the record of the plea does not consist solely of the transcript. It includes a written plea and acknowledgment-and-waiver-of-rights form—bearing the signatures of Mims and his lawyer—that advised [Defendant] of his privilege against self-incrimination and the right of confrontation, on which [Defendant] acknowledged that he understood his rights, and on which his lawyer certified that he had reviewed each item of the form with [Defendant] and believed that [Defendant] understood his rights.” *Mims v. State*, 299 Ga. 578, 582 (2016), citing *Burch v. State*, 293 Ga. 816 (2013), *Brown v. State*, 290 Ga. 50 (2011); *State v. Cooper*, 281 Ga. 41 (2006).
	+ But remember that some defendants cannot read
		- So do not solely rely upon written forms to make the record.
* SEX OFFENSES
	+ It is ineffective assistance for trial counsel to not advise a defendant that the guilty plea would result in the defendant having to register as a sex offender. *Taylor v. State*, 304 Ga. App. 878 (2010)
		- The *Taylor* court provided a good discussion of the distinction between “collateral consequences” which need not be explained to a defendant versus “direct consequences” that must be explained to a defendant.
		- Because registration as a sex offender is “intimately related to the criminal process” because it is an “automatic result” following certain convictions. *Taylor*, at 883.
		- Registration as a sex offender is a “drastic measure” just like deportation and, therefore, the *Taylor* court held that failure to advise a defendant of this consequence of a guilty plea is ineffective.
	+ Once again, the burden is not necessarily on the trial judge to address this issue but doing so helps alleviate the possibility of ineffective assistance claims in the future
	+ Even though we will probably address this in more detail in a moment, remember that many sex offenses (those where a life sentence is not a potential punishment) requires the court to impose a split sentence with at least 1 year on probation
		- §17-10-6.2; *Watkins v. State*, 336 Ga. App. 145 (2016). *Watkins*, at n.4 (statutory definition does not apply to aggravated child molestation or rape)
1. CONCLUSION AND IMPOSING SENTENCE
* Allow defense counsel to provide their “argument” and any evidence in mitigation
* Allow defendant to say anything he/she may want to say
* If accepted, make a verbal finding that the defendant understands the nature of the crime(s), the consequences of the plea and that he/she has decided knowingly, intelligently and voluntarily to enter the plea
	+ We have a form order (“voluntariness order”) that the judge enters
		- Think about how much this written finding by the judge might impact a future 404(b) hearing or potential recidivist punishment
			* Written finding of voluntariness removes that argument in the future
* IF 1ST OFFENDER OR COND. DISCHARGE, you need to make different findings
	+ Judge is “withholding adjudication”
		- If you “accept guilty plea” or use similar language, your attempt to revoke 1st Offender/Cond. Discharge sentence in future may be prohibited; . *Hoosline v. State*, 328 Ga. App. 175 (2014); *Stinson v. State*, 279 Ga. App. 107 (2006); *Brundidge v. State*, 302 Ga. App. 510 (2010); *Smith v. State*, 322 Ga. App. 549 (2013).
* But what if you intend to reject the plea? See U.S.C.R. 33.10 (referred to as a “bright line rule” and requires “explicit compliance”)
	+ Must inform defendant that:
		- Court is not bound by plea agreement
		- Court intends to reject the plea agreement presently before it
		- Disposition may be less favorable than as contemplated by plea agreement
		- Defendant may withdraw guilty plea as a matter of right
	+ Failure to explicitly follow U.S.C.R. 33.10 will result in reversal *Underwood v. State*, 338 Ga. App. 670 (2016).
	+ If the defendant does not withdraw, the court may pronounce sentence
	+ This comes up in the obvious scenario where the court does not feel that the sentence is harsh enough
		- But what about where the court feels the sentence is too harsh? Can court imply (or expressly state) that the judge intends to impose a less restrictive sentence?
		- What about where the plea agreement contains obligation to perform community service at the landfill and the judge thinks that is inappropriate? Is that rejecting the plea agreement?
		- What about where defendant is attempting to enter a *nolo contendre* plea and the court rejects the *nolo contendre* plea? See *Forrest v. State*, 251 Ga. App. 487 (2001)
	+ The obligation to inform the defendant of intent to not follow the agreement only applies to negotiated pleas. *Gray v. State*, 273 Ga. App. 441 (2005); *James v. State*, 326 Ga. App. 231 (2014)
* PRONOUNCING SENTENCE
	+ Be clear on what portion of a sentence is to be served in confinement and what portion is to be probated.
		- If it is a “sex offense” where life in prison is not an option, the sentence must be split with at least 1 year on probation. §17-10-6.2
	+ At our winter conference, we had a very informative presentation from Mr. Stan Cooper with the DOC (Friend of Podcast)
		- He described some of the different programs through both probation and the DOC that we have as options
			* Tain, I do not regularly impose sentences to the probation detention center or day reporting center. I probably use probation RSAT (Residential Substance Abuse Treatment) more than the other 2. What about you?
* FIRST OFFENDER AND CONDITIONAL DISCHARGE
* If you are sentencing under the First Offender Act or Cond. Discharge there are some things to remember
	+ - First, be clear which count is being sentenced under which program
			* There are several offenses that cannot be sentenced under 1st Offender (§42-8-60)
				+ A serious violent felony as defined in §17-10-6.1. (Murder, Armed Robbery, Kidnapping, Rape, Aggravated Child Molestation (exception-where victim is between 13 and 16 years old; defendant is 18 years old or younger and no more than 4 years of age difference between victim and defendant; and basis of charge making it “aggravated” is an act of sodomy); Aggravated Sodomy; Aggravated Sexual Battery);
				+ A sexual offense as defined in §17-10-6.2. (Aggravated Assault with intent to rape, False Imprisonment (exception—if victim is child of defendant and less than 14 years of age), Sodomy (exception—Romeo law relating to relative ages of defendant and victim), Statutory Rape (if defendant is 21 years of age or older), Child Molestation (exception—Romeo law relating to relative ages of defendant and victim), Enticing a Child for Indecent Purposes (exception—Romeo law relating to relative ages of defendant and victim), Sexual Assault against Person in Custody, Incest, Sexual Battery (if second or subsequent offense), Sexual Exploitation of Children (exception--§16-12-100(f)(2) and (3));
				+ Sex Trafficking as defined in §16-5-46;
				+ Neglecting Disabled Adults as defined in §16-5-101;
				+ Sexual exploitation of Minors as defined in §16-12-100;
				+ Electronically furnishing obscene material to minor as defined in §16-12-100.1;
				+ Computer Pornography and child exploitation as defined in §16-12-100.2;
				+ Where law enforcement officer is victim in following:

Aggravated Assault vs. LEO;

Aggravated Battery vs. LEO;

Felony Obstruction of LEO where serious physical harm or injury to LEO;

* + - * + DUI as defined in §40-6-391.
	+ If defendant is being sentenced on multiple charging instruments on the same day, only one of the cases can be sentenced under 1st Offender. *Higdon v. State*, 291 Ga. 821 (2012).
	+ Judge has discretion whether to impose a 1st Offender sentence—but judge must exercise the discretion. It is reversible error for the judge to simply refuse to consider 1st Offender in certain types of cases. (Dozens of cases make this point—*Wilcox v. State*, 257 Ga. App. 519 (2002); *Graydon v. State*, 313 Ga. App. 580 (2012)).
	+ As to Conditional Discharge, (§16-13-2) the defendant can only receive a cond. discharge sentence for *possession* of illegal drugs or for offenses related to drug use. So a defendant charged with *manufacturing* marijuana is not eligible for a cond. discharge sentence. *State v. Barrow*, 332 Ga. App. 353 (2015). Same if defendant charged with *trafficking* in cocaine. *Andrews v. State*, 271 Ga. App. 162 (2004).
* MISC ISSUES RE: CONDITIONS OF PROBATION
	+ If, at the time of sentencing, a condition of a probated sentence is identified as a “special condition” and that is explained to the defendant at the time of sentencing, a violation of that condition can result in a full revocation of the sentence. O.C.G.A. §42-8-34.1(a). *Singleton v. State*, 332 Ga. App. 484 (2015).
		- Otherwise, there are limits of 2 years for a “technical violation”
		- And if a new offense, the amount of probation revoked cannot exceed the maximum time that could be imposed for the new offense
	+ 4th Amendment Waiver—must be agreed to by the defendant as part of the plea bargaining process. At the very least, the court should explain the condition to the defendant and not merely rely upon the probation officer to notify the defendant of the condition. *Fox v. State*, 272 Ga. 163 (2000)
		- But if discussed *by the judge* as part of sentencing and the defendant does not object, a 4th Amendment waiver as part of a probated sentence is valid. *Cummings v. State*, 345 Ga. App. 702 (2018).
* BEHAVIORAL INCENTIVE DATE (‘BID”)
	+ I think we have discussed this topic in other episodes but just to be clear, the judge is required to set a BID of no more than 3 years if:
		- 1) First Offender or Conditional Discharge or
		- 2) no prior felony convictions AND
			* A) straight probation imposed OR
			* B) split sentence with no more than 1 year in confinement imposed.
	+ O.C.G.A. §17-10-1(a)(1)(B)
* HABEAS CORPUS NOTIFICATION
	+ Judge is required to notify the defendant of the relevant statute of limitations relating to any habeas corpus action the defendant may wish to file (O.C.G.A. §9-14-42 (c) and (d)
		- 4 years if felony
		- 1 year if misdemeanor
		- 180 days if purely a traffic offense
* OTHER CONDITIONS OF PROBATION
	+ I typically make a special condition of probation that the defendant not *knowingly* be in the presence of any illegal drugs or drug paraphernalia while on probation.
		- It seems to be a common problem with our probationers
* WITHDRAWAL OF PLEA AND INEFFECTIVE ASSISTANCE
	+ At the beginning of this episode, we told you we were going to discuss a “hot issue” from recent appellate decisions.
* *Collier*
	+ In October 2019, the Supreme Court decided *Collier v. State*, \_\_ Ga. \_\_, 834 S.E.2d 769 (2019). This decision overruled dozens of prior decisions, including some we have discussed today (but the principle we cited in the case was not addressed in *Collier*)
	+ In *Collier*, a defendant who entered a guilty plea to murder filed a motion for out-of-time appeal, contending his plea counsel was ineffective for failing to inform him of his right to appeal. That is correct, he claimed his plea counsel was ineffective for not telling him he could appeal his guilty plea.
	+ The trial judge summarily denied defendant’s request for an out-of-time appeal and the appeal ensued.
	+ The US Supreme Court decided *Garza v. Idaho*, 139 S.Ct. 738 (2019). And the Georgia Supreme Court decided *Ringold v. State*, 304 Ga. 875 (2019). Both of those cases suggested that long-standing Georgia case law needed to be corrected. In *Collier*, that correction was realized.
	+ Defendant entitled to out-of-time appeal if his plea counsel’ performance was deficient and that deficiency deprived the defendant of an appeal he would have otherwise filed.
		- For many years, our law provided that the defendant would have to prove that his appeal would potentially have merit. That is no longer the law after *Collier*. See *Roe v. Flores-Ortega*, 528 U.S. 470 (2000).
	+ Even after *Collier*, the defendant is required to prove that his plea counsel was constitutionally ineffective under the *Strickland* test.
		- 1) counsel’s performance fell below the objective standard of reasonableness; and 2) counsel’s deficiency prejudiced the defendant
	+ The first element of *Strickland* requires the trial court to make a factual inquiry into defendant’s allegations. As to the second component, the defendant must only show a reasonable probability that he would have filed an appeal but for counsel’s deficient performance.
	+ This standard applies to convictions which resulted from a plea or following a verdict.
	+ In a bit of good news, the *Collier* court did indicate that the prosecutor can challenge an out-of-time appeal based upon a defense of “prejudicial delay” if the prosecutor can prove that the delay between the conviction and the out-of-time appeal being filed actually would be prejudicial to the prosecutor.
	+ The take-away from *Collier*: If a defendant files a motion for out-of-time appeal (either on a plea or a trial), the defendant has the burden of proving, under *Strickland*, that plea counsel was deficient in not 1) advising the defendant that he had a right to appeal or 2) not filing the appeal in a timely manner.
		- In order for the trial court to rule on the motion, the court will be required to conduct a factual hearing to determine whether trial counsel was actually deficient. If so, the defendant must reasonably establish that but for the deficient performance, he would have timely filed an appeal
		- A waiver of the right to appeal will not prevent the defendant’s ability to request an out-of-time appeal (see *Garza*, 139 S.Ct. at 747)
		- Defendant must have appellate counsel appointed to pursue the ineffectiveness claim (and remember that it must be conflict-free counsel)
* MOTION TO WITHDRAW PLEA
	+ You may be asking, well *Collier* dealt with an out-of-time appeal—why did you include motions to withdraw guilty pleas in this conversation
		- In his concurring opinion, Justice Peterson noted, “Although we have not yet held that a granted motion for out-of-time appeal from a guilty plea authorizes not only an appeal but also a motion to withdraw the guilty plea, such a conclusion would appear to be merely a logical extension of statements we have previously made.” Justice Peterson went on to cite cases where that has occurred.
	+ In general, (I think), U.S.C.R. 33.12 only allows withdrawal of a plea if that withdrawal is necessary to correct a manifest injustice.
	+ In *DosSantos v. State*, \_\_\_ Ga. \_\_\_, 834 SE2d 733, n.1 (2019), the Supreme Court noted that the defendant has the right to withdraw his/her plea any time before sentence is pronounced (§17-7-93(b)) but after sentencing, only manifest injustice would support granting such a motion, such as where the defendant was denied effective assistance of counsel or the plea was entered involuntarily.
		- And the trial judge does not have authority to permit defendant to withdraw a plea after expiration of the term and time for filing an appeal. After that date, the only remedy is through a habeas corpus action. *Downs v. State*, 270 Ga. 310 (509 S.E.2d 40) (1998), quoting *Foskey v. State*, 232 Ga. App. 303, 304 (501 S.E.2d 856) (1998). See also *White v. State*, 278 Ga. 355, 357 (2) (602 S.E.2d 594) (2004); *Harris v. State*, 278 Ga. 805 (606 S.E.2d 248) (2004)
		- However, see *Sosa v. State*, \_\_ Ga. App. \_\_, 835 S.E.2d 695, n.1 (2019)
			* “We note that Sosa's motion to withdraw his guilty plea was untimely because it was not filed in the same term of court in which the plea was entered. See *Terry v. State*, 301 Ga. 776, 778 (1), 804 S.E.2d 71 (2017). But, if Sosa is successful on remand in obtaining an out-of-time appeal, he may be able to challenge the voluntariness of his plea in that proceeding. See *Collier*, ––– Ga. ––––, 834 S.E.2d 769 (Peterson, J., concurring). Moreover, the right to appeal carries with it the right to appointed counsel. See *Garland v. State*, 283 Ga. 201, 202, 657 S.E.2d 842 (2008). Thus, any ruling on these issues in this appeal would be premature, and we decline to address them in the first instance.”