STATE v. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date: \_\_\_\_\_\_\_\_\_\_\_

Criminal Action No.\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Superior Court

**CRIMINAL TRIAL PROCEDURE OUTLINE**[[1]](#endnote-1)

1. **OPEN COURT**: Sheriff (or Bailiff) calls court to order and introduces presiding Judge.

Dialogue: “All Rise! The Superior Court for the County of , State of

Georgia, is now in session, Judge J. Wade Padgett presiding.”

**I. PRETRIAL ISSUES**

**[OUTSIDE THE PRESENCE OF THE JURY PANEL]**

* 1. Have Defendant rise and ensure that the **maximum possible punishment** is put on the record in the Defendant’s presence. Discuss any pre-trial notices in aggravation and if the Defendant is facing any such mandates. [i.e. §17-10-7(a) or (c)].
  2. Then ask if there is any **plea offer** “on the table.” [[2]](#endnote-2) Ask the Defendant if he/she is aware of the plea offer and if he/she wants to accept the plea offer or proceed to trial. Proceed accordingly **BUT DO NOT** get involved with plea negotiations. (It is permissible for the Court to tell parties whether their negotiation has a chance of being approved, assuming the plea colloquy supports the facts—but not to interject “counter offers.”)[[3]](#endnote-3)
  3. Determine if there are any **pre-trial issues** that need to be addressed (i.e. Motions in Limine, *Jackson-Denno* hearings, bifurcation of trial,[[4]](#endnote-4) etc.). Court may want to address such issues before jury panel enters courtroom or reserve them to after jury selection. **Determine if any stipulations have been made.**
     1. When Defendant asks for continuance due to absence of witness, must be shown that the witness’ testimony is material.[[5]](#endnote-5)
  4. **Advise counsel that after jury is selected, judge will ask them if they have any objections to the manner of jury selection. That is their opportunity to raise *Batson/McCollum* challenges. If not raised at that time, they will be waived.**[[6]](#endnote-6)
  5. If Defendant *pro se*, see ***Faretta*** memo/waiver[[7]](#endnote-7)
  6. If trial will have multiple defendants, see memo “Issues In a Trial with Multiple Defendants **[Tab 12];**
  7. If Defendant **Sovereign Citizen**, “Defendants claiming to be ‘sovereign citizens’ assert that the ... government is illegitimate and insist that they are not subject to its jurisdiction. The defense has no conceivable validity in American law.”[[8]](#endnote-8) Courts “have repeatedly rejected [such] theories of individual sovereignty, immunity from prosecution, and their ilk. Regardless of an individual’s claimed status of descent ... as a ‘sovereign citizen,’ ... that person is not beyond the jurisdiction of the courts. These theories should be rejected summarily, however they are presented.”[[9]](#endnote-9)
  8. If any issues with **media coverage**, see USCR 22 and §15-1-10.1;[[10]](#endnote-10)
  9. If there is a request for “complete recordation” by court reporter, not automatic right except in death penalty cases.[[11]](#endnote-11)

1. **Judge CONFERS with COUNSEL and CLERK to:**
   1. obtain DUPLICATE COPIES AND ELECTRONIC COPIES of REQUESTS TO CHARGE[[12]](#endnote-12) from counsel (so that Judge/staff can work on charge during jury selection process),
   2. **VERDICT FORM**
2. **Discuss NUMBER OF JURORS to qualify and METHOD OF VOIR DIRE.**
   1. If **FELONY:**[[13]](#endnote-13)
      1. In **ALL FELONY CASES** (other than death penalty), **qualify 30 jurors** with **State 9** peremptory challenges and **Defense 9** peremptory challenges[[14]](#endnote-14): **12 member jury**.
      2. **DEATH PENALTY**, (co-defendants normally must be severed and tried separately),[[15]](#endnote-15) **qualify 42 jurors** with **State 15** peremptory challenges and **Defense 15** peremptory challenges[[16]](#endnote-16): **12 member jury**.
      3. If ***MISDEMEANOR***,[[17]](#endnote-17) qualify **12** with **State 3** peremptory challenges and **Defense 3** peremptory challenges: **6 member jury**.
      4. **BUT** if CO-DEFENDANTS TRIED TOGETHER ***AND*** EXTRA STRIKES given per §17-8-4 (b)[[18]](#endnote-18), QUALIFY ADDITIONAL JURORS in a number EQUAL to the TOTAL EXTRA STRIKES given to Defendants and State.[[19]](#endnote-19)
      5. **ALTERNATE JURORS**: Advise how to pick **alternate jurors** and number of alternates. The number of alternate jurors shall be determined by the court.[[20]](#endnote-20) The State and the defendant shall be entitled to as many peremptory challenges for alternate jurors as there are alternate jurors called.[[21]](#endnote-21) Decide if needed, and, if so, **each alternate = 3 jurors qualified** with the **State** having **1** peremptory challenge and **Defendant 1** peremptory challenge, leaving the **alternate juror** who will serve.[[22]](#endnote-22) ***FOR MULTIPLE DEFENDANTS***, the **procedure** on exercising base strikes and obtaining possible extra strikes **for alternates** is the **same as for regular jurors**.[[23]](#endnote-23)
   2. Clarify with counsel that, during their voir dire of jurors as individuals or by panel, any **MOTION TO EXCUSE JUROR FOR CAUSE** must be made **before** panel with juror returned to audience so that Court or counsel can ask the juror any additional questions necessary on motion.
3. **THE DEFENDANT MUST BE PRESENT FOR EVERY PORTION OF THE PROCEEDINGS! AVOID BENCH CONFERENCES OF SUBSTANCE AND SEND THE JURY OUT TO DISCUSS ANY MATERIAL PORTION OF THE TRIAL!!**[[24]](#endnote-24)

**II. OATHS AND INSTRUCTIONS TO VENIRE PANEL**

**☞BRING JURY IN☜**

**[HAVE JURY PANEL ENTER AND SIT IN DESIGNATED SEATS]**

1. **Welcome** jurors and state:
   1. **“It is important that judges do not ad lib and make misstatements in criminal trials so you will see me reading from my notes at length during this trial. Please understand that I am doing so to ensure that the trial is conducted appropriately.”**
2. **Judge instructs CLERK to CALL the ROLL OF JURORS.**

**☞OATH☜**

1. **BEFORE 1ST TRIAL ONLY:** Judge (only) administers the following general OATH to TRAVERSE JURORS *en masse*:
   1. **“You shall well and truly try each case submitted to you during the present term and a true verdict give, according to the law as given you in charge and the opinion you entertain of the evidence produced to you, to the best of your skill and knowledge, without favor or affection to either party, provided you are not discharged from the consideration of the case submitted. So help you God.”**[[25]](#endnote-25)

**☞OATH☜**

1. BEFORE 1ST TRIAL ONLY: Judge (only) gives the following OATH to ***BAILIFFS*** who take charge of traverse juries:
   1. **“You shall take all juries committed to your charge to the jury room or some other private and convenient place designated by the Court and you shall not allow the jurors to receive any books, papers, nourishment, or hydration other than water, or to use any electronic communication device except as directed by the Court. You shall make no communication with the jurors nor permit anyone to communicate with the jurors except as specifically authorized by the Court. You shall discharge all other duties which may devolve upon you as bailiff to the best of your skill and power. So help you God.”**[[26]](#endnote-26)
2. Judge gives PRELIMINARY VOIR DIRE INSTRUCTION to jurors *en masse*.

**JURY SELECTION (VOIR DIRE)**

**I want to take a few minutes to speak to the jurors and other persons in the courtroom as an orientation to our business here. I want to give you some information about your surroundings, the people involved in our judicial process, our schedule, and the process we will employ over the next few hours and days.**

**I ask that you take a moment to silence all cell phones or other communication devices so that they do not distract us as we begin our work. I will do the same myself.**

**The bailiffs have seated the jurors separately from other persons in attendance today and in a specific order. That's purposeful. The case we will try this week will be decided by a jury. It will be decided only on the evidence that is admissible in the trial and the law that will be delivered to you by the court, and no other influence should enter into your decision. We will therefore make every effort to ensure that the jurors are insulated from the influence of other persons who are not involved in the trial of the case. That will start now and will continue through the conclusion of the trial.**

**You should be mindful to avoid the influence of others as you come and go. You will notice that the lawyers will avoid communication with you. That is not rudeness. It is the way they honor your role as jurors and potential jurors. If at any time, you feel that anyone has attempted to influence you by improper communication, you should report that concern to the Court through the Bailiffs.**

**Your service as jurors is not expected to extend beyond one week. We will instruct you at the end of this morning's session about how you will access instructions throughout the week.**

**We will be trying a criminal case. After a jury has been selected, I will provide more instructions about the particular parties and your role. For now, however, it is sufficient that you understand that an indictment or accusation has been returned against the defendant and the defendant is entitled to a jury trial on those charges.**

**The next step in this proceeding is to select a jury. In doing this, the court and the attorneys will ask you questions concerning your qualification to sit as a juror in this trial. This is the voir dire examination.**

**Under the law, each party has the right to examine each prospective juror individually about anything that shows an interest in the result of the case. This includes (1) any opinion about which party should prevail, (2) the relationship or acquaintance of any individual juror with the parties or with counsel, (3) any fact or circumstance indicating any inclination, leaning or bias that an individual juror has concerning the subject of the case, counsel, or the parties, and (4) the religious, social and fraternal connections of the jurors.**

**These questions are not designed to unfairly pry into your personal affairs. Their purpose is to discover if you have any knowledge of this case, or any preconceived opinion that you cannot lay aside, or any experience in your personal, family or business life that causes you to relate with either party in this case. While reviewing these sorts of matters to determine if you can be a fair and impartial juror in this case, the attorneys and the Court may have to ask you some rather searching questions.**

**If you do not feel that a question is fairly appropriate on whether you can be a fair and impartial juror, you can let me know and I will tell you whether you still have to answer that question or not. Please understand that this questioning is necessary to assure each party a fair and impartial jury and a lawful trial.**

**[**Consider recognizing that jury duty requires sacrifice and encourage jurors not to try to avoid service…

1.We recognize that you probably did not celebrate receiving jury summons

2. Each of you have other things you could be doing this week

3. If the right to a jury of your peers that we all learned about in civics or history class means anything, it is because of your sacrifice

4. If you or someone you loved was involved in the judicial process as defendant, victim, witness or other, you would want someone like you on the jury

5. If lawyers ask if there is some reason you cannot serve, please search your heart before responding

**[OUTLINE STARTS HERE FOR TRIALS AFTER 1st.]**

1. Judge calls for trial CRIMINAL CASE that is to be tried next.
   1. Judge inquires if STATE is READY to proceed.
   2. Judge asks if DEFENSE is READY TO PROCEED.

**III. VOIR DIRE AND JURY SELECTION**

**☞OATH☜**

1. Judge administers the following VOIR DIRE OATH to TRAVERSE JURORS en masse: **“You shall give true answers to all questions as may be asked by the court or its authority, including all questions asked by the parties or their attorneys, concerning your qualifications as jurors in the case of (herein state the style of the case). So help you God.”**[[27]](#endnote-27)
2. ALLOW COUNSEL TO INTRODUCE THE PARTIES AND COUNSEL TO THE JURY.[[28]](#endnote-28)
3. **Court OUTLINES CASE** to jury by reading indictment to the jury or summarizing as follows: “This is the case of the State of Georgia vs. \_\_\_\_\_\_\_\_\_\_, charged with the offense(s) of \_\_\_\_\_\_\_\_\_\_\_\_, in which \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ is the defendant(s), \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ is the prosecutor and \_\_\_\_\_\_\_\_\_\_\_\_\_\_ is/are the alleged victim(s).”
4. ***EN MASSE***[[29]](#endnote-29) **VOIR DIRE**
   1. [Voir dire does not have to be recorded unless requested except in death penalty cases.[[30]](#endnote-30)]
   2. **COURT ASKS** REQUIRED QUESTIONS ABOUT RELATIONSHIP BY BLOOD OR MARRIAGE:[[31]](#endnote-31)

**Georgia law provides that jurors are not allowed to hear cases in which the juror is related to certain parties within the 3rd Degree, by blood or marriage. I am personally not very good with the concept of degrees of relationship. Therefore, I am going to ask if any jurors are related to the following participants in this trial by blood or marriage within the 3rd Degree. That means you should respond if you are related to these participants as a parent, child, grandparent, brother/sister, grandchild, great-grandchild, aunt/uncle, niece/nephew or great-grandparent. You should also respond if you are related to any of the following participants as a spouse, parent-in-law, daughter/son–in-law, grandparent-in-law, brother/sister-in-law or grandchild-in-law. You should also respond if you are married to a person who is related within the 3rd Degree as I have defined.**

**Therefore, please respond if you or your spouse are related to the following participants within the 3rd degree as I just defined:**

\_\_\_\_\_\_\_\_\_ (*DEFENDANT*(S)),

\_\_\_\_\_\_\_\_\_ **(*CO-DEF-EVEN IF NOT ON TRIAL)***[[32]](#endnote-32)

\_\_\_\_\_\_\_\_\_ (*PROSECUTOR*)**[on indictment AND any LE involved with case]**[[33]](#endnote-33)

\_\_\_\_\_\_\_\_\_ (the *ALLEGED VICTIM*(S)).

If so, please stand and I will ask you to identify yourselves one at a time.

* 1. Are any members of the panel:[[34]](#endnote-34)
     + 1. under the age of 18?
       2. not a citizen of the United States?
       3. a convicted felon whose civil rights have not been restored?[[35]](#endnote-35)
       4. unable to effectively communicate the English language?

(NOTE: if a prospective juror has difficulty hearing, that is not a ground to remove the juror for cause)[[36]](#endnote-36)

1. Court[[37]](#endnote-37)asks **STATUTORY VOIR DIRE QUESTIONS** after Court instructs jury that these are questions that are required by law. On trials for felonies, the following questions[[38]](#endnote-38) shall be propounded to the jurors:
   1. \*\*\*\*\*\**Warn jurors* to only give response of yes or no while sitting *en masse*. If any further response needed, ask juror if their experience or knowledge will prevent them following the instructions of the Court and consideration of only the evidence presented in Court? If yes, excuse for cause.\*\*\*\*\*\*
   2. **“Have you, for any reason, formed and expressed any opinion in regard to the guilt or innocence of the accused?”**
   3. **“Have you any prejudice or bias resting on your mind either for or against the accused?”**
   4. **“Is your mind perfectly impartial between the state and the accused?” [are there any jurors whose minds are not perfectly impartial]**
   5. **“Did you serve on the Grand Jury that indicted this case?” [refer to date on indictment and foreperson].**
   6. **“Are any of you currently not residents of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ County?**[[39]](#endnote-39)
   7. **(IF DP only) “Are you conscientiously opposed to capital punishment?”**
2. **ASK COUNSEL** for both parties if the **PANEL** appears to be **STATUTORILY QUALIFIED** before beginning individual voir dire.[[40]](#endnote-40) O.C.G.A. §15-12-131 **IF REQUESTED** by either party, duty of court to place jurors in box in panels of 12 at a time for individual voir dire.[[41]](#endnote-41)
   1. PANEL and INDIVIDUAL VOIR DIRE.
   2. ORGANIZATION/GENERAL QUESTIONS: Have JURORS use the sheet that has the general questions used in this Circuit.
3. **VOIR DIRE**[[42]](#endnote-42) or Questioning of jurors by:
   1. **STATE**, if desired;
   2. **DEFENDANT(S)**, if desired.

**PROPER AND IMPROPER VOIR DIRE QUESTIONS BY COUNSEL**

Permissible for Court to require written voir dire questions in advance of trial.[[43]](#endnote-43)

“The right in criminal cases to examine each prospective juror in order to secure an impartial jury is set out in the Code at OCGA §15–12–133…which provides in part: “In the examination, the counsel for either party shall have the right to inquire of the individual jurors examined touching any matter or thing which would illustrate any interest of the juror in the case, including any opinion as to which party ought to prevail, the relationship or acquaintance of the juror with the parties or counsel therefor, any fact or circumstance indicating any inclination, leaning or bias which the juror might have respecting the subject matter of the action or the counsel or parties thereto, and the religious, social, and fraternal connections of the juror.”[[44]](#endnote-44)

However, questions which tend to test the prospective juror’s willingness to accept particular defenses are not allowed.[[45]](#endnote-45)

* 1. Where a potential juror makes a statement that may be prejudicial and could be seen to **have infected the entire jury panel**, see endnote.[[46]](#endnote-46)

**On voir dire, counsel may ask jurors following questions:**

**Always permissible to ask:**[[47]](#endnote-47)

Any opinion as to which party should prevail;

The relationship or acquaintance with the defendant or counsel;

Any fact or circumstance indicating an inclination, leaning or bias respecting:

The subject-matter of the action;

Counsel (including elected DA)[[48]](#endnote-48) or

Defendant;

Any religious, social or fraternal connections.

Error not to allow in a drug case for Def. to ask if you or member of your family ever had any problems with drugs.[[49]](#endnote-49)

If a juror indicates that they have a relationship with anyone connected to the case, error to not allow counsel latitude to determine if the relationship will result in bias.[[50]](#endnote-50)

As to whether the juror has ever been represented by counsel in the case.[[51]](#endnote-51)

As to whether the juror knows or is related to a witness in the case.[[52]](#endnote-52)

Regarding any juror prejudice as to the subject matter of the suit.[[53]](#endnote-53)

Whether the juror or any close family members employed in law enforcement.[[54]](#endnote-54)

In molestation case, whether the juror has such a strong feeling about child molestation that it would impair their judgment or make it difficult to judge the case.[[55]](#endnote-55) Same where the murder victim is a child—the jury can be asked whether that fact alone will make it impossible to be fair.[[56]](#endnote-56)

Whether the race of the parties would impact the jurors’ ability to be impartial.[[57]](#endnote-57) Same with national origin or immigration status.[[58]](#endnote-58)

State may ask whether anyone on panel believes that a person who assists another in the commission of a crime should not be prosecuted.[[59]](#endnote-59)

**On voir dire, counsel may not ask jurors questions:**

**Irrelevant questions (Generally)**:

Asking jurors about books, magazines, televisions programs, bumper stickers, views on abortion;[[60]](#endnote-60)

Prior **military** service.[[61]](#endnote-61)

Asking jurors about the **employment of their children** (EXCEPT LAW ENFORCEMENT-LAW ENFORCEMENT EMPLOYMENT IS A VALID QUESTION).[[62]](#endnote-62)

Asking jurors whether they **smoked cigarettes or drank alcohol**.[[63]](#endnote-63)

Whether the jurors have ever taken a **Spanish class**.[[64]](#endnote-64)

**Prior jury service (Irrelevant):**

Whether juror who had previously served on a grand jury, petit jury or had been the foreman of any type of jury;[[65]](#endnote-65)

**Hypothetical, argumentative or require prejudgment of case:**

Framed in language which is confusing or unduly argumentative or which is general and hypothetical or which is general or technically legal.[[66]](#endnote-66)

Of a hypothetical nature regarding the evidence in the case-Court has some discretion on hypothetical questions but not if the answer requires a prejudgment of the case.[[67]](#endnote-67)

**Possible defenses (Prejudgment of case):**

Asking whether juror could believe a defense of **insanity**.[[68]](#endnote-68)

Any question which tests willingness of juror to accept defense (i.e. using a gun in **self-defense**);[[69]](#endnote-69)

Cannot ask about their **feelings about cases where the allegations involve a man beating a woman**.[[70]](#endnote-70)

Asking if jurors think it is **possible for the gun to discharge** if two people are tussling over the weapon;[[71]](#endnote-71)

Asking if jurors had **ever heard of a death being accidental**;[[72]](#endnote-72)

Defense cannot ask whether the jurors have ever heard of the phrase of **“guilt by association”** and what that phrase may mean to jurors.[[73]](#endnote-73)

**Verdict without hearing evidence (Prejudgment):**

Asking jurors what their **verdict would be without hearing any evidence**.[[74]](#endnote-74) Or, if jurors believe the **defendant is probably guilty of something.**[[75]](#endnote-75)

Asking whether juror would convict if only evidence was only one witness’ **eyewitness identification**.[[76]](#endnote-76)

Asking if they believe that the defendant might be guilty but the state has not proved this beyond reasonable doubt **would the verdict be guilty or not guilty**? “Technical legal question”[[77]](#endnote-77)

Asking if jurors would be reluctant to return not guilty verdict if there was a **reasonable doubt** as to guilt.[[78]](#endnote-78)

Asking if jury understands that they would **also be enforcing the law by voting not guilty** if the case is not proven.[[79]](#endnote-79)

**Would believe certain witnesses over others/reliability of certain evidence (Prejudgment):**

Asking if jurors believe that **testimony of police officers due more weight** than other witnesses is improper.[[80]](#endnote-80)

Asking if they believed that **the accused’s testimony is less valuable than that of the person accusing him**.[[81]](#endnote-81)

Asking jurors about the **reliability of eye witness identification**.[[82]](#endnote-82)

**Aware of notorious cases (Irrelevant):**

Asking whether the jurors are familiar with the OJ Simpson case or any other **notorious cases** (even local case).[[83]](#endnote-83)

**Presumption of innocence (Technical, Legal Question):**

That defendant is **presumed innocent** unless evidence proves beyond reasonable doubt that he is guilty;[[84]](#endnote-84)

Asking jurors if they agree that **law presumes Def’s are innocent**–are the jurors “ok” with that principle.[[85]](#endnote-85)

That sometimes **innocent men are charged with crimes**.[[86]](#endnote-86)

Asking jurors if they **believe that the defendant is innocent**.[[87]](#endnote-87)

**Defendant must have done something to be here (Technical, Legal Question/Prejudgment):**

Asking if the presence of a state prosecutor means that the **defendant must be guilty of something**;[[88]](#endnote-88)

Asking if the presence of a state prosecutor means that the **defendant must be guilty of something**;[[89]](#endnote-89)

Asking whether the **def. must have done something wrong** or he wouldn’t be here (Prejudgment of case);[[90]](#endnote-90)

Asking jurors **what weight should be given the fact that the defendant has been charged** or indicted.[[91]](#endnote-91)

**Grand Jury/Indictment (Technical, Legal Question):**

That proceedings before **grand jury are one sided**;[[92]](#endnote-92)

If juror understands that an **indictment is merely an accusation** and is no indication of guilt or innocence of accused;[[93]](#endnote-93)

**Burden of Proof (Technical, Legal Question):**

Cannot ask about their **feelings on the State’s burden of proof**;[[94]](#endnote-94)

Asking whether the jurors understand that the **State’s burden is beyond a reasonable doubt**.[[95]](#endnote-95)

**Right to remain silent (Technical, Legal Question):**

Asking if jurors would **expect someone who pleads not guilty to give some explanation**;[[96]](#endnote-96)

**Opinion of laws/justice system (Argumentative, Hypothetical, Prejudgment):**

Asking whether the criminal justice system works or if **criminals are treated too leniently**.[[97]](#endnote-97)

Asking if jurors believe that certain **drugs change people**.[[98]](#endnote-98)

As to whether, if not personally agreeing with certain laws, the **juror would attach less importance to those laws than to laws the juror agreed with**.[[99]](#endnote-99)

Questions calling for opinion **of juror on law are improper**.[[100]](#endnote-100)

**Put yourself in the position of defendant (Technical, legal question):**

Asking any question that begins by ‘**if you were ever so unfortunate as to find yourself sitting at this table...**’[[101]](#endnote-101)

1. **CHALLENGES FOR CAUSE**:
   1. Sworn police officer with arrest powers shall be removed for cause.[[102]](#endnote-102)
      1. A retired but sworn police officer does not have to be removed for cause.[[103]](#endnote-103)
      2. A private security guard does not have to be removed for cause.[[104]](#endnote-104)
   2. Shareholder of victim company or business shall be removed for cause.[[105]](#endnote-105)
   3. "A prospective juror's doubt as to his or her own impartiality does not demand as a matter of law that he or she be excused for cause. Nor is excusal required when a potential juror expresses reservations about his or her ability to put aside personal experiences.”[[106]](#endnote-106)
   4. However, where juror indicates that their personal experiences will prevent them from being impartial, the juror should be removed for cause.[[107]](#endnote-107)
   5. Judge should be careful not to be “coercive” in any attempt to rehabilitate a juror who may be challenged for cause.[[108]](#endnote-108) “We certainly caution trial courts about being overzealous in attempts to rehabilitate jurors given the constitutional implications at stake.”[[109]](#endnote-109)
   6. If there is a question about whether a juror should have been stricken for cause, it is irrelevant whether the defendant exhausted all of his/her peremptory strikes.[[110]](#endnote-110)
2. **BEFORE RECESS:**
   1. **Review** on **jury list** with **counsel and Clerk what jurors** will be in (a) **base jury panel** and (b) **alternate jury panel**, if alternates will be selected.
3. **[RECESS]**
   1. **FIFTEEN** (15) MINUTES RECESS for counsel to prepare for jury selection as required by Uniform Superior Court Rule 11.[[111]](#endnote-111)
4. **[RECONVENE]**
5. Commence **JURY SELECTION** using STRIKE BY **LIST METHOD**.[[112]](#endnote-112)
6. Tell interesting stories:[[113]](#endnote-113)
   1. Third Grade Tours
   2. History of Courthouse
      1. (**Burke Co**- 1773 Log Cabin; 2nd est. 1777 Burned 1825; 3rd Courthouse 1856 also burned – Current Built 1857 expanded 1900 & offices added 1940; Closed in breezeway in 1980; New courthouse 2019)
      2. (**Columbia Co**- Appling built 1812-1856 Current Structure in Evans built 11-2002)
      3. (**Richmond Co** Opened April 2011, broke ground 12/2008-previous Courthouses all on same block as Marble Palace—Old Gov’t House)
   3. My Judge Ruffin Story
   4. Teenage Years 101
   5. Judge Henry Hammond
   6. Tell them my background/bio—they had to so I will also
   7. Explain the different courts (i.e. Probate, Magistrate, State; Municipal)
   8. Explain process once a jury is selected and how those selected should move into the jury box;
   9. **take a stretch break in place**
7. Ask counsel for any **OBJECTIONS** concerning **JURY SELECTION PROCESS**.[[114]](#endnote-114) Ask if there is any reason why the panel cannot be released after the names of the jurors and alternates have been called.[[115]](#endnote-115) [This is their opportunity to raise *Batson* or *McCollum* issues]
8. Have **CLERK CALL SELECTED JURORS/ALTERNATES** into JURY BOX.[[116]](#endnote-116)
   1. Ask COUNSEL if they AGREE with the COMPOSITION of the jury as called
9. **RELEASE JURORS NOT SELECTED** *for this trial* until call back, set time, etc.
   1. Make arrangements for work/school excuses, etc. for those not selected;
10. **TAKE A RECESS TO ALLOW JURORS TO RETIRE TO JURY ROOM AND RELEASE PANEL OF JURORS.**

**IV. PRELIMINARY INSTRUCTIONS TO JURY AND OPENINGS**

**☞OATH☜**

1. Judge or Clerk gives following *TRIAL JURY OATH* to selected jurors (determine if *ANY PROBLEM with WITNESSES* because DOUBLE JEOPARDY will attach with OATH):  **“You shall well and truly try the issue formed upon this bill of indictment (or accusation) between the State of Georgia and *(name of accused)* who is charged with *(here state crime or offense)* and a true verdict give according to the evidence. So help you God.”**[[117]](#endnote-117)
2. Judge should determine if the **RULE OF SEQUESTRATION** will be invoked and, if it is, CALL and SWEAR WITNESSES and GIVE FOLLOWING INSTRUCTIONS (victim and immediate family OCGA §§24-6-615-616; §17-17-9):[[118]](#endnote-118)
   1. **“All witnesses should remain outside of the courtroom except when you are personally called to testify. Additionally, all witnesses should not discuss the case with the other witnesses or parties until the evidence is concluded or you have been excused from further appearance.”**[[119]](#endnote-119)

NOTE: If it appears necessary, the court should instruct counsel that counsel cannot tell any witness what an earlier witness has said. Certain witnesses, such as the primary officer, can be excused from the rule of sequestration.[[120]](#endnote-120)

1. Review with jury about **soft drinks** and **coffee**.
2. Ask JURY if they want **PADS AND PENS** to take notes.[[121]](#endnote-121)
3. **Regarding jury note taking**:

**I have asked the bailiff to provide you with pencils and note pads for your use during the trial. You may take notes, but you are not required to do so. If you decide to take notes, please remember that note taking should not divert you from paying full attention to the evidence and evaluating witness credibility. Your observations of the witness during their testimony can be vital to your determination of the believability of their testimony. The notes that you take are for your use only and are not to be shared with anyone until you begin deliberation with your fellow jurors.**

**During deliberation, you should rely on your own recollection of the proceedings but you may consult the notes of other jurors if you wish. Do not be influenced by the notes of other jurors, unless their notes help you in determining your own independent recollection. Notes are not entitled to any greater weight than the recollection or impression of each juror as to what the evidence may have been. After the trial is over, the notes will be collected and destroyed. At this time, please write your name on the front sheet of paper in the pad and make no further notes on that front sheet. That way, no other person can see your notes if your pad should be seen by another person.**[[122]](#endnote-122)

1. **Communications via Computers and Cellphones.**

**The law requires that you decide this case solely upon evidence presented in this courtroom. This means that during the trial, you must not conduct any independent research about this case, the matters in the case, or any individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials; search the internet, websites, or blogs; or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom--to include media of any sort or online research.**

**The bailiffs have been instructed to collect your cellphones, and tablet or laptop computers during the proceedings. You may want to leave those in your vehicle or elsewhere during the breaks.**[[123]](#endnote-123)

**Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end.**

**I hope that for all of you this case is interesting and noteworthy. I know that many of you use tools of technology in your daily life but you may not do so in connection with your service as a juror. You also must not talk to anyone about this case or use these electronic tools to communicate with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case or your jury service via the internet, text messaging, e-mail or on Twitter; through any blog or website; through any internet chat room; or by way of any other social networking websites, including, but not limited to, Facebook, Instagram, Snapchat and YouTube.**

**I cannot stress strongly enough that communication via electronic devices is prohibited.**

1. **Seating Arrangements**

**You may sit in any of the seats in the jury box during the trial. During the voir dire process, we asked that you sit in specific seats for identification purposes. However, there is no need to do so during the trial itself. If you need anything while in the jury room, you may knock at the door to notify the bailiff that you wish to communicate with the Court. I would then give you instructions on how this should be done depending on the stage of the trial and the nature of your request.**

1. **PRELIMINARY INSTRUCTIONS:**[[124]](#endnote-124)

**OVERVIEW**

**I believe it might be helpful if I give you some preliminary instructions concerning criminal law and trial procedure that will apply in this criminal case.**

**BASIC CONCEPTS**

**A crime is a violation of a statute of this state in which there shall be a union or joint operation of act and intention. That is, a crime is committed when a person violates a statute of this State by acting as prohibited while, at the same time, he has a criminal intention and no other defense excuses the conduct. A person will not be presumed to act with criminal intention. However, the jury may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.**

**The State cannot bring a person accused of a felony to trial unless the grand jury has first indicted that person [or an accusation has been filed by the Prosecutor]. Grand jurors do not try criminal cases. They ordinarily only hear from witnesses for the State.**

**When a criminal case is tried, the defendant has pled not guilty to the indictment. This plea of not guilty denies every essential allegation of the indictment and forms the issue or question that you as a trial jury will decide.**

**The indictment and the plea of not guilty to it are not evidence and you should not consider them as evidence.**

**Every person is presumed innocent until proved guilty. No person shall be convicted of a crime unless each element of the crime is proved beyond a reasonable doubt. The State has the burden to prove each essential element of each crime charged beyond a reasonable doubt.**

**In this state a defendant on trial may or may not testify as he chooses. If he does testify, you would judge his credibility by the same tests applied to any other witness. If the defendant does not testify, which is his absolute, constitutional right, you shall not draw any inference of guilt from this decision, and his election not to testify may not in any way affect your verdict.**

**Moreover, the defendant has no duty to call any witnesses or present any evidence during a trial. If he calls no witnesses or presents no evidence, you may not derive any inference of guilt from such failure to produce evidence. In such case, you decide guilt on whether the State’s evidence proves the defendant guilty beyond a reasonable doubt.**

**ROLES OF JUDGE AND JURY**

**Under our system, I have the duty, as the trial judge, to decide the law that applies to a case and to instruct you on it. You have the duty, as the jury, to decide the facts in a case from the evidence and reasonable inferences arising from the evidence. In reaching your verdict, you also have the duty to apply the law to those facts.**

**EVIDENCE**

**You decide the facts from the evidence. The evidence has two parts: testimony of witnesses and exhibits. A “witness” means anyone who testifies in person from the stand. The exhibits are those documents, objects, or photos, etc., that the court admits into evidence. You will have most of the exhibits with you in the jury room while you deliberate. However, there are some exhibits that cannot be sent to the jury room so it will be important that you pay close attention to all of the exhibits admitted during the trial.**

**I caution you that what the lawyers say during a trial is not evidence. Also, anything that I might do or say is not evidence. I have no leanings at all in these cases. My only interest is to have the cases tried fairly and according to the law and the Constitutions of this State and the United States.**

**WITNESSES’ CREDIBILITY**

**You are the exclusive judges of the witnesses’ credibility; that is, you decide the truthfulness and reasonableness of their testimony. You may believe or disbelieve all or any part of the testimony of any witness. You have the duty to decide what testimony is worthy of belief and what testimony is not worthy of belief. You should lay aside any preconceived notions and not decide a witness’ credibility until the witness has testified.**

**JUDGE’S RULINGS ON WHETHER EVIDENCE ADMISSIBLE**

**Rules of law govern what the Court admits into evidence. If an attorney objects to the admission of evidence, then I must rule on the objection and decide whether you can consider such evidence. You should understand that there are two ways that I can respond to an objection: (1) if I say “sustained,” then that means that I granted the objection and you should not consider the objected to evidence, or (2) if I say “overruled,” then that means that I did not grant the objection and you may consider the objected-to-evidence. You should not infer or assume anything from either the lawyer’s objections or the Court’s rulings.**

**PROCEEDINGS OUTSIDE PRESENCE OF JURY**

**During this trial, the Court will have to consider some procedures outside your presence. When that occurs, I shall excuse you to the jury room for a time. During these periods, the Court will do its best to handle the matter as promptly as the law permits. On the other hand, I will appreciate your patience when these occur.**

**PROCEDURE IN CRIMINAL TRIALS**

**Now the procedure in a criminal trial is generally as follows:**

**First, the attorneys for both sides may make an opening statement to you. This opening statement is not evidence itself; remember that what the lawyers say is not evidence. However, it is a preview or an outline of what they expect the evidence to show.**

**Following the opening statements, the State has the opportunity to present evidence to support the charges against the defendant, and the defendant has the opportunity, if he so elects, to present evidence in his defense. This part of a trial is called each party’s case-in-chief. In the State’s case-in-chief, the State calls its witnesses and introduces any exhibits. When these witnesses testify, they may be cross-examined by the defendant. When the State has presented all its evidence, the State will rest its case. Then, if the defendant elects to present any evidence, the defendant may call his witnesses and introduce his exhibits. Of course, when these witnesses testify, they may be cross-examined by the State. However, the Defendant has no duty to testify or present any evidence whatsoever.**

**After the presentation of the evidence, the attorneys may make a closing argument to you. At this time the attorneys will try to persuade you to decide the case in their favor.**

**Following the closing arguments, I will charge or instruct you more specifically on the law that directly applies to this case. Then you will retire to the jury room to deliberate and reach your verdict.**

**This is not an exhaustive description of the procedure in a criminal trial, but hopefully it will give you a quick overview that will help you to understand the trial as it proceeds.**

**SPECIAL CONSIDERATIONS**

**It is your duty to follow any instructions that the Court may give you during a case.**

**Please remember to listen carefully to all the evidence. Do not jump to conclusions before the parties present all the evidence. Also, please remember that during a trial it would be improper for you to discuss the case with anyone or to allow anyone to discuss the case with you or in your presence or within your hearing.**

**This applies even to discussions among yourselves in the jury room or elsewhere before actual deliberations begin. Also, during a trial, you should not communicate with the parties, their attorneys, or any of the witnesses. Under this rule, you should not engage in even social greetings or “small talk” with anyone involved with this case. I have had situations where the juror saw a party or attorney in the parking lot during a break of some sort and was offended that the attorney or party did not speak to the juror. Please understand that these attorneys and parties should not speak with you as the trial progresses and will likely avoid speaking with you to ensure that there is no appearance of impropriety. So please do not take offense to their failure to speak with you as we go forward with trials this week. This procedure will protect you not only from wrongdoing but from the appearance of wrongdoing. And these restrictions also apply to the friends and family members of interested parties.**

**During these trials, the law will not require that you be kept together during breaks for meals or at night. When you return to the courthouse from any adjournment for meals or the night, please go directly to the jury assembly area [place designated by the Bailiffs]. This will lessen the opportunity for an accidental meeting with a person that you may not know is involved with the case.**

**If there is any coverage of a case by the newspaper, radio, television, or other media, you should be careful not to consider it. Do not independently investigate any facts or visit any scenes depicted in the evidence. Do not independently research any law concerning a case. For instance, you are prohibited from doing any such independent investigation or research concerning a case on the internet.**

**You have now received two specific instructions that make it clear that you cannot conduct independent research of the case and cannot communicate about the case via electronic devices or otherwise. I have said it twice because it is important that the only evidence you consider is that which is produced within this Courtroom.**

**THIS CONCLUDES MY PRELIMINARY INSTRUCTIONS**

1. **OPENING STATEMENT**[[125]](#endnote-125) to jury by:
   1. **STATE**.[[126]](#endnote-126)
   2. **DEFENSE** (has the right to delay opening)

**V. PRESENTATION OF EVIDENCE**

1. **STATE** presents **EVIDENCE** for its **case-in-chief** to jury
   1. The court may allow the jury to submit written questions for witnesses which must be received by the court and provided to counsel for both parties to determine if there are any objections before the question is asked of the witness by the judge.[[127]](#endnote-127)
2. **POTENTIAL TRIAL ISSUES:** 
   1. If State introduces **404(b) evidence**, use limiting instruction;[[128]](#endnote-128)
      1. There is a difference between “**intrinsic**” evidence (404(b) does not apply and no notice required) and extrinsic evidence (404(b) applies and requires notice);[[129]](#endnote-129)
         1. Intrinsic evidence must also satisfy the requirements of Rule 403.[[130]](#endnote-130)
         2. The evidence that was once referenced as “**prior difficulties between the parties**” is now codified within §24-4-404(b) as **intrinsic evidence** which does not require notice or a pretrial hearing.[[131]](#endnote-131)
      2. When ruling on 404(b) motion, the admissibility test requires the court “find (1) the evidence is relevant to an issue in the case other than the defendant's character, (2) the probative value is not substantially outweighed by undue prejudice, and (3) there is sufficient proof for a jury to find by a preponderance of the evidence that the defendant committed the prior act. [Cit.] When weighing the probative value of other acts evidence against its prejudicial effect, Georgia courts apply the balancing test set forth in [OCGA § 24–4–403](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000468&cite=GAST24-4-403&originatingDoc=I72bdded0b7ad11e6afc8be5a5c08bae9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).”[[132]](#endnote-132)
         1. “probative value depends ... upon the need for the evidence. When the fact for which the evidence is offered is undisputed or not reasonably susceptible of dispute, the less the probative value of the evidence.”[[133]](#endnote-133)
         2. If defendant does not claim **accident or mistake**, improper to allow 404(b) evidence for that reason;[[134]](#endnote-134)
         3. “In order for other acts evidence to be admitted for the purposes of establishing a **plan**, the evidence should “logically raise[ ] an inference that the defendant was engaged in a larger, more comprehensive plan. The existence of a plan then tends to prove that the defendant committed the charged crime, since commission of that crime would lead to the completion of the overall plan.”[[135]](#endnote-135)
      3. See **Rule 413** for prior acts involving **sex offenses.**
   2. Possible ***JACKSON v. DENNO***Hearing **[Tab 17]**
      1. [Outside Presence of Jury].[[136]](#endnote-136)
   3. **TRIAL PROCEDURE:**
      1. Parties cannot prevent introduction of evidence by willingness to **stipulate**;[[137]](#endnote-137)
      2. Objections require “**Contemporaneous Objection**.”[[138]](#endnote-138) Motion to strike is available if an admitted exhibit is later learned to be inadmissible.[[139]](#endnote-139)
      3. **§24-6-611** allows court some control over manner of presenting evidence.
      4. If witness refuses to testify, see memo on **Recalcitrant Witnesses** **[Tab 12].**
         1. “[W]hen a witness declines to answer on cross-examination certain pertinent questions relevant to a matter testified about by the witness on direct examination, all of the witness’ testimony on the same subject matter should be stricken.”[[140]](#endnote-140)
      5. If there is a **Disruptive Defendant**.[[141]](#endnote-141)
      6. If **defendant voluntarily absents himself** after trial begins, “[i]t is well-established that if a trial has begun in the defendant’s presence and he voluntarily absents himself, ‘this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.’”[[142]](#endnote-142)
   4. **EVIDENCE**
      1. **§24-4-403** “should be used ‘only sparingly’ because it permits the exclusion of concededly relevant evidence.”[[143]](#endnote-143) “[T]he exclusion of evidence under O.C.G.A. §24-4-403 is an extraordinary remedy which should be used only sparingly….”[[144]](#endnote-144) Balance should be struck in favor of admissibility.[[145]](#endnote-145)
      2. Victim’s character is not generally admissible in a criminal case.[[146]](#endnote-146) Can be admitted if there is a claim that victim was first aggressor. State cannot rebut the defendant’s claim that victim had violent character with evidence of non-violence until after defendant has testified and raised the issue.[[147]](#endnote-147)
      3. Cannot introduce evidence of victim’s intoxication unless coupled with evidence of how that intoxication affected victim’s behavior.[[148]](#endnote-148)
      4. Extrajudicial identification of defendant by witness is admissible, regardless of whether witness’ credibility has been attacked.[[149]](#endnote-149)
      5. **PHOTOS**
         1. Of **victim** should not include other family members and should not be identified by a family member;[[150]](#endnote-150)
         2. Crime scene and **autopsy photos**. Is it a photo pre-incision or post-incision?;[[151]](#endnote-151)
         3. Video or photo is admissible where “operator of machine which produced it, or one who personally witnessed the events recorded testifies that the video accurately portrayed what the witness saw take place at the time the events occurred.”[[152]](#endnote-152)
      6. **CROSS-EXAMINATION**
         1. Defendant cannot cross-examine witness about **immigration status**.[[153]](#endnote-153)
         2. **Rape Shield** Statute-§24-4-412. **Prior false allegation** of sexual misconduct is admissible. Not barred by rape shield statute.[[154]](#endnote-154) Rule 412 was revised after decision in *White v. State*.[[155]](#endnote-155)
   5. **IMPEACHMENT** 
      1. §24-6-609-Prior Convictions; [[156]](#endnote-156) (see Impeachment with **Prior Convictions** memo) **[Tab 6]**
      2. If alleged that defendant “**opened the door**” to character that would render prior convictions admissible, see §24-6-611;[[157]](#endnote-157)
      3. Impeachment by reputation or opinion for **untruthfulness**. §24-6-608(a)(1) allows witness to give opinion or testify as to reputation as to UNTRUTHFULNESS. However, witness cannot give opinion as to TRUTHFULNESS unless to rebut charge if recent fabrication.[[158]](#endnote-158)
      4. ***Giglio* issues**; If witness is facing potential sentence for crimes, defendant ***must*** be allowed to cross-examine about potential sentence. But only where witness has been charged with a crime. If there is no “concrete plea deal” in exchange for testimony, accused may not bring out potential penalties faced by witness.[[159]](#endnote-159)
   6. **REHABILITATION OF IMPEACHED WITNESS**
      1. §24-6-613-prior consistent statements can be admitted if they logically rebut *any* attack on witness’ credibility; not limited to claims of recent fabrication.[[160]](#endnote-160)
3. **PROBLEMS WITH JURORS**
   1. If a **juror** needs to be **removed for cause.**[[161]](#endnote-161) How to deal with a juror who is sleeping, ill, refuses to deliberate, etc. Where a juror is alleged to have conducted on-line research on the law and shared his findings with the jury during deliberations, see *Chambers v. State*.[[162]](#endnote-162)
   2. Make sure everything is on the record and all decisions are made in the presence of the defendant;[[163]](#endnote-163)
   3. Duty of trial judge to awaken a sleeping juror and duty on counsel to point it out to the judge;[[164]](#endnote-164)
   4. If something happens to a juror and they cannot complete service, first look to O.C.G.A. § 15-12-172:
      1. Judge must make inquiry on the record by way of voir dire of the juror or, if the other jurors have a problem with a single juror, voir dire all of the jurors INDIVIDUALLY and on the record;[[165]](#endnote-165)
      2. You cannot remove a juror who has an honest and fixed opinion of the evidence—but judge can remove a juror who refuses to deliberate;[[166]](#endnote-166)
      3. Judge can remove a juror who knows the witnesses and imparts “inside knowledge” to other jurors in jury room;[[167]](#endnote-167)
      4. Judge can remove a juror who is seen having conversations with defendant, defendant’s family or others during the trial.[[168]](#endnote-168)
      5. Judge can remove a juror who is abusive to other jurors;[[169]](#endnote-169)
      6. Court can remove a juror who made a false statement during voir dire. That authority exists when there is a false response to a voir dire question as confirmed by the court conducting additional voir dire of the juror and allowing parties to ask questions of the juror.[[170]](#endnote-170)
      7. Court can remove a juror who raised his/her hand during voir dire but that hand was not seen by counsel.[[171]](#endnote-171)
      8. In making a decision to remove a juror, ensure that the judge evaluates the demeanor and credibility of the juror (and put that observation/conclusion on the record).[[172]](#endnote-172)
   5. **Juror misconduct:** Presumption of harm and burden of State to overcome presumption beyond reasonable doubt. Should identify the juror who was guilty of misconduct (i.e. visiting crime scene, using cell phones in jury room, etc.) and potentially call all jurors to determine extent of “damage.”[[173]](#endnote-173)
   6. NOTE THAT WHEN A JUROR IS DISMISSED AND IS REPLACED BY AN ALTERNATE, THE FIRST ALTERNATE SELECTED FOLLOWING VOIR DIRE MUST BE THE FIRST SEATED. Alternates are seated in the order they were selected.
4. **STATE RESTS.**
5. **IF MOTION FOR DIRECTED VERDICT:** Δ entitled to so move at close of evidence offered by prosecuting attorney or at close of case (or both).[[174]](#endnote-174)
   1. State not required to prove that crime occurred on date alleged in indictment unless date is a material allegation in the indictment.[[175]](#endnote-175)
6. **MISTRIAL**- a mistrial can only be granted in cases which demonstrate a “manifest necessity.” If it is found that the mistrial was not granted because of a “manifest necessity,” the defendant cannot ever be retried. A trial court may grant a mistrial over the defendant’s objection when, “taking all the circumstances into consideration, there is a manifest necessity for doing so.”[[176]](#endnote-176) If the jury announces it is deadlocked, the trial court should consider four factors before granting mistrial as set forth below in section dealing with jury deliberations.
7. **COURT’S INQUIRY ABOUT Δ’S DECISION TO TESTIFY OR NOT.**[[177]](#endnote-177) **(Before the Court tells the Defense to call its first witness**, ***OUTSIDE THE PRESENCE OF THE JURY*** ask **DEFENDANT** the following:)
   1. Do you understand that you have a ***right to testify*** and if you want to testify then ***no one*** can ***prevent*** you from doing so?
   2. Do you understand that ***no one can make*** or ***compel*** you to ***testify***? That is, do you understand that you have a ***right to not testify*** if you do not want to?
   3. Do you understand that not your lawyer but you personally are the one who ***decides*** whether you will testify or not?
   4. Do you understand if you do not testify, then upon proper request by you, the Court will ***instruct the jury*** that your decision cannot be used against you?
   5. Do you understand if you choose to testify, you will be both examined by your counsel and cross-examined by the Assistant D.A.?
   6. Do you feel that you need any additional time to think about whether you want to testify or not?
   7. Do you ***personally want to testify or not***?
      1. [Where defendant says he is not sure or wants to “sleep on it,” court is not required to accommodate such a request. “While a defendant has a ‘fundamental constitutional right’ to testify on his own behalf, this right is ‘not without limitation.’”[[178]](#endnote-178)]
   8. **[Ruling:]** **I find** that the **defendant** has **decided** to **testify/not testify** with a **complete understanding** of **his/her rights**.
8. **DEFENSE** presents **EVIDENCE** for its **case-in-chief** to jury
   1. Defendant can offer evidence of his/her good character but defendant must make the decision as to whether that door should be opened (i.e. State cannot “force the door open”);[[179]](#endnote-179)
   2. State can cross-examine character witnesses on things in the defendant’s history, even if not convictions;[[180]](#endnote-180)
9. **DEFENSE RESTS.**
10. **STATE REBUTTAL**, if any – RESTS. **Evidence is closed.**
    1. The decision as to whether to allow rebuttal evidence after the defendant has rested his/her case “is a matter resting in the sound discretion of the court.”[[181]](#endnote-181)
    2. The trial court always has the discretion to allow either party to reopen their case, and allowing “rebuttal evidence” when the other party has offered no evidence should properly be referred to as allowing the State to reopen the evidence.[[182]](#endnote-182)
    3. The fact that a witness was released from sequestration after the State rested does not bar that witness being recalled in rebuttal.[[183]](#endnote-183)

**VI. CHARGE CONFERENCE AND CLOSING ARGUMENTS**

1. **PRE-CHARGE [and PRE-CLOSINGS] CONFERENCE between the court and counsel.** [Ensure Defendant is present for entire charge conference][[184]](#endnote-184)
   1. ***PUT CONFERENCE ON RECORD****.* During this conference, be sure to ask counsel if any OBJECTIONS TO WRITTEN CHARGE GOING TO JURY ROOM WITH JURY; if so, make record of authority to do so.[[185]](#endnote-185)
   2. REVIEW the PARTIES’ REQUESTS to CHARGE and the COURT’S TENTATIVE INSTRUCTIONS and DETERMINE the FINAL version of the INSTRUCTIONS that the Court will give to the jury.
      1. **Lesser included offenses**; As a general rule, “a trial court is required to give a charge on a lesser included offense if requested and if there is any evidence, however slight, to support such a charge.” But where the evidence supports either the crime charged or no crime at all, the court is not required to charge on the lesser included offense.[[186]](#endnote-186)
      2. It is error for a trial court to refuse to give a requested charge on accomplice corroboration where evidence includes testimony from accomplice (and probably plain error if only evidence that connects defendant to crime is testimony of accomplice);[[187]](#endnote-187)
      3. Avoid sequential charge described in ***Edge v. State***;[[188]](#endnote-188)
      4. **Charge Aggravated Assault as charged in the indictment**;[[189]](#endnote-189)
         1. If indictment charges defendant committed aggravated assault by shooting the victim, it is error to give the pattern charge on aggravated assault which describes aggravated assault to be a completed crime if the defendant pointed a deadly weapon at the victim;[[190]](#endnote-190)
      5. Where there are **multiple defendants and/or multiple charges**, charge the jury that they should consider each count separately as to each individual defendant.[[191]](#endnote-191)
      6. There is no legal necessity to give a jury charge on the voluntariness of a confession unless there is a specific request for one.[[192]](#endnote-192)
      7. Repeat any **limiting instruction** in multiple defendant cases[[193]](#endnote-193) and in cases where a limiting instruction was given at the time the evidence was presented (i.e. 404(b) evidence);[[194]](#endnote-194)
      8. Generally, “[t]he trial court must charge the jury on the defendant's **sole defense**, even without a written request, if there is some evidence to support the charge.” But there must be some evidence to support that defense.[[195]](#endnote-195)
      9. To receive a **justification** charge, the defendant must admit all of the elements of the crime other than intent. If defendant denies being present, or claims he did not have gun, no charge on justification; See memo on Justification Charge **[Tab 16]**
      10. **Good character is not a “defense;”**[[196]](#endnote-196)
      11. Where possibility of **misidentification** of defendant is not raised by evidence, not error to refuse to charge on **identity**;[[197]](#endnote-197)
      12. If no evidence of “irresistible passion,” no error to refuse charge on voluntary manslaughter;[[198]](#endnote-198)
          1. “A trial court is not required to give a charge on voluntary manslaughter when a defendant's own testimony shows unequivocally that he was not angered or impassioned when the killing occurred, and when the other evidence does not show otherwise.”[[199]](#endnote-199)
          2. Charges on **self-defense and voluntary manslaughter** are **NOT** mutually exclusive;[[200]](#endnote-200)
   3. Get **VERDICT FORM** completed and, if possible, approved by counsel.[[201]](#endnote-201)
   4. REVIEW THAT STATE has OPENING and CLOSING SUMMATIONS.[[202]](#endnote-202)
   5. If MULTIPLE ATTORNEYS represent STATE or any ONE DEFENDANT, REVIEW the NUMBER OF COUNSEL permitted to argue.[[203]](#endnote-203)
   6. Review TIME ALLOWED under O.C.G.A. §§17-8-72 through 74; USCR 13.1.[[204]](#endnote-204)
   7. Ensure the parties agree which jurors are alternates and their order.[[205]](#endnote-205)
2. **CLOSING ARGUMENT**:

|  |  |
| --- | --- |
| **ALLOWED IN CLOSING ARGUMENTS** | |
| Deductions from the evidence (Even if illogical) | *Davis v. State*, 285 Ga. 343, 347 (2009); *Harris v. State*, 296 Ga. App. 465, 469 (2009). |
| Credibility of Defendant’s testimony (If Defendant testifies) | *Wells v. State*, 200 Ga. App. 104, 106 (1991). |
| Defendant has subpoena power too (Defendant’s failure to bring evidence/witnesses to support his theory) | *Peek v. State*, 247 Ga. App. 364 (2000); *Kilgore v.* State, 300 Ga. 429, 432 (2017); Biswas *v. State*, 255 Ga. App. 339 (2002); *Ponder v. State*, 268 Ga. 544 (1997); *Morgan v. State*, 267 Ga. 203 (1996); *Duncan v. State*, 271 Ga. 16 (1999). State can comment on defendant’s failure to produce certain witnesses when the defendant testifies to the existence of a witness with knowledge of material and relevant facts and that person does not testify at trial. In order to make such a comment the argument must be derived from evidence properly before the fact finder.  The State cannot comment that the forensic witness was in the hall all week (because that was not in evidence) BUT the prosecutor CAN comment that the defendant also has subpoena power provided that the prosecutor does not imply that the defendant has any burden of proof. *Campbell v. State*, 329 Ga. App. 317 (2014). Same with a girlfriend who was in court but was not called to testify—improper to have her stand up in closing and point out she could have been called if she had relevant evidence. *Mowoe v. State*, 328 Ga. App. 536 (2014). |
| Defendant has not rebutted State’s evidence | *Kilgore v. State*, 300 Ga. 429, 432 (2017). |
| Defendant is dangerous (**cannot** allude to future conduct) | *Turner v. State*, 345 Ga. App. 427, 433 (2018); *Stroud v. State*, 272 Ga. 76, 77 (2000). |
| Urge jury to convict to send a message to the community (“Speak on behalf of the community”) | *Philmore v. State*, 263 Ga. 67, 69 (1993); *Poellnitz v. State*, 296 Ga. 134, 136 (2014); *Faust v. State*, 302 Ga. 211 (2017). |
| Use of terms “Murder,” “Rape,” and “Victim” | *Clark v. State*, 300 Ga. 899, 902 (2017) (“murder”); *Nguyen v. State*, 279 Ga. App. 129, 133 (2006) (“rape”); *McCray v. State*, 301 Ga. 241, 247-248 (2017) (“victim”). |
| Defendant can argue witnesses received benefits in exchange for testimony (Potential prison time avoided) | *Palma v. State*, 280 Ga. 108 (2005). |

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| **NOT ALLOWED IN CLOSING ARGUMENTS** | |
| Facts not in evidence | *Morgan v. State*, 267 Ga. 203 (1996). |
| Pre-trial silence of Defendant (Pre-Arrest or after) | *Mallory v. State*, 261 Ga. 625 (1991); *State v. Orr*, 345 Ga. App. 74, 76 (2018), citing *Sanders v. State*, 290 Ga. 637, 640 (2012) and *Reynolds v. State*, 285 Ga. 70, 71 (2009); *Davis v. State*, 328 Ga. App. 796, 799 (2014), disapproved on other grounds *Martin v. McLaughlin*, 298 Ga. 44 (2015). |
| Defendant’s failure to testify (Defendant did not deny or dispute the State’s evidence) | U.S.C.A. Const. Amend. 5; O.C.G.A. § 24–5-506; *Eason v. State*, 283 Ga. App. 574 (2007) citing *Smith v. State*, 279 Ga. 48 (2005); *Smith v. State*, 170 Ga. App. 673, 674 (1984). Judge Jack Goger, *Daniel’s Georgia Handbook on Criminal Evidence*, § 23:7 (West Pub. 2018 Ed.) |
| Golden Rule (put jurors in victim’s shoes) | *Braithwaite v. State*, 275 Ga. 884 (2002); *McClain v. State,* 267 Ga. 378 (1996). *McKibbins v. State*, 293 Ga. 843, 849-850 (2013). |
| Defendant’s future conduct | *Turner v. State*, 345 Ga. App. 427, 433 (2018); *Stroud v. State*, 272 Ga. 76, 77 (2000). |
| Prosecutor may not “testify” as victim | *McCray v. State*, 301 Ga. 241, 250-251 (2017). However, see *Watkins v. State*, 278 Ga. 414, 414-415 (2004) where prosecutor allowed to give a portion of his closing argument while seated in the witness chair. |
| Biblical quotes | *Carruthers v. State*, 272 Ga. 306, 310 (2000), overruled on other grounds *Vergara v. State*, 283 Ga. 175 (2008). |
| Personal Opinions | *McKibbins v. State*, 293 Ga. 843, 850 (2013). |
| Reference to other notorious cases | *Humphrey v. Lewis*, 291 Ga. 202, 216-217 (2012); *Carr v. State*, 267 Ga. 547, 555 (1997). Several older cases where comparing the defendant to the Viet Cong, the Nazi extermination of Jews, and other analogies have been upheld on appeal but the more modern rule seems to demand that any such analogy must be based upon facts in the case before the court. *Martin v. State*, 223 Ga. 649, 650 (1967); *Forehand v. State*, 235 Ga. 295 (1975). But see *Hudson v. State*, 273 Ga. 124, 127 (1998) where the prosecutor asked the jury to consider the cases involving Manson, Berkowitz, and Dahmer where those defendants were all found to be accountable for their actions even though they had claimed insanity. A deeply divided Supreme Court allowed that argument. |
| Punishment (or lenient sentence) | O.C.G.A. § 17-8-76. This rule does not apply to death penalty cases as §17-10-31(b) provides that the parties may argue and the court may charge the definitions of life without parole and life imprisonment. |
| Failure to bring forth evidence which was suppressed | *Ellis v. State*, 279 Ga. App. 902, 905 (2006) (where court ruled that the State could not use photographs of the victim’s injuries because they were not produced 10 days before trial, the defense could not argue that the State failed to produce photos of the victim’s injuries); *Piast v. State*, 230 Ga. App. 222, 223 (1998). |

* 1. Defendant cannot argue jury nullification.[[206]](#endnote-206)
  2. O.C.G.A. §17-8-75–where counsel makes prejudicial statement on matters not in evidence in presence of jury, Court has a duty to interpose and prevent same. On objection, Court shall rebuke counsel and make proper instructions to jury–in Court’s discretion, may grant a mistrial.[[207]](#endnote-207)

1. SUMMATIONS[[208]](#endnote-208) (CLOSING ARGUMENTS) given jury by:
   1. STATE Start:\_\_\_\_\_\_\_\_\_\_; Stop:\_\_\_\_\_\_\_\_\_\_. Time used:\_\_\_\_\_\_\_\_\_\_.
   2. DEFENSE Start:\_\_\_\_\_\_\_\_\_\_; Stop:\_\_\_\_\_\_\_\_\_\_.
   3. STATE Time left:\_\_\_\_\_\_\_\_\_\_;Start:\_\_\_\_\_\_\_\_\_\_; Stop:\_\_\_\_\_\_\_\_\_\_.

**VII. CHARGE OF COURT AND DELIBERATION OF JURY**

1. JURY INSTRUCTIONS
   1. Court reads INSTRUCTION (CHARGE) to jury including alternates.
   2. REGULAR JURY RETIRES to jury room.
   3. ALTERNATE JURORS are kept in separate room from regular jurors during deliberations under care of a bailiff.[[209]](#endnote-209)
2. Court receives **OBJECTIONS TO CHARGE,** if any, not already covered at pre-charge conference and RE-INSTRUCTS jury, if necessary.[[210]](#endnote-210)
3. Send INDICTMENT AND APPROPRIATE EVIDENCE to JURY after obtaining COUNSELS’ CONFIRMATION that EVIDENCE sent is PROPER and COMPLETE.[[211]](#endnote-211)
   1. Make a record of which exhibits are going out with the jury.
   2. Consider whether there are exhibits that should not be given to the jury at the same time (i.e. weapons, firearms and ammo, drugs. etc.)
   3. **Be aware of “continuing witness rule”**[[212]](#endnote-212)

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| **EVIDENCE WHICH IS ALLOWED UNDER CONTINUING WITNESS RULE** | |
| Death certificate (redacted to exclude manner of death) | *Bryant v. State*, 270 Ga. 266 (1998) |
| Letters (where the letter *IS* the crime) (i.e. intimidating witnesses via letter) | *Bollinger v. State*, 272 Ga. App. 688, 692 (2005); *Vinyard v. State*, 177 Ga. App. 188, 190 (1985); *Johnson v. State*, 234 Ga. App. 58, 60 (1998) |
| Photo lineup (even where the witness initialed selection) However, degree of certainty information should be redacted | *Kenney v. State*, 196 Ga. App. 776, 777 (1990); *Dockery v. State*, 287 Ga. 275, 276-277 (2010) (addresses required redactions) |
| Photographs | *Davis v. State*, 285 Ga. 343, 348 (2009) |
| Drawings on anatomically correct diagram | *Banks v. State*, 279 Ga. App. 57, 58-59 (2006), disapproved on other grounds *Patel v. State*, 282 Ga. 412 (2007) (child drawings); *Ruffin v. State*, 333 Ga. App. 793, 794-795 (2015) (nurse drawings); *James v. State*, 270 Ga. 675, 678 (1999) (medical examiner drawings); *Abernathy v. State*, 278 Ga. App. 574, 586-587 (2006) (child drawings); *Griffin v. State*, 243 Ga. App. 282, 286 (2000) (nurse drawings) |
| Surveillance tape (w/o audio) | *Matthews v. State*, 258 Ga. App. 29 (2002) |
| Copy of implied consent card | *Sagenich v. State*, 255 Ga. App. 663, 664 (2002) |
| Print out of Intoxilyzer test result | *Whiteley v. State*, 188 Ga. App. 129, 132 (1988) |
| Police artist sketch | *Sims v. State*, 275 Ga. App. 836, 840 (2005) |
| GBI crime lab report (but not if merely conclusions) | *Ogburn v. State*, 196 Ga. App. 254, 257 (2009); *Tanner v. State*, 259 Ga. App. 94, 97-98 (2003); *Starks v. State*, 240 Ga. App. 346 (1999) |
| Medical records | *Hodson v. Mawson*, 227 Ga. App. 490 (1997) |
| Copy of municipal ordinance | *Davis v. State*, 172 Ga. App. 193, 194 (1984) |
| Certified copies of prior convictions introduced for impeachment (REDACTED)**[[213]](#endnote-213)** | *Relaford v. State*, 306 Ga. App. 549, 557 (2010) |
| Rule 24.2 affidavits in domestic relations cases | *McAlpine v. Leveille*, 258 Ga. 422, 423 (1988) |

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| **EVIDENCE WHICH IS NOT ALLOWED UNDER CONTINUING WITNESS RULE** | |
| Affidavits and depositions | *Tibbs v. Tibbs*, 257 Ga. 370, 371 (1987) |
| Answers to written interrogatories | *Shedden v. Stiles*, 121 Ga. 637 (1905) |
| Written confessions | *Davis v. State*, 285 Ga. 343, 348 (2009) |
| Dying declarations | *Davis v. State*, 285 Ga. 343, 348 (2009); *Strickland v. State*, 167 Ga. 452, 460 (1928) |
| Videotaped recording of interview or transcript of testimony | *Summage v. State*, 248 Ga. App. 559, 561 (2001); *Hinton v. State*, 233 Ga. App. 213 (1998) |
| Video or audio recording of statement of defendant | *Fields v. State*, 266 Ga. 241, 243 (1996); *Ross v. State*, 344 Ga. App. 477, 479-480 (2018) |
| Narrative portions of police report | *Hopkins v. State*, 283 Ga. App. 654, 659 (2007) |
| Search warrants or arrest warrants | *Nelson v. State*, 197 Ga. App. 898, 899-900 (1990); *Cain v. State*, 113 Ga. App. 477, 481 (1996) |
| Report of document examiner that included only conclusions (no evidence of type of testing, how testing conducted) | *Roberts v. State*, 282 Ga. 548, 552-553 (2007) |
| Written or recorded statement of victim | *Kent v. State*, 245 Ga. App. 531 (2000); *Clark v. State*, 284 Ga. 354, 353-355 (2008) |
| Report of polygraph examiner that simply reiterates his sworn testimony | *Harris v. State*, 168 Ga. App. 458, 460-461 (1983) |
| Written prior consistent or inconsistent statements | *Buchanan v. State*, 282 Ga. App. 298, 300-301 (2006); *Broadnax-Woodland v. State*, 265 Ga. App. 669, 670 (2004); *Gough v. State*, 236 Ga. App. 669 (2004) |
| Past recollection recorded | *Platt v. National General Ins. Co.*, 205 Ga. App. 705 (1992) |

1. **JURY DELIBERATIONS**.[[214]](#endnote-214) Jurors can be allowed to use items such as rulers and yardsticks.[[215]](#endnote-215) Keep notes on time when deliberations start, recess, end so have information that may be necessary for rulings, conduct of deliberations, etc. (Most Court Reporters keep these times also.)

Deliberations start:

Recesses:

Deliberations end:

1. **JURY NOTES/RECHARGE**
   1. **Do not address any note from jury without defendant present—put it on record that defendant is present before you read note into record;**
   2. Read the note on the record, allow counsel the opportunity to see the note and give the parties an opportunity to propose a response. Write your response, date and time, and ensure that all notes and all responses are recovered by the bailiff and given to the court reporter to be made a part of the record.[[216]](#endnote-216)
   3. If the jury sends out a note asking about potential punishment or whether the defendant would be eligible for parole, the judge should respond by “telling the jury in no uncertain terms that such matters are not proper for the jury’s consideration.[[217]](#endnote-217)
   4. During any recharge, ensure that the **alternate jurors** are brought back into the courtroom;
   5. During recharge, it is important that the court not overemphasize the particular point the judge is trying to cover;[[218]](#endnote-218)
   6. When a jury does not ask the trial court to recharge its instructions, “but rather to expound on them[,] ... it [is] within the trial court's sound discretion to determine the need, breadth, and formation of any additional jury instructions.”[[219]](#endnote-219)
   7. Court cannot provide a dictionary to the jury;[[220]](#endnote-220) However, the court can allow the jury to have a ruler or yardstick during their deliberations.[[221]](#endnote-221)
   8. If a jury note suggests that the jury is deadlocked or uses similar language, it is appropriate for the trial judge to “inquire how the jury stands numerically” but the judge should make it clear that it does not want any information about the nature of that numerical division (i.e. if the jury indicates it is 7-5, the court should do everything in his or her power to avoid a response like “7 for guilty, 5 for not guilty”);[[222]](#endnote-222) **But if note contains the numeric breakdown, the court must share the note with the parties as written**.[[223]](#endnote-223)
      1. It has been suggested that where the trial judge receives a “deadlock note,” the judge should consider the following four factors before deciding whether to declare a **mistrial**:
         1. Poll the jurors or questioning them as a group to determine whether additional time would be helpful in overcoming their current deadlock;
         2. Consider whether the jury is so exhausted that the minority might be induced to vote for a verdict which they otherwise would not support;
         3. Consider the length of the trial and complexity of the issues involved;
         4. Consider the length of time that they jury has deliberated before declaring itself deadlocked.[[224]](#endnote-224)
      2. **GO SLOW when the jury announces they are deadlocked and ensure that the only real option is a mistrial because if you are wrong, the defendant can never be retried on that charge. MAKE A RECORD (including your observations of jury demeanor). (Consent of the defendant to the grant of a mistrial may prove very important but do not “force” the defendant to consent to the declaration of a mistrial.)**[[225]](#endnote-225)
2. ***ALLEN* CHARGE:**
   1. A jury charge under *Allen v. United States*, 164 U.S. 492 (1896) has been referred to as a “dynamite charge,” “hung-jury charge,” “log-jam charge,” and “hammer instruction.” This charge may be considered where the jury declares itself hung. Giving an *Allen* charge has certain dangers if the charge is deemed coercive.[[226]](#endnote-226)
   2. If you decide to give an *Allen* charge, use the pattern charge (1.70.70 of Pattern Charges). Do not include language which has been a part of older *Allen* charges (but later ruled inappropriate) such as “this case must be decided by some jury…and there is no reason to think a jury better qualified than you would ever be chosen,”[[227]](#endnote-227) or make any reference to any additional expense the county might incur if a verdict is not returned by this jury.[[228]](#endnote-228)
      1. See *Humphreys v. State*, 287 Ga. 63, 79-82 (2010) before considering giving any version of an *Allen* charge (even the pattern charge) in the penalty phase of a death penalty case.

**VIII. RECEIVING THE VERDICT AND ENDING TRIAL**

1. **COURT IS NOTIFIED THAT THE JURY HAS REACHED A VERDICT**
2. **ADMONISHMENT TO SPECTATORS**
   1. **I have been advised that the jury has reached a verdict. To everyone in attendance, I realize that criminal trials can involve all sorts of emotions for everyone involved. However, in this courtroom we cannot have emotional reactions to the verdict returned by the jury that are audible or disruptive. Therefore, I am advising everyone in attendance that there shall be no audible reactions to the verdict when it is published. The bailiffs are instructed to escort anyone who makes any type of outburst from the courtroom until such time as that person can regain their composure. Many of you have been here for a significant amount of time, waiting for this verdict. Please do not make any outburst that would be disruptive to these proceedings because that will cause you to be removed from the courtroom. Thank you all for your cooperation.**
3. **RECEIVE VERDICT FROM JURY**.
   1. Colloquy with Foreperson: Ask the Foreperson to rise, and then ask the Foreperson to identify themselves and ask:
      1. **Have you reached a verdict?**
      2. **Was it unanimous?**
      3. **Has the verdict been filled in, signed and dated by you?**
      4. **Please hand the verdict to the bailiff and have a seat.**
   2. Then have Bailiff bring verdict form to Judge.
   3. **Pre-Publishing Conference**[[229]](#endnote-229) between Court and Counsel:
      1. During Conference, Ask counsel if there is any OBJECTION as to the FORM or LEGALITY OF THE VERDICT as written. If no objection is raised, then it has been waived and it cannot be brought up on appeal. If a valid objection is raised, then the judge can send the jury back to correct it before the verdict is published and excused. Verdict forms previously approved by counsel should prevent many problems. **Ask if any objections to the form of the verdict on the record.**
      2. There is no “inconsistent verdict” rule in Georgia.[[230]](#endnote-230) However, there is a difference between an inconsistent verdict and mutually exclusive verdicts.[[231]](#endnote-231) A seemingly inconsistent verdict is a valid verdict and should be received by the court. However, a mutually exclusive verdict is improper and the court should not allow a mutually exclusive verdict to be received or published.
   4. **Publish Verdict**:
      1. Ask the defendant to stand to receive the verdict (see endnote if defendant is shackled);[[232]](#endnote-232)
      2. Then ask the Clerk of Court to publish the verdict.
4. If **POLLING OF JURY** [[233]](#endnote-233)REQUESTED, have Clerk call name of each juror one at a time and ask them:
   1. **Was that your verdict in the jury room?**
   2. **Was it freely and voluntarily made by you?**
   3. **Is it still your verdict?**
5. **HANDCUFFING OR SHACKLING THE DEFENDANT AFTER CONVICTION:**[[234]](#endnote-234)
6. **DO NOT EXPRESS APPROVAL/DISAPPROVAL OF THE VERDICT:**
   1. For details on why a judge shall not express approval or disapproval of the verdict, see OCGA §§17-9-22 and 17-9-23.
   2. **THANK YOU, MEMBERS OF THE JURY, FOR YOUR SERVICE. IF ANYONE WANTS TO SPEAK WITH YOU NOW ABOUT YOUR DELIBERATIONS, THAT IS COMPLETELY UP TO THE INDIVIDUAL JUROR. THERE IS NO REQUIREMENT THAT YOU DO SO. HOWEVER, I AM ORDERING THAT NO CONTACT WITH JURORS BE MADE WITHIN THE COURTHOUSE OR ON COURTHOUSE PROPERTY.**[[235]](#endnote-235)
   3. Arrange for work/school excuses for jurors;
   4. Release the jury.

**[RECESS]**

1. **IF VERDICT IS *NOT GUILTY,*** discharge defendant if there are no other pending cases against him/her. If the defendant was in confinement, take steps to ensure that the jail is advised that the case is resolved but avoid simply ordering the defendant to be “released” as there may be other holds against the defendant or other charges pending.

**IX. SENTENCING**

1. **IF VERDICT IS GUILTY**, conduct ***PRE-SENTENCE HEARING IN NON-CAPITAL FELONIES***:[[236]](#endnote-236) [Note: there is no requirement that sentencing occur on the same day as the verdict is returned. Consider the emotion of the case, the rights of the victim(s) to be present, whether the defendant wants witnesses to testify in mitigation, the security of the courtroom and any other factor you believe to be important before deciding whether to proceed immediately following the verdict or waiting until the matter can be scheduled for sentencing.]
   1. Judge may ***dismiss*** the ***jury*** first (and probably should).[[237]](#endnote-237)
   2. Consider **MERGER** and **RULE OF LENITY.** See Merger brief, if an issue. Remember to start Merger analysis with deciding if there is a “deliberate interval” between acts. If so, no merger because not a single act or transaction. If not, go through the “required evidence test” and determine if elements of one crime are “used up” in proof of the other crime. See Merger Memo **[Tab 15]**
      1. Rule of Lenity applies where two statutes make the same conduct illegal and provide for two different levels of potential punishment [*McNair v. State*, 293 Ga. 282 (2013)]. The Defendant gets the benefit of the lesser punishment.
   3. **OPENING STATEMENTS**, if desired by counsel, is required in DP cases, and it is a probably a “better practice” in other cases.[[238]](#endnote-238)
   4. **EVIDENCE**.[[239]](#endnote-239)
      * 1. STATE may present evidence in AGGRAVATION, including prior criminal record of defendant.[[240]](#endnote-240)
        2. Ensure any prior convictions which were a part of the pre-trial notice under §17-10-7(a) or (c) are put into evidence.
        3. DEFENDANT may present evidence in EXTENUATION and MITIGATION.[[241]](#endnote-241)
        4. STATE apparently has a right to present REBUTTAL evidence during the sentencing stage of case.[[242]](#endnote-242) Therefore, DEFENDANT would haveright also to REBUTTAL.
   5. Judge shall hear ARGUMENT[[243]](#endnote-243)of parties by:
      * 1. STATE,
        2. DEFENDANT,
        3. STATE.
   6. Upon CONCLUSION of evidence and argument the judge shall:
      1. Consider aggravating and mitigating factors and review any statutory sentencing requirements and impose sentence.
2. **COURT PRONOUNCES JUDGMENT** and has written sentence prepared and executed.[[244]](#endnote-244)
   1. Fine cannot exceed the maximum sum set by statute. If the statute does not set a fine amount, the court can impose a fine not to exceed $100,000. OCGA §17-10-8.[[245]](#endnote-245)
   2. If court asked to deviate from mandatory minimum sentence is sexual offense, the court must make findings required under §17-10-6.2(c)(1)(A) through (F);[[246]](#endnote-246)
   3. If defendant convicted of possession of firearm by convicted felon or First Offender probationer or person serving a Conditional Discharge sentence, (§16-11-131(b)).the sentence range is 1-10 years and 5-10 on a second or subsequent conviction. If the defendant has previously been convicted of a “forcible felony” as defined by the statute, (or the offense for which he is on First Offender/Conditional Discharge probation is a “forcible felony”), the sentence must be 5 years.[[247]](#endnote-247) “Possession of weapon during commission of a crime” (§16-11-106) must be a consecutive sentence of 5 years.
3. **SENTENCE PRONOUNCEMENT**
   1. TIME OF SENTENCE[[248]](#endnote-248)
      1. Incarceration/Probation/Split NOTE**: All sex offenses must be split sentences with some portion (not less than one year) being probated.**[[249]](#endnote-249)
      2. Regular Supervision or Enhanced?
         1. **(#7)** Probation Detention Center
         2. **(#8)** Probation RSAT (substance abuse history) or Integrated Residential Treatment Facility (mental health and substance abuse history)
         3. **(#9)** Day Reporting Center
         4. **(#23)** Electronic Monitoring
      3. First Offender/Conditional Discharge
         1. The defendant should **consent** to a First Offender or Conditional Discharge sentence being imposed.
         2. **The defendant has requested a sentence under the First Offender Act or Conditional Discharge Act. The Court will approve that request, withhold adjudication, and does hereby impose the following terms under the First Offender Act/Conditional Discharge Act.**[[250]](#endnote-250)
         3. If a First Offender sentence, the court should also advise the defendant of the following:
            1. **If you, as a defendant sentenced under the First Offender Act, violate the terms of this sentence, the Court may enter an adjudication of guilt and proceed to sentence you to the maximum sentence provided by law.**
            2. **Additionally, I want you to understand that if an adjudication of guilt is entered, you may be sentenced to a sentence greater or more restrictive than that imposed today.**
            3. **However, if you are so sentenced, you will receive credit for time served on probation against any new sentence.**
            4. **If you successfully complete this sentence, you will not have been convicted of a crime in this case.**
            5. **Have you ever been convicted of a felony?**[[251]](#endnote-251) **Do you understand the conditions of a First Offender sentence? Do you want to receive the requested First Offender Sentence?**
         4. If sentenced under the Conditional Discharge Act, the defendant should be advised of the following:
            1. **You are advised of the following concerning the Conditional Discharge sentence you are requesting:**
            2. **The maximum sentence for drug offenses under 16-13-2(a) is 3 years and under 16-13-2(c) the maximum sentence is 5 years;**
            3. **Have you ever been convicted of a crime which involved illegal drugs?**[[252]](#endnote-252)
            4. **Upon a violation of any term or condition of this sentence, the Court can enter an adjudication of guilt and proceed accordingly-including sentencing for this offense and the sentence could be for the maximum time allowed by the statute;**
            5. **You only have one opportunity in your lifetime to receive a Conditional Discharge and this sentence requires your consent;**
            6. **If you successfully complete this Sentence, you will not have been convicted of a crime in this case.**
            7. **Do you understand these conditions? Do you want to receive the requested Conditional Discharge?**
   2. FINE[[253]](#endnote-253)
   3. RESTITUTION[[254]](#endnote-254)
      * 1. Restitution to victim may require hearing;
        2. 3A - Application Fee - $50.00 - OCGA § 15-21A-6(c)
        3. $150- Reimbursement of Costs of Representation - OCGA § 17-12-51
   4. TERMS OF PROBATION (IF ANY);
      1. **In addition to the standard conditions of probation, the Court is imposing the following special conditions of probation which means that if any of the following conditions are violated, the entire balance of your probation can be revoked even if the violation does not constitute a new criminal offense:**[[255]](#endnote-255)
         1. **(#02)** - Report Date
         2. **(#10)** - 4th Amend Waiver
         3. **(#11)** - Breath/Blood Test
         4. **(#15)** - Record Release
         5. **(#25)** - DNA (Not if 1st Offender or Conditional Discharge)
         6. **(#32)** - No Drug/Alcohol Use
         7. **(#33)** - Contagious Disease Testing
      2. **Additional Conditions that the Court may consider imposing:**
         * 1. **(#03)** Community Service
           2. **(#04)** POM- through RSAT
           3. **(#10)** Consider 4th Amendment Waiver - *IF 4th AMENDMENT WAIVER IS CONDITION OF PROBATION:[[256]](#endnote-256) Do you agree that (a) a special condition of probation will be that you shall submit to a search of your person or property any time of the day or night, with or without your consent or a search warrant, whenever requested to do so by a probation officer or a law enforcement officer and (b), if anything is taken, it may be used as evidence against you in any court proceeding?*
           4. **(#12)** No Contact Provisions/ **(#13)** Harassment and Threats
           5. **(#16)** Substance Abuse Treatment
           6. **(#17)** 12 Step Meetings
           7. **(#18)** GED/Education
           8. **(#19)** Curfew
           9. **(#20)** Banishment
           10. **(#21)** Surrender Driver’s License
           11. **(#22)** Ignition Interlock
           12. **(#24)** Administrative if all Special Conditions Completed
      3. **ADDITIONAL SPECIAL CONDITIONS?**[[257]](#endnote-257)
         * 1. **If Conditional Discharge**-do not be in possession of a firearm;[[258]](#endnote-258)
           2. Do not knowingly be in the presence of any illegal drugs or drug paraphernalia while on probation;
      4. **Specific Crime Sentencing**
         * 1. **(#14)** Family Violence – FVIP
           2. **(#26)** Sex Offender Conditions (ask for a copy of the form to go over on the record)[[259]](#endnote-259)
           3. **(#28)** If Stalking/Aggravated Stalking

Issue Permanent Restraining Order

Require Psychological Treatment

* 1. If defendant has a Weapon Carry License, duty to notify probate court.[[260]](#endnote-260)
  2. **Behavioral Incentive Date** (BID) §17-10-1(a)(1)(B) – Court required to set BID no more than 3 years from sentencing date 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.[[261]](#endnote-261)
  3. **ASK ON THE RECORD TO DETERMINE IF STATE, DEFENSE, PROBATION OR CLERK HAVE ANYTHING TO ADD/ADDRESS**[[262]](#endnote-262)

1. **ADVISE DEFENDANT of RIGHT to MOTION FOR NEW TRIAL and APPEAL, and APPOINTMENT of COUNSEL IF INDIGENT.**[[263]](#endnote-263)
   1. **You have a right to seek post judgment relief from your conviction of the crime(s) by either making a motion for a new trial in this court and/or filing an appeal to a higher, appellate court. If you want to file a motion for new trial or an appeal, then you will need to file the said motion or a notice of appeal with the Clerk of Superior Court of this county within 30 days. You may want to more fully discuss this with your attorney. If a motion for new trial is made and the court denies it, you will have 30 days from the filing of the order of denial in which to file with the Clerk of Court your notice of appeal.**
   2. **You have a right to have an attorney represent you on the motion for new trial and the first level of direct appellate review and, if you cannot afford to hire an attorney, the Court will provide you an attorney and a transcript of your trial at no cost.**[[264]](#endnote-264)
2. **ADVISEMENT OF HABEAS STATUTE OF LIMITATIONS:**[[265]](#endnote-265)
   1. IF FELONY CONVICTION: **In a felony, usually you have a period of four years from the date that your sentence in this Court becomes final to file a habeas corpus petition.**
   2. IF MISDEMEANOR CONVICTION: **In a misdemeanor, usually you have a period of one year (in the case of a traffic misdemeanor, 180 days) from the date your sentence in this Court becomes final to file a habeas corpus petition.**[[266]](#endnote-266)
3. Ensure this conviction is tracked by judge to ensure timely hearings on motion for new trial.[[267]](#endnote-267)

**END OF TRIAL**

**ENDNOTES**

1. This outline was originally provided by Judge Parrott when the author became a Superior Court judge. It has been adapted to policies and procedures of the Augusta Judicial Circuit. The references have been updated as of November 2018. Going forward, there may be edits which include references to older cases or older versions of *Ga. Trial Practice* or other treatises. [↑](#endnote-ref-1)
2. There are no cases which suggest that the trial court is under a duty to put the plea offer on the record but there are numerous ineffective assistance cases where the defendant claimed he was unaware of any plea offer and would have accepted it of he had known of the offer. Putting offer on the record eliminates that issue and allows the parties to put recidivism issue on record as well. Be aware of *Alexander v. State*, 297 Ga. 59 (2015) which holds that if the defendant is entering a plea in which recidivism notice under §17-10-7(c) is not waived, that fact must be made known to the defendant prior to sentencing because the defendant would not be eligible for parole, even on a “blind plea.” [↑](#endnote-ref-2)
3. *Carr v. State*, 301 Ga. 128, 130-131 (2017). [↑](#endnote-ref-3)
4. This frequently occurs when a defendant is charged with a crime and also charged with possession of a firearm by a convicted felon. *Head v. State*, 253 Ga. 429 (1984). While the trial judge is not required to bifurcate a trial on its own motion (*Pyburn v. State*, 175 Ga. App. 158 (1985)), it is probably a better practice to clarify whether there will be a request to bifurcate before the trial begins and the jury is summoned. NOTE: if you have a bifurcated trial, the indictment/accusation needs to be redacted to remove any reference to the “other” charge.

   There is no need or requirement to bifurcate the trial if the possession of a firearm by a convicted felon charge is relevant to the primary charge (i.e. felony murder). *Roberts v. State*, 212 Ga. App. 607, 608 (1994). But the court will need to give a limiting instruction if the counts are tried together in a single trial. *Appling v. State*, 256 Ga. 36, 38 (1986); *Shepard v. State*, 300 Ga. 167, 172 (2016). [↑](#endnote-ref-4)
5. O.C.G.A. §17-8-25; *Morris v. State*, 303 Ga. 192, 194-195 (2018). [↑](#endnote-ref-5)
6. Be aware of *Littlejohn v. State*, 320 Ga. App. 197 (2013) that provides that a *Batson* challenge is timely even if made after the jury has been selected but before the jury was sworn. [↑](#endnote-ref-6)
7. The *Faretta* waiver is on the CSCJCloud. However, understand that the defendant has a right to counsel AND a right to represent himself. *Wiggins v. State*, 298 Ga. 366 (2016)-addresses right to represent self. *Tyner v. State*, 334 Ga. App. 890 (2015)-addresses right to counsel even where defendant tries to represent himself and almost immediately decides to request counsel. [↑](#endnote-ref-7)
8. *Brown v. State*, 346 Ga. App. 245 (2018). [↑](#endnote-ref-8)
9. *Brown v. State*, 346 Ga. App. 245 (2018). [↑](#endnote-ref-9)
10. *Roberts v. State*, 344 Ga. App. 324, 332-333 (2018); Concerning “gag orders,” see *WXIA-TV v. State*, 303 Ga. 428, 811 S.E.2d 378 (2018). [↑](#endnote-ref-10)
11. *Anderson v. State*, 206 Ga. App. 354, 355 (1992); *Ney v. State*, 227 Ga. App. 496, 503 (1997); *Roper v. State*, 251 Ga. 95, 98 (1983) (“Nonetheless, we observe that by far the better practice is to order complete recordation.”); *McFarlane v. State*, 291 Ga. 345, 346-347 (2012). [↑](#endnote-ref-11)
12. *See* USCR §10.3, **Requests and Exceptions to Charge**. The author sends out written charges in every criminal case and, therefore, obtaining electronic copies aid in that process. [↑](#endnote-ref-12)
13. *See* OCGA §15-12-165. [↑](#endnote-ref-13)
14. OCGA §15-12-165. [↑](#endnote-ref-14)
15. OCGA §17-8-4 (a). [↑](#endnote-ref-15)
16. OCGA §15-12-165. [↑](#endnote-ref-16)
17. OCGA §15-12-165. [↑](#endnote-ref-17)
18. ***STRIKES BY MULTIPLE DEFENDANTS***: OCGA §17-8-4(b):

    “. . .[W]hen **two or more defendants** are **tried jointly** for a crime or offense, such defendants shall be entitled to the **same number of strikes as a single defendant** if tried separately. The strikes shall be exercised jointly by the defendants or shall be apportioned among the defendants in the manner the court shall direct. [Also] the court, upon request of the defendants, **shall** allow an **equal number of additional strikes** to the defendants, **not to exceed five each**, as the court shall deem necessary…. The court may allow the state additional strikes not to exceed the number of additional strikes as are allowed to the defendants.”

    NOTE ON STATUTE: **If requested**, multiple defendants have a right to extra strikes with the court determining if each will get 1 to 5 EXTRA strikes. Each defendant would get an equal number of strikes. The court has discretion on whether to give the state any extra strikes. Also the Court does not have to give an equal number to the state but may give any number "not to exceed the number . . . allowed to the defendants[,]” that is, with the maximum being the total extra strikes given to all defendants. If multiple defendants, use same method for determining extra strikes of alternate jurors. OCGA §15-12-169. **BEWARE APPORTIONING BASE STRIKES BETWEEN CO-DEFENDANTS**. [↑](#endnote-ref-18)
19. *See* OCGA §15-12-160.1. [↑](#endnote-ref-19)
20. OCGA §15-12-168. **Authority to call alternate jurors:** “Whenever in the opinion of a judge of a superior court any felony trial is likely to be a protracted one, immediately after the jury has been impaneled and sworn the court shall direct the calling of one or more additional jurors to be known as ‘alternate jurors.’” [↑](#endnote-ref-20)
21. OCGA §15-12-169.1. [↑](#endnote-ref-21)
22. This rule applies to trials with **one defendant** **or** **co-defendants who do not request extra strikes** for selection of the alternate juror(s). Otherwise, it sets number for standard alternate panel. [↑](#endnote-ref-22)
23. When **multiple co-defendants**, OCGA §15-12-169.1 incorporates OCGA §17-8-4(b). [↑](#endnote-ref-23)
24. This warning cannot be overstated! Ensure that the defendant(s) are always present for every stage and event within the trial. Failure to do so can result in reversal. *Payne v. State*, 290 Ga. App. 589 (2008); *Peterson v. State*, 284 Ga. 275 (2008). Some judges elect to have the defendant approach the bench during any bench conferences. Personally, my security personnel do not want that to happen so I simply do not have bench conferences. Sending the jury out—even for short periods of time—ENSURES that you do not violate the rule. See *Lyde v. State*, 311 Ga. App. 512, 513-516 (2011); *Hanifa v. State*, 269 Ga. 797, 807 (1998); *Phillips v. Harmon*, 297 Ga. 386 (2015). The case of *Brewner v. State*, 302 Ga. 6 (2017) was appealed to the US Supreme Court-Cert Denied 8/14/2017. [↑](#endnote-ref-24)
25. OCGA §15-12-138. [↑](#endnote-ref-25)
26. OCGA §15-12-140. (new effective 2013) [↑](#endnote-ref-26)
27. OCGA §15-12-132. [↑](#endnote-ref-27)
28. This process is not required but allows the lawyers an opportunity to introduce themselves to the panel and also allows defense counsel to introduce the defendant. This process usually also allows the court reporter an opportunity to check microphones, etc. [↑](#endnote-ref-28)
29. It is important to note that it is proper for the court to propound the general, statutory qualification questions to the panel *en masse* and then, IF REQUESTED, to put the panel into the box in groups of 12 for individual voir dire. *Hammond v. State*, 273 Ga. 442, 443-445 (2001). ”The court's duty to place the jurors in the box is triggered upon a request by either party that he do so. The statute does not provide for judicial discretion in the matter. The court's ruling [denying appellant's request to place prospective jurors in the jury box in panels of 12 for voir dire] was thus erroneous as a matter of law.” *Mathis v. State*, 176 Ga. App. 362 (1985). It is important to note that it is proper for the court to propound the general, statutory qualification questions to the panel *en masse* and then, IF REQUESTED, to put the panel into the box in groups of 12 for individual voir dire. *Hammond v. State*, 273 Ga. 442, 443-445 (2001). [↑](#endnote-ref-29)
30. O.C.G.A. § 5-6-41(a); *McFarlane v. State*, 291 Ga. 345 (2012). [↑](#endnote-ref-30)
31. **NOTE—THIS CHANGED TO 3RD DEGREE IN JULY 2016! OCGA §15-12-135**, **Disqualification for relationship** **to interested party**: “(a) All trial jurors in the courts of this state shall be disqualified to act or serve in any case or matter when such jurors are related by consanguinity or affinity to any party interested in the result of the case or matter within the third degree as computed according to the civil law. Relationship more remote shall not be a disqualification.” Note: The civil law degree of kinship is ascertained by counting from the juror to the common ancestor to the interested party. Therefore the correct method of computation is to count the “steps” or generations from one ancestor to the next counting each step or generation as one degree and not to count each ancestor as a degree.] See *Cheeks v. State*, 234 Ga. App. 446 (507 S.E.2d 204) (1998). “Consequently, under the civil law formula, first cousins are related within the fourth degree of consanguinity, second cousins come within the sixth degree, and third cousins are eighth-degree relations.” *Id*. at 449.

    *Ga. Crim. Trial Prac.* (2016-2017 ed.), §18-23, Challenge for cause — relationship: “Justice Bleckley once said: *‘The groom and bride each comes within/ The circle of the other’s kin;/ But kin and kin are still no more/ Related than they were before.*’ Thus, while a husband or a wife is said to be related to the relations of the other, their marriage does not cause the relatives of the husband to be relatives of the family of the wife.”

    *Alexander v. State*, 260 Ga. 870 (401 S.E.2d 7) (1991): “*A criminal defendant [husband] is considered related by marriage to blood relatives of his wife, but not to people that his wife is related to only by marriage.” Garrett v. State*, 203 Ga. 756 (48 S.E.2d 377) (1948), contains similar quote using language in brackets.

    *Georgia Power Co. v. Moody*, 186 Ga. 343 (197 S.E. 844) (1938): *“The general rule is that the husband is related by affinity to the blood relatives of the wife, and the wife is likewise related to the blood relatives of the husband. This relationship by affinity is dissolved by the death of either party to the marriage which created the affinity provided the deceased party left no issue living.”*

    *Eaton v. Grindle*, 236 Ga. 324, 325 (223 S.E.2d 670) (1976): “The statute is applicable to jurors and interested parties related by consanguinity or affinity, i.e., by blood or by marriage. ***The husband is related to his wife’s kindred by affinity in the same degree that she is related by consanguinity.*** See *Burns v. State*, 89 Ga. 527 (15 S.E. 748) (1892).” But see *Cheeks v. State*, 234 Ga. App. 446 (1980), that criticizes the degree of relationship computed in this case. [↑](#endnote-ref-31)
32. *Banfield v. State*, 221 Ga. App. 156 (1996). [↑](#endnote-ref-32)
33. *McKee v. State*, 168 Ga. App. 214 (1983). In *McKee*, the juror was the wife of the officer who questioned the defendant and swore out the arrest warrant for the defendant. Be aware, there are several other cases in which a juror’s relationship to someone in law enforcement who was not directly involved with the defendant’s particular case has been held as non-disqualifying. See *Ga. Practice and Procedure* (2016-2017 ed.) §18-23. [↑](#endnote-ref-33)
34. OCGA §15-12-163. [↑](#endnote-ref-34)
35. A potential juror who has a pending First Offender sentence is NOT disqualified. *Humphreys v. State*, 287 Ga. 63 (2010)–or if the conviction is on direct appeal, NOT disqualified. *Turnipseed v. State*, 53 Ga. App. 194 (1936). [↑](#endnote-ref-35)
36. Juror cannot be removed for cause because of an inability to hear. *Jones v. State*, 249 Ga. App. 327 (2001); *Carter v. State*, 228 Ga. App. 335, 337 (1997). In *Jenkins v.* State, 269 Ga. 282, 289 (1998), the Supreme Court held it was not error for the trial court to excuse a prospective juror who had difficulty hearing and did not have own a hearing aid. However, that hearing disability may be a race neutral reason to strike a juror with a peremptory challenge. *Jones*, at 327. [↑](#endnote-ref-36)
37. Court may allow the prosecuting attorney to propound them. *Davis v. State*, 189 Ga. App. 439 (2) (376 S.E.2d 230) (1988); *Robertson v. State*, 268 Ga. 772 (5) (493 S.E.2d 697) (1997). [↑](#endnote-ref-37)
38. OCGA §15-12-164. [↑](#endnote-ref-38)
39. OCGA §15-12-163 [felony jury]; *State Highway Dep’t v. Smith,* 117 Ga. App. 210 (1968); *Taylor v. Warren*, 175 Ga. 800, 804 (166 S.E. 225, 227) (1932). [↑](#endnote-ref-39)
40. Since apparently the above questions would clarify whether jurors appear qualified under statutory questions asked under OCGA §15-12-164, the Court should be aware and take action if any juror appears disqualified under the following statute at any time during voir dire:

    OCGA §15-12-163, **Challenges for cause; hearing of evidence; when objection may be made:**

    (a) When each ***juror*** is called, he shall be presented to the accused in such a manner that he can be ***distinctly seen***.

    (b) The state or the accused may make any of the following objections to the juror:

    (1) That the juror is not a ***citizen, resident in the county***;

    (2) That the juror is under ***18 years of age***;

    (3) That the juror is incompetent to serve because of ***mental illness*** or ***mental retardation***, or that the juror is ***intoxicated***;

    (4) That the juror is so near of ***kin to the prosecutor, the accused, or the victim*** as to disqualify the juror by law from serving on the jury;

    (5) That the juror has been ***convicted of a felony*** in a federal court or any court of a state of the United States and the juror's ***civil rights*** have ***not been restored***; or

    (6) That the juror is unable to communicate in the ***English language***.

    (c) It shall be the duty of the court to hear immediately such evidence as is submitted in relation to the truth of these objections; the juror shall be a competent witness for this purpose. If the judge is satisfied of the truth of any objection, the juror shall be set aside for cause. [↑](#endnote-ref-40)
41. ”The court's duty to place the jurors in the box is triggered upon a request by either party that he do so. The statute does not provide for judicial discretion in the matter. The court's ruling [denying appellant's request to place prospective jurors in the jury box in panels of 12 for voir dire] was thus erroneous as a matter of law.” *Mathis v. State*, 176 Ga. App. 362 (1985). It is important to note that it is proper for the court to propound the general, statutory qualification questions to the panel en masse and then, IF REQUESTED, to put the panel into the box in groups of 12 for individual voir dire. *Hammond v. State*, 273 Ga. 442, 443-445 (2001). [↑](#endnote-ref-41)
42. See **USCR §10.1** about **procedure** and **limitations**. The court can require that questions be asked once to full array of the jurors, rather than to every juror—one at a time. *Legare v. State*, 256 Ga. 302, 303 (1986).

    **DURING VOIR DIRE, NOTE** *Kim v. Walls*, 275 Ga. 177, 563 S.E.2d 847 (2002), held: “OCGA §15-12-134 provides: ‘In all civil cases it shall be good cause of challenge that a juror has expressed an opinion as to which party ought to prevail or that he has a wish or desire as to which shall succeed. Upon challenge made by either party upon either of these grounds, it shall be the duty of the court to hear the competent evidence respecting the challenge as shall be submitted by either party, the juror being a competent witness. The court shall determine the challenge according to the opinion it entertains of the evidence adduced thereon.’

    . . . [T]he broad general principle intended to be applied in every case is that each juror shall be so free from either prejudice or bias as to guarantee the inviolability of an impartial trial. . . . If error is to be committed, let it be in favor of the absolute impartiality and purity of the jurors. [Cit.] Thus, when a prospective juror has a relationship with a party to the case that is either close or subordinate, or one that suggests bias, the trial court must do more than "rehabilitate" the juror through the use of any talismanic question. The court is statutorily bound to conduct voir dire adequate to the situation, whether by questions of its own or through those asked by counsel.

    . . . [T]he trial court [is required] to conduct voir dire of sufficient scope and depth to ascertain any partiality. [Cits.] To assist the court in accomplishing this task, counsel should be given the "broadest of latitude" in questioning prospective jurors who have expressed interest or bias. *White v. State*, 230 Ga. 327, 336 (5) (196 S.E.2d 849) (1973). . . . [W]e [reject] a bright-line or per se rule that [excludes] a class of persons from jury duty . . .

    Our holding today in no way modifies our adherence to the fundamental principle that "the law presumes that potential jurors are impartial," [Cit.], and that the burden of proving partiality still rests with the party seeking to have the juror disqualified. OCGA §15-12-133; OCGA §15-12-163. See also *Clack-Rylee v. Auffarth*, 273 Ga. App. 859, 616 S.E.2d 193 (2005).

    **BUT NOTE: Where juror is client of counsel in case, no automatic disqualification. *Moore*, 281 Ga. 81 (2006). Where juror is patient of party physician-no automatic disqualification. *Cohen,* 267 Ga. 422 (1997).**

    Juror Rehabilitation by trial judge- *Clark v. State*, 309 Ga. App. 749, 711 S.E.2d 339 (2011); *Ros v. State*, 279 Ga. 604 Ga. 604, 619 S.E.2d 644 (2005); *Poole v. State*, 291 Ga. 848 (2012). [↑](#endnote-ref-42)
43. *Wilkins v. State*, 246 Ga. App. 667 (2000). [↑](#endnote-ref-43)
44. *Henderson v. State*, 251 Ga. 398, 399 (1983). [↑](#endnote-ref-44)
45. *Lester v. State,* 343 Ga. App. 618 (2017); *Stewart v. State*, 262 Ga. App. 426, 427 (2003); Meeks *v. State*, 216 Ga. App. 630, 632 (1995) citing *Henderson v. State*, 251 Ga. 398, 400 (1983). [↑](#endnote-ref-45)
46. “In determining whether a trial court is required to excuse a jury panel for remarks made during voir dire, the inquiry is whether the remarks were inherently prejudicial and deprived [defendant] of his right to begin his trial with a jury free from even a suspicion of prejudgment or fixed opinion. If so, then the trial court's failure to excuse the panel constitutes an abuse of discretion.” *Johnson v. State*, 340 Ga. App. 429 (2017). Proper procedure for a “tainted panel” is a motion to disqualify panel and have the jury selected from a different panel. *Sharpe v. State*, 272 Ga. 684, 687-688 (2000). Any motion for mistrial made before the jury is impaneled and sworn is premature and Court should overrule it. *Smalls v. State*, 174 Ga. App. 698 (1985). However, it is permissible to ignore the “use of incorrect nomenclature” if the import of the motion is to make a “challenge to the poll.” *Herrington v. State*, 300 Ga. 149, 152 (2016). Where there is no timely objection (i.e. before the jury is impaneled or sworn), the objection may be waived. *Smith v. State*, 276 Ga. 97, 98 (2003). “Generally, dismissal of a jury panel is required when, during voir dire, a prospective juror relays information that is specific to the defendant and germane to the case for which the defendant is on trial. Dismissal is not required, however, when the statements establish only gossamer possibilities of prejudice.” *Johnson v. State*, 340 Ga. App. 429 (2017). [↑](#endnote-ref-46)
47. OCGA §15-12-133. [↑](#endnote-ref-47)
48. *Cowan*, 156 Ga. App. 650 (1980). [↑](#endnote-ref-48)
49. *Henderson*, 251 Ga. 398 (1983); *Craig*, 165 Ga. App. 156 (1983) [↑](#endnote-ref-49)
50. *Kim v. Walls*, 275 Ga. 177 (2002) [↑](#endnote-ref-50)
51. *Glover v. Maddox*, 100 Ga. App. 262 (1959) (civil case). *Payne v. State*, 195 Ga. App. 523 (1990); *Darden v. State*, 212 Ga. App. 345, 346 (1994). [↑](#endnote-ref-51)
52. *Hendricks*, 108 Ga. App. 259 (1963) (overruled on other grounds) [↑](#endnote-ref-52)
53. *Curtis*, 224 Ga. 870 (1968) [↑](#endnote-ref-53)
54. *Falsetta*, 158 Ga. App. 392 (1981); *Henderson*, 251 Ga 398 (1983) [↑](#endnote-ref-54)
55. *Meeks*, 269 Ga. App. 836 (2004) [↑](#endnote-ref-55)
56. *Ellington*, 292 Ga. 109 (2012) [↑](#endnote-ref-56)
57. *Keating*, 309 Ga. App. 804 (2011) [↑](#endnote-ref-57)
58. *Flores*, 277 Ga. App. 211 2006) [↑](#endnote-ref-58)
59. *Thomas*, 296 Ga. 485 (2015) [↑](#endnote-ref-59)
60. *Spivey*, 253 Ga. 187, 193 (1984); *Frazier*, 138 Ga. App. 640 (1976); *Alderman*, 254 Ga. 206 (1985); *Curtis* 224 Ga. 870, 871 (1968) [↑](#endnote-ref-60)
61. *Brown* 170 Ga. App. 398 (1984) [↑](#endnote-ref-61)
62. *White*, 230 Ga. 327 (1973); *Frazier*, 138 Ga. App. 640 (1976); *Falsetta*, 158 Ga. App. 392 (1981) [↑](#endnote-ref-62)
63. *Frazier*, 138 Ga. App. 640 (1976) [↑](#endnote-ref-63)
64. *Flores*, 277 Ga App. 211 (2006) [↑](#endnote-ref-64)
65. *Alderman*, 254 Ga. 206 (1985); *Frazier* 138 Ga. App. 640 (1976); *McGinnis* 135 Ga. App. 843 (1975); *Curtis* 224 Ga. 870, 871 (1968). [↑](#endnote-ref-65)
66. *Gatlin v. State*, 236 Ga. 707 (1976) [↑](#endnote-ref-66)
67. “Hypothetical voir dire questions are not *per se* improper [cits omitted] but a trial judge should be cautious in allowing counsel to propound question which ask the juror to assume that certain facts will be proven. Such questions tend to improperly influence jurors.” *Waters v. State*, 248 Ga. 355 (1981); *Walker v.* State, 294 Ga. 752, 755 (2014). USCR §10.1 provides “hypothetical questions are discouraged, but may be allowed in the discretion of the court. It is improper to ask hoe a juror would act in certain contingencies or on a certain hypothetical state of facts. No question shall be framed so as to require a response from a juror which might amount to a prejudgment of the action.” [↑](#endnote-ref-67)
68. *Waters*, 248 Ga. 355 (1981) [↑](#endnote-ref-68)
69. *Holloway*, 137 Ga. App. 124 (1975); *Stewart*, 262 Ga. App. 426 (2003); *Johnson,* 244 Ga. 295 (1979). [↑](#endnote-ref-69)
70. *Ganas*, 245 Ga. App. 645 (2000) [↑](#endnote-ref-70)
71. *Freeman*, 132 Ga. App. 615 (1974) [↑](#endnote-ref-71)
72. *Freeman*, 132 Ga. App. 615 (1974) [↑](#endnote-ref-72)
73. *Hubbard*, 274 Ga. App. 184 (2005) [↑](#endnote-ref-73)
74. *McNeal,* 228 Ga. 633, 635 (1972); *Mills*, 137 Ga. App. 305 (1976); *Montgomery*, 128 Ga. App. 116 (1973). [↑](#endnote-ref-74)
75. *Gonzales v. State*, 345 Ga. App. 334, 340-341 (2018). [↑](#endnote-ref-75)
76. *Jenkins*, 157 Ga. App. 310 (1981). [↑](#endnote-ref-76)
77. *Stack*, 234 Ga. 19 (1975). [↑](#endnote-ref-77)
78. *Chastain*, 255 Ga. 723 (1986); *Ross*, 194 Ga. App. 285 (1990). [↑](#endnote-ref-78)
79. *Hill*, 221 Ga. 65, 68 (1965); *Curtis*, 224 Ga. 870, 871; *McNeal*, 228 Ga. 633, 635-636; *Bethay*, 235 Ga 371 (1975); *Stack*, 234 Ga. 19 (1975). [↑](#endnote-ref-79)
80. *Foster*, 288 Ga. 98 (2010); *Simmons*, 282 Ga. 183 (2007); *Bennett*, 153 Ga. App. 21 (1980); *Smith*, 148 Ga App 1 (1978); *Cox*, 248 Ga 713 (1982); *Ganas*, 245 Ga. App. 645 (2000). [↑](#endnote-ref-80)
81. *Bramble*, 263 Ga. 745 (1994); *Baxter*, 254 Ga. 538 (1985). [↑](#endnote-ref-81)
82. *Jenkins*, 157 Ga App 310 (1981). [↑](#endnote-ref-82)
83. *Williams*, 259 Ga. App. 742 (2003); *Alderman*, 254 Ga. 206 (1985); *Meeks,* 216 Ga. App. 630 (1995). [↑](#endnote-ref-83)
84. *Westbrook v. State*, 242 Ga. 151 (1978). [↑](#endnote-ref-84)
85. *McCoy*, 231 Ga. App. 703 (1998); *Goughf*, 232 Ga. 178 (1974). [↑](#endnote-ref-85)
86. *Westbrook v. State*, 242 Ga. 151 (1978). [↑](#endnote-ref-86)
87. *Evans*, 222 Ga. 392; *Pinion*, 225 Ga. 36 (1969). [↑](#endnote-ref-87)
88. *Freeman*, 132 Ga. App. 615 (1974). [↑](#endnote-ref-88)
89. *Freeman*, 132 Ga. App. 615 (1974). [↑](#endnote-ref-89)
90. *Baxter*, 254 Ga. 538, 543 (1985); *Conley*, 157 Ga. App. 166 (1981); *McCoy*, 231 Ga. App.703 (1998). [↑](#endnote-ref-90)
91. *Todd*, 243 Ga. 539 (1979); *Freeman*, 132 Ga. App. 615 (1974). [↑](#endnote-ref-91)
92. *Westbrook v. State*, 242 Ga. 151 (1978). [↑](#endnote-ref-92)
93. *McNeal*, 228 Ga. 633, 636; *Lundy*, 130 Ga. App. 171 (1973). [↑](#endnote-ref-93)
94. *Ganas*, 245 Ga. App. 645 (2000). [↑](#endnote-ref-94)
95. *Stack*, 234 Ga. 19 (1975); *Mills*, 137 Ga. App. 305 (1976). [↑](#endnote-ref-95)
96. *Conley*, 157 Ga. App. 166 (1981); *Anderson*, 161 Ga. App. 816 (1982); *Freeman*, 132 Ga. App. 615 (1974). [↑](#endnote-ref-96)
97. *Reynolds*, 231 Ga. 582; *Williams*, 165 Ga. App. 69 (1983). [↑](#endnote-ref-97)
98. *Smalls*, 174 Ga. App. (1985). [↑](#endnote-ref-98)
99. *Williams*, 249 Ga. 6, 7 (1982). [↑](#endnote-ref-99)
100. *McCoy*, 231 Ga. App. 703 (1998). [↑](#endnote-ref-100)
101. *Freeman*, 132 Ga. App. 615 (1974). [↑](#endnote-ref-101)
102. *Hutcheson v. State*, 246 Ga. 13 (1980). Such officers are eligible to be on the panel but, upon motion, they shall be removed for cause. [↑](#endnote-ref-102)
103. *Smith v. State*, 201 Ga. App. 82 (1991). [↑](#endnote-ref-103)
104. *Dixon v. State*, 180 Ga. App. 222 (1986). [↑](#endnote-ref-104)
105. *Kirkland v. State*, 274 Ga. 778 (2002). [↑](#endnote-ref-105)
106. *Holmes v. State*, 269 Ga. 124, 126 (1998); *Goulding v. State*, 334 Ga. App. 349 (2015). [↑](#endnote-ref-106)
107. “For a juror to be excused for cause, it must be shown that he or she holds an opinion of the guilt or innocence of the defendant that is so fixed and definite that the juror will be unable to set the opinion aside and decide the case based upon the evidence or the court's charge upon the evidence.” “The fact that at some point during voir dire, a prospective juror expressed some doubt as to her own impartiality does not demand as a matter of law that she be excused for cause.” *Leonard v. State*, 292 Ga. 214, 216-217 (2012). The trial court has a great deal of deference on this issue (striking for cause a juror who is ambivalent as to their impartiality). However, where the ultimate answer is either ambiguous or a statement that the juror cannot be fair and impartial, the juror should be excused for cause. [↑](#endnote-ref-107)
108. Juror Rehabilitation by trial judge- *Clark v. State*, 309 Ga. App. 749, 711 S.E.2d 339 (2011); *Ros v. State*, 279 Ga. 604 Ga. 604, 619 S.E.2d 644 (2005); *Poole v. State*, 291 Ga. 848 (2012). [↑](#endnote-ref-108)
109. *Budhani v. State*, 345 Ga. App. 34, 41 (2018). [↑](#endnote-ref-109)
110. *Budhani v. State*, 345 Ga. App. 34, n. 6 (2018). [↑](#endnote-ref-110)
111. I generally allow the jurors to go to the restroom, etc. here but allowing them to roam the courthouse could prove problematic if someone approaches them in halls so our bailiffs stand in the hallway and observe what is going on. Not a perfect solution but it works for us.

     Also pursuant to **USCR §11**, ***if above 15 minute recess given*** for counsel to prepare for jury selection, “thereafter, during the selection of jurors, the **court in its discretion**, upon **first warning counsel**, may **restrict to not less than 1 minute** the time within which each party may exercise a peremptory challenge; a party shall **forfeit a challenge** by failing to exercise it within the time allowed.” [↑](#endnote-ref-111)
112. **JURY SELECTION PROCEDURE proposed at Superior Court Council meeting**:

     Upon completion of the voir dire, the jurors will be seated en masse in the courtroom. The Clerk of Superior Court will be seated between counsel tables and will call the names of the jurors one at a time in the numerical order that they appear on the jury list. As each juror’s name is called, the juror shall be instructed to stand up for about five seconds where he or she is currently seated so that counsel can refresh their memories on how the juror looks. After the name of the first juror is called, the Clerk shall give the jury list to State’s counsel. State’s counsel will note on the jury list whether the State accepts or excuses the juror and will return the jury list to the Clerk. Next the Clerk gives the jury list to defense counsel. If the State has accepted the juror, defense counsel will note on the jury list whether the defense accepts or excuses the juror and will return the jury list to the Clerk. As the State exercises its peremptory challenges, it shall mark each with a “S” (or its readily distinguishable legal equivalent such as a pi “π” ) and the number of the challenge just exercised. As the Defense exercises its peremptory challenges, it shall mark each with a “D” (or its readily distinguishable legal equivalent such as a delta “Δ”) and the number of the challenge just exercised. The Clerk will mark and number each juror that is accepted by both sides as they occur. At this time the juror would not know whether they had been accepted or excused by either the State or the defendant; **counsel should insure that neither their comments nor actions should give any indication at this time to a juror that they have been excused or accepted.** This same method would be used for the balance of the jurors in the numerical order that they appear on the jury list.

     When 12 jurors have been accepted by both the State and defendant the Clerk notifies the Court by saying “we have a jury.” The Judge then calls both counsel and Clerk to the bench to see if there are any exceptions by either side to the jury. If either side moves to make a *Batson* objection, and it is found they have made a prima facie showing, the Court then calls upon the opposing or responding side to make explanation as to why the questioned juror has been excused. If the Court determines there are satisfactory reasons given by the responding side then the jury is accepted and seated.

     If the Court determines that the explanation for excusing one or more of the jurors is not acceptable to the Court, it would so rule. When a *Batson* motion is granted, counsel is told by the Court that the juror excused by responding side is on the moving side to accept or excuse. The lawyers then proceed from that juror down the list of jurors and reconsider each of the jurors on the original list. It is not necessary for jurors to stand up when the Clerk recalls these jurors because the attorneys have seen the jurors and presumably are familiar with them. There would be no indication to the jurors that anything has transpired to affect any one of them one way or another.

     By going back to the strike of the responding side that is disallowed, the moving side will then have the opportunity to make the remainder of his strikes fresh from that point on. Of course, there may be later jurors whose peremptory challenges have been likewise found invalid, and the party who made the improper earlier strike may not challenge them again.

     One advantage of having, in effect, a silent method of jury selection is that if the responding side improperly exercises a peremptory challenge that juror does not have to be excused from jury service. The *Batson* decision addresses itself not only to the rights of the parties but also to the rights of the jurors to serve. If the jurors are notified when counsel exercises their peremptory challenges it would appear this would necessitate having an entire new voir dire with 42 additional jurors.

     [*Selection of* ***alternate jurors*** *will be handled similarly from a* ***separate alternate juror pool****. For example, if 1 defendant, the separate alternate juror pool of 6 prospective jurors will be used to select two (2) alternate jurors.*] [↑](#endnote-ref-112)
113. There is no requirement that the judge make any comments during this part of the process. However, I have found it valuable to fill the time with comments/discussion of things about the history of the Circuit, the courthouse, explain the difference between Probate Court, Magistrate Court, etc. and other topics that have nothing to do with guilt/innocence or anything else that might be deemed a comment on the evidence or punishment. [↑](#endnote-ref-113)
114. For *Batson v. Kentucky* challenge, *see* *Ga. Crim. Trial Prac.* (2016-2017 ed.), §18-31. See *Batson* memo on CSCJCloud. If State raises it, it is referred to as a *McCollum* motion. If there is a successful *Batson* challenge then following remedies have been successful (*See Batson memo)*:

     (1) reinstate the improperly struck juror, and the previously chosen twelfth juror can be made into an alternate juror. *Stokes v. State*, 281 Ga. 825, 829 (3), 642 S.E.2d 82 (2007); *Holmes v. State*, 273 Ga. 644*,* 645-46 (2), 543 S.E.2d 688 (2001) [if more than one juror struck improperly, then presumably all chosen jurors over twelve are made into alternate jurors].

     (2) reinstate the improperly struck jurors, and “then [permit] selection to resume starting with the first reinstated juror.” *Eppinger v. State*, 231 Ga. App. 614, 616 (5), 500 S.E.2d 383 (1998).

     (3) restrike the entire jury from the same panel that has been voir dired and disallow any peremptory strikes against the jurors that were previously improperly stuck. *Ellerbee v. State*, 215 Ga. App. 312, 315-18 (7), 450 S.E.2d 443 (1994).

     (4) Of course, *Batson* has always allowed for the “trial court to discharge the venire and select a new jury from a panel not previously associated with the case.” *Batson v. Kentucky*, 476 U.S. 79, 99 (1986). [↑](#endnote-ref-114)
115. A *Batson* motion is untimely when it is raised after the jury is sworn. *Littlejohn v. State*, 320 Ga. App. 197 (2013). As a practical matter, I am unclear how the judge would be able to proceed if the venire panel has been released following jury selection and it was eventually determined that a *Batson* violation had been established. [↑](#endnote-ref-115)
116. I do not identify the alternate juror(s). I am aware of which juror(s) are the alternates and the order in which they were selected (i.e. ALT 1, ALT 2, etc.). I feel that identifying the alternate leads to the alternate being less interested and more likely to not be attentive. I will identify them at the time of the jury charge as noted below. [↑](#endnote-ref-116)
117. OCGA §15-12-139. Please make sure your courtroom staff reminds you to swear the jury! I typically will not swear the jury until after a break in the proceedings on the off chance that something happens that would interfere with the trial. Remember, jeopardy attaches at the time the jury is sworn. [↑](#endnote-ref-117)
118. OCGA §24-6-615 and §24-6-616, more importantly §17-17-9. Exclusion of testifying victim [and immediate family] from criminal proceedings; separate victims’ waiting areas: Victim/immediate family not excluded unless (a) established that material and necessary witness and substantial probability that person’s presence impair conduct of fair trial or (b) removed for misconduct under same rules as for accused. If excluded, be sure they have separate waiting area from Defendant’s family and witnesses. If not excluded, the court shall require that victim testify as early as practical in the proceedings. [↑](#endnote-ref-118)
119. See *O’Kelley v. State*, 175 Ga. App. 503 (1) (333 S.E.2d 838) (1985). [↑](#endnote-ref-119)
120. *See* OCGA §24-6-615, Presence in courtroom of victim of criminal offense; *Superior Court Criminal Bench Book* §16.14. Witness who disobeys sequestration order is NOT incompetent to testify but is subject to contempt citation. *Scoggins*, 98 Ga. App. 360 (1958); *Keller*, 221 Ga. App. 846 (1996). The non-offending party can request instruction to the jury that they may consider the violation in determining the credibility of the witness *Jackson*, 222 Ga. App. 843 (1996). Superior Court Criminal Bench Book §16.14, **Rule of Sequestration of Witnesses**. As to police officers, *Thorpe*, 285 Ga. 604 (2009)-police officer not automatically excluded; *Carter*, 271 Ga App 588 (2005); *Warner v. State*, 281 Ga. 763, 765 (2007); *Burns v. State*, 288 Ga. App. 507, 509-510 (2007). [↑](#endnote-ref-120)
121. Judge has **discretio**n as to whether **jurors** may **take notes** and use them during deliberations. *Wilson v. Childers*, 174 Ga. App. 179 (5) (329 S.E.2d 503 (1985); *Denson* *v. State*, 149 Ga. App 453, 455 (3) (254 S.E.2d 455) (1979); *Wilson v. Childers*, 174 Ga. App. 179 (5) (1985); *Potts v. State*, 259 Ga. 96 (21) (376 S.E.2d 851) (1989). But does **not err** in **declining** to make these **notes** a **part** of the **record** on appeal. *Cromartie v. State*, 270 Ga. 780 (25) (514 S.E.2d 205) (1999). [↑](#endnote-ref-121)
122. *Denson v. State*, 149 Ga. App. 453, 455(3) (1979); *Miller*, 307 Ga. App. 598 (2011). [↑](#endnote-ref-122)
123. Some judges do not require that jurors leave their cell phones outside of the jury room during a trial. I really do not understand this policy, given the number of jury trials that have been reversed on appeal due to misconduct by jurors involving cell phones. [↑](#endnote-ref-123)
124. There is no requirement that you give preliminary instructions. However, I have found it helpful and it forms a good record in the event you misspeak or overlook a basic charge during the jury charge process. Preliminary instructions cannot serve as a substitute for complete instructions as the conclusion of the trial. *Massey v. State*, 270 Ga. 76 (1998). However, it is permissible and even commendable to give pre-trial instructions to the jury. *Paulhill v. State*, 229 Ga. 415, 416 (1972); *Oliver v. State*, 168 Ga. App. 477, 478 (1983). [↑](#endnote-ref-124)
125. USCR §10.2 provides, “Opening statements in criminal matters provides: “The *district attorney* may make an opening statement prior to the introduction of evidence. This statement shall be limited to expected proof by legally admissible evidence. *Defense counsel* may make an opening statement immediately after the state's opening statement and prior to introduction of evidence, or following the conclusion of the state’s presentation of evidence. Defense counsel’s statement shall be restricted to expected proof by legally admissible evidence, or the lack of evidence.”

     “The *trial court* has a *sound discretion* to *control* the *content* of the *opening statement* of either party, *particularly* with regard to matters of *questionable admissibility*.” *McGee v. State,* 272 Ga. 363 (3) (529 S.E.2d 366) (2000); *Wynn v. State,* 225 Ga. App. 206 (5) (483 S.E.2d 352) (1997). [↑](#endnote-ref-125)
126. Where prosecutor says this is the “worst case I have ever seen,” such a statement in opening is improper but does not require a mistrial. *McKibbibns v. State*, 293 Ga. 843, 849 (2013). If either attorney makes an improper argument, it is appropriate for the court to issue a curative instruction, reminding the jury that what the lawyers say is not evidence. Where applicable, also appropriate for court to admonish lawyers for improper argument such as personal opinion. [↑](#endnote-ref-126)
127. *Hernandez v. State*, 299 Ga. 796, 798-799 (2016), citing *Allen v. State*, 286 Ga. 392, 396-397 (2010). I do not allow jury questions to witnesses but some judges do allow that to occur. My opinion—very bad idea because it changes the overall trial strategy of the lawyers and could interject issues that were not intended (or appropriate) to be raised. [↑](#endnote-ref-127)
128. This is a limiting instruction I gave in a 404(b) case where I allowed the evidence as I found that it went to intent and was not barred under 403: “Sometimes evidence is admitted for a limited purpose. Such evidence may be considered by the jury for the sole issue or purpose for which the evidence is limited and not for any other purpose. In order prove to its case, the State must show intent. To do so, the State intends to offer evidence of other acts allegedly committed by the accused. You are permitted to consider that evidence only insofar as it may relate to those issues and not for any other purpose. You may not infer from such evidence that the defendant is of a character that would commit such crimes. The evidence may be considered only to the extent that it may show the issues that the state is required or authorized to prove in the crimes charged in the case now on trial. Such evidence, if any, may not be considered by you for any other purpose. The defendant is on trial for the offenses charged in this bill of indictment only and not for any other acts. Before you may consider any other alleged acts for the limited purposes stated, you must first determine whether it is more likely than not that the accused committed the other alleged acts. If so, you must then determine whether the act sheds any light on the Defendant’s intent in the crimes charged in the indictment in this trial. Remember to keep in mind the limited use and the prohibited use of this evidence about other alleged acts of the Defendant.  By giving this instruction, the Court in no way suggests to you that the Defendant has or has not committed any other acts, nor whether such acts, if committed, prove anything; this is solely a matter for your determination.” [↑](#endnote-ref-128)
129. Evidence is intrinsic if it is: 1) an uncharged offense which arose out of the same transaction(s) as the charged offense; 2) necessary to complete the story of the crime, **or** 3) inextricably intertwined with evidence of the charged offense. *Brooks v. State*, 298 Ga. 722, 726, n. 11 (2016). When evidence may tend to put the defendant’s character in issue, the state generally has to provide notice that they intend to introduce evidence of other crimes, wrongs or acts of the defendant (404(b)) before they can introduce such evidence. However, if the evidence is intrinsic to the charged crime as defined above, it is not considered an “other crime, wrong or act” because it essentially is a part of the charged crime. See also *Bradshaw v. State*, 296 Ga. 650 (2015); *State v. Jones*, 297 Ga. 156 (2015); *Gibbs v. State*, 340 Ga. App. 723 (2017); *Williams v. State*, 302 Ga. 474, 485-486 (2017); These factors have been cited by several cases but in *Sanchez-Villa v. State*, 341 Ga. App. 264, 272 (2017) the Court referred to the 3 factors as “*Brooks* factors” based upon the holding in *Brooks v. State*, 298 Ga. 722, 726 (2016).

     Be aware of §413 and §414 in sexual assault cases because those rules allow virtually any prior sex crime or sex act to be introduced in a case where sexual assault and/or child molestation is the charged offense. Notice is required if extrinsic to the charged crime but, by and large, the prior act comes into evidence where defendant is charged with a sex crime. *Steele v. State*, 337 Ga. App. 562 (2016); *Dority v. State*, 335 Ga. App. 83 (2015). [↑](#endnote-ref-129)
130. *Williams v. State*, 302 Ga. 474, 485-486 (2017), citing *U.S. v. Edouard*, 485 F.3d 1324, 1344 (11th Cir. 2007). [↑](#endnote-ref-130)
131. *Everhart v. State*, 337 Ga. App. 348, 352 (2016); Again, the last sentence of §24-4-404(b) provides, “Notice shall not be required when the evidence of prior crimes, wrongs, or acts is offered to prove the circumstances immediately surrounding the charged crime, motive, or *prior difficulties between the accused and the alleged victim*.” (emphasis supplied). [↑](#endnote-ref-131)
132. *Parks v. State*, 300 Ga. 303, 306 (2016); *Brown v. State*, 303 Ga. 158, 161 (2018). [↑](#endnote-ref-132)
133. *Brown v. State*, 303 Ga. 158, 161-162 (2018), citing *Olds v. State*, 299 Ga. 65, 70 (2016). [↑](#endnote-ref-133)
134. *Brown v. State*, 303 Ga. 158, 161-162 (2018). [↑](#endnote-ref-134)
135. *Brown v. State*, 303 Ga. 158, 164 (2018). [↑](#endnote-ref-135)
136. *Ga. Crim. Trial Prac.* (2016-2017 ed.), §20-6, **Jackson-Denno hearings**, provides in part:

     “The trial judge must be satisfied by a ***preponderance of the evidence*** that the *confession* was *freely* and *voluntarily* given, and, *where Miranda applies*, that the defendant *knowingly* and *intelligently waived* his *Miranda rights*. In *Jordan v. State,* 207 Ga. App. 710, 713 (3) (1993), the court pointed out that a resolution of the ‘*Miranda* issue, when there is one, does not dispense with the mandate that “a jury is not to hear a confession unless and until the trial judge has determined that it was freely and voluntarily given.”’ The trial judge does not have to make a formal finding of fact, but a mere ruling that he finds the issue in dispute and will let it go to the jury is insufficient. The judge must rule that he will admit or reject the confession for the consideration of the jury. The judge’s failure to make a preliminary finding as to voluntariness before submitting the confession to the jury violates the defendant’s Fourteenth Amendment rights. The Georgia Supreme Court has said that it prefers rather ‘**complete findings of fact**, if the evidence warrants them, **substantially as follows**:  ***I find from a preponderance of the evidence that the defendant was advised of each of his Miranda rights, that he understood them, that he voluntarily waived them, and that he thereafter gave his statement freely and voluntarily without any hope of benefit or fear of injury. (If the defendant denies having been advised of any one of his Miranda rights or says that he requested an attorney, specific findings as to the point in controversy should also be made.)***’ However, in *Bryant v. State*, 268 Ga. 664 (1997), the court pointed out that if there is no such findings of fact, a remand for clarification would generally be required.” [↑](#endnote-ref-136)
137. *Scott v. State*, 250 Ga. 195, 198 (1982), citing *Franklin v. State*, 245 Ga. 141, 150 (1980). However, the court may want to limit the amount of potentially prejudicial evidence if that point is not in controversy. [↑](#endnote-ref-137)
138. OCGA §24-1-103; *Womack v. Johnson*, 328 Ga. App. 543 (2014); *Stolte v. Fagan*, 291 Ga. 477 (2012). [↑](#endnote-ref-138)
139. *Mable v. State*, 197 Ga. App. 751 (1990). [↑](#endnote-ref-139)
140. *McKoy v. State*, 303 Ga. 327, 335 (2018). [↑](#endnote-ref-140)
141. *State v. Fletcher*, 252 Ga. 498, 499 (314 S.E.2d 888) (1984): *“Illinois v. Allen*, [397 U.S. 337 (90 S. Ct. 1057, 25 L. Ed. 2d 353) (1970)], holds that a defendant may waive his Sixth Amendment right to be present at his trial through his own misconduct and that in dealing with disruptive defendants the trial court is vested with discretion.” *State v. Fletcher*, 252 Ga. 498, 499 (314 S.E.2d 888) (1984). GA LEGAL STANDARD: *Lovelace v. State*, 262 Ga App 690 (2003).

     **If defendant fails to appear for trial** or fails to return following a break, **see** *Cesari v. State*, 334 Ga. App. 605 (2015) where defendant failed to return from a break in proceedings and, after court decided to go forward without defendant, the defendant showed up in the courthouse and was not allowed to enter courtroom because he was late. Ct of Appeals reversed conviction. But see *LaGon v. State*, 334 Ga. App. 14 (2015) where held if defendant fails to appear, court is not required to make “moment-by-moment inquiries” as to whether defendant wishes to be present.

     Superior Court Criminal Bench Book, §13.11, Disruptive Spectators or Participants [citing *Illinois v. Allen, supra]*: ***“Where disruptive conduct is presented by a defendant or witness, the judge should, out of the presence of the jury, patiently explain and warn the disruptive party of possible consequences of such conduct and steps that may be taken against such person, including:***

     ***(a) Being cited and punished for contempt;***

     ***(b) Being excluded from the courtroom until being assured of proper conduct;***

     ***(c) Being bound and gagged but allowed to remain in the courtroom***.”

     This *warning* may persuade the defendant to stop the disruptions. Repeated warnings or specific words not required *State v. Fletcher*, 252 Ga. 498 (1984). *Contempt* will prove a hollow threat in most criminal cases since the possible sentence so heavily outweighs any punishment for contempt. *Binding and gagging* should be a **last resort.** Except possibly when a defendant is *pro se*. *See* (*Rogers v. State*, 271 Ga. App. 698 (2) (2005); compare *Graham v. State*, 172 Ga. App. 660 ((1984) ((removal of pro se). However, binding and gagging a pro se defendant can pose a great risk of *reversal*. *Weldon v. State*, 247 Ga. App. 17 (1) (2000).

     “Removal is preferable to gagging or shackling the disruptive defendant.” ABA Standard, infra. Apparently, the best practice for removal includes: (1) The Court should warn the defendant outside the jury’s presence that disruptive behavior will result in removal; if this is not possible before removal, the record should be perfected on informing the defendant outside the presence of the jury as to these removal rules as soon thereafter as possible. (2) If removed, the defendant should be required to be present in the court building while the trial is in progress, (3) be given the opportunity of learning of the trial proceedings through his counsel at reasonable intervals, and (4) be given a continuing opportunity to return to the courtroom during the trial upon his assurance of good behavior. The removed defendant should be summoned to the courtroom at appropriate intervals, with the offer to permit him to remain in the courtroom repeated in open court each time. *State v. Fletcher*, supra, fn.2 at 501. (5) The Court should instruct the jurors to disregard the defendant’s removal from the courtroom and not to consider it in reaching a verdict. *West v. State*, 271 Ga. App. 522 (2005). See *Ga. Crim. Trial Prac*. (2016-2017 ed.), §17-7; *Sanders v. State*, 242 Ga. App. 487, 488 (1) (a) (2000); *Richards v. State*, 254 Ga. App. 708 (2) (2002).

     *Young v. State*, 269 Ga 478 (499 S.E.2d 604) (1998): “***RACC belt***,” an electronic security device worn under clothing and activated by a remote transmitter which enables law enforcement personnel to administer an electric shock to control courtroom behavior. *Young v. State*, 269 Ga 478 (499 S.E.2d 604) (1998). See also *Lovelace v. State*, 262 Ga. App. 690 (586 S.E.2d 386) (2003) (“*stun belt*”); *Nance v. State*, 280 Ga. 125, 126 (3) (623 S.E.2d 470) (2005).

     *Allen v. State*, 248 Ga. App. 79 (545 S.E.2d 629) (2001) *Criteria for shackling, including just ankles*: (1) evidence that defendant has threatened or struggled with guards, court officials or jurors or (2) evidence that defendant was disruptive during trial or attempted to escape while in police custody. Trial court had duty to *give following instruction* “once the jury was exposed to the vision of a shackled defendant:” “[T]he use of physical restraints on the defendant has no bearing on the defendant’s guilt or innocence and should not be considered by [you] during [your] deliberations.” *Allen v. State*, 248 Ga. App. 79 (545 S.E.2d 629) (2001). [↑](#endnote-ref-141)
142. *Worthen v. State*, 342 Ga. App. 612, 613 (2017), citing *Taylor v. United States*, 414 U.S. 17, 19 (1973) and *Byrd v. Ricketts*, 233 Ga. 779, 780 (1975). [↑](#endnote-ref-142)
143. *Burns v. State*, 345 Ga. App. 822, 824 813 S.E.2d 425, 427 (2018), citing *Olds v. State*, 299 Ga. 65, 70 (2016). [↑](#endnote-ref-143)
144. *Lowery v. State*, 347 Ga. App. 26 (2018), “Relevance and probative value are related, but distinct, concepts. Relevance is a binary concept—evidence is relevant or it is not—but probative value is relative. Evidence is relevant if it has “any tendency” to prove or disprove a fact, whereas the probative value of evidence derives in large part from the extent to which the evidence tends to make the existence of a fact more or less probable.” *Olds v. State*, 299 Ga. 65, 75 (2016). [↑](#endnote-ref-144)
145. *State v. Voyles*, 345 Ga. App. 634 (2018). [↑](#endnote-ref-145)
146. *Morris v. State*, 303 Ga. 192, 194 (2018) (“But a murder victim's reputation for violence ‘may be offered as evidence by the accused upon the accused making a prima facie showing that the victim was the aggressor and was assaulting the accused, who was acting to defend himself.’”). [↑](#endnote-ref-146)
147. *Mondragon v. State*, 304 Ga. 843, 844-845 (2019). [↑](#endnote-ref-147)
148. *Mondragon v. State*, 304 Ga. 843, 845-846 (2019). [↑](#endnote-ref-148)
149. *Hall v. State*, 282 Ga. 294 (2007) (Ok to admit evidence that V identified photo of D.) [↑](#endnote-ref-149)
150. *Boyd v. State*, 284 Ga. 46 (2008). *Ragan v. State*, 299 Ga. 828 (2016) has good discussion of the considerations the court should consider in admitting photos. The relevancy under §403 is diminished when the issue is not contested at trial. *Stuckey v. State*, 301 Ga. 767, 773 (2017); *Ragan v. State*, 299 Ga. 828, 832-833 (2016). [↑](#endnote-ref-150)
151. *Plez v. State*, 300 Ga. 505 507-508 (2017); *Allaben v. State*, 299 Ga. 253 (2016) citing *Dailey v. State*, 297 Ga. 442, 444 (2015); *Davis v. State*, 299 Ga. 180 (2016); *McKibbins v. State*, 293 Ga. 843 (2013). Post-incision photographs are only admissible if they show internal injuries or are otherwise relevant to an issue in the case. Because such photographs are frequently gruesome, the trial court is expected to perform a more thorough analysis under Rule 403 when such photos are offered into evidence. *McClure v. State*, 278 Ga. 411, 412 (2004). “Post-incision autopsy photographs ‘are admissible if necessary to show some material fact that becomes apparent only due to the autopsy.’” *Banks v. State*, 281 Ga. 678, 680 (2007); *McClure v. State*, 278 Ga. 311, 412 (2004). [↑](#endnote-ref-151)
152. *Moore v. State*, 305 Ga. 251 (2019); *Sowell v. State*, 327 Ga. App. 532 (2014). [↑](#endnote-ref-152)
153. *Lucas v. State*, 303 Ga. 134, 138-139 (2018). [↑](#endnote-ref-153)
154. *Burns v. State*, 345 Ga. App. 822, 813 S.E.2d 425 (2018). [↑](#endnote-ref-154)
155. *White v. State*, 305 Ga. 111 (2019)—Rule 412 fully revised to track the FRE on this topic in 2019. [↑](#endnote-ref-155)
156. **Admissibility considerations**—(Considerations below are not hard and fast, and individual facts and circumstances MAY dictate a different result than that directed by this QUICK guide.) In balancing, judge should make express findings. *Quiroz v. State*, 291 Ga. App. 423 (2008). Subject to balancing probative value versus prejudicial effect, which trumps all other considerations below (OCGA §24-4-403 for ALL evidence and specifically for FELONY convictions and “Bad Acts” OCGA §§24-9-608(b), 24-9-609(a)(1).)

     The court should perform the following analysis of convictions less than 10 years old:

     “This analysis includes [but is not limited to] the following factors: (1) the nature, i.e., impeachment value of the crime; (2) the time of the conviction and the defendant's subsequent  history; (3) the similarity between the past crime and the charged crime, so that admitting the prior conviction does not create an unacceptable risk that the jury will consider it as evidence that the defendant committed the crime for which he is on trial; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue.” *Smith v. State*, 331 Ga. App, 296, 299-300 (2015). However, not required where the statement is less than 10 years old.

     **Admissible**—**Convictions less than 10 years from conviction or actual release from confinement** (OCGA §24-6-609(a)(1) and (2)). Note: *Allen v. State*, 286 Ga. 392 (2010). Calculating 10 years (probation does NOT equal “confinement”) and end date is date of testimony and date conviction offered. *Smith v. State*, 331 Ga. App 296 (2015)

     **SOME juvenile “convictions,”** but not for the defendant (OCGA §24-6-609(d));

     **Cases on appeal**, but the pendency of appeal is also admissible (OCGA §24-6-609(e));

     **Inadmissible**—**Time Barred**—Over 10 years old from date of conviction or release from ACTUAL confinement, not probation (*Allen v. State*, 286 Ga. 392 (2010)), the provisions of §24-6-609(b) apply (with heightened scrutiny and a pre-trial notice requirement). Calculating 10 years (probation does not equal “confinement”) to time of testifying, not time of offense, unless judge balances and finds interests of justice permit longer. see *Clay v. State*, 290 Ga. 822 (2012) FIVE BALANCING FACTORS where conviction is more than 10 years old:

     This analysis includes the following factors: (1) the nature, i.e., impeachment value of the crime; (2) the time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime, so that admitting the prior conviction does not create an unacceptable risk that the jury will consider it as evidence that the defendant committed the crime for which he is on trial; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. *Clay v. State*, 290 Ga. 822, 835 (2012) (the cases hold that even though *Clay* was decided under the old evidence code, the requirement of the 5 findings being specifically made remains a requirement under the new rules.

     **First offender and conditional discharge unadjudicated and pardoned offenses** inadmissible (OCGA §§24-6-609(c), 24-6-622); but remember *Davis v. Alaska*. 415 U.S. 308 (1974) which holds that defendant may impeach witnesses with convictions. Also, present probation, even for first offender, is probably admissible against state witness as possibly illustrative of interest in testifying or state of feelings of witness. OCGA §24-6-622

     **Convictions based on pleas of nolo contendere and juvenile “convictions”** of defendant inadmissible (OCGA §24-6-609(d)) [↑](#endnote-ref-156)
157. *Parks v. State*, 300 Ga. 303, 398-309 (2016) (defendant testified that he had changed and become more responsible family man since 1990 and admitted that he had been in “some prior trouble,” the door was opened for convictions since 1990). [↑](#endnote-ref-157)
158. *Gonzales v. State*, 345 Ga. App. 334, 338 (2018). [↑](#endnote-ref-158)
159. *Lucas v. State*, 303 Ga. 134, 138-139 (2018); *Smith v. State*, 300 Ga. 538, 542 (2017). [↑](#endnote-ref-159)
160. *Walters v. State*, 335 Ga. App. 12, 14 (2015). [↑](#endnote-ref-160)
161. OCGA §15-12-172 provides that the trial court may remove a juror "at any time, whether before or after final submission of the case to the jury . . . [if] good cause [is] shown to the court [that the juror is] unable to perform his duty, or . . . for other legal cause. . . ." "The trial court must exercise its discretion in removing a juror, and it may effect such a removal even after deliberations have begun. [Cit.]" *State v. Arnold*, 280 Ga. 487, 489 (629 SE2d 807) (2006). However, "'[t]here must be some sound basis upon which the trial judge exercises his discretion to remove the juror.' [Cit.]" *State v. Arnold*, supra. See *Moon v. State*, 288 Ga. 508 (2011). Out of court communication can result in removing a juror for cause. *White v. State*, 287 Ga. 713 (2010); *Murray v. State*, 276 Ga. 396 (2003). [↑](#endnote-ref-161)
162. *Chambers v. State*, 321 Ga. App. 512, 517-519 (2013); *Woodruff v. State*, 339 Ga. App. 707, 709 (2016). [↑](#endnote-ref-162)
163. *Dunn v. State*, 308 Ga. App. 103 (2011); *Ward v. State*, 288 Ga. 641 (2011). [↑](#endnote-ref-163)
164. *Foster v. State*, 255 Ga. 425 (1986); *Jones v. State*, 233 Ga. App. 291 (1998); *Dunn v. State*, 308 Ga. App. 103 (2011). [↑](#endnote-ref-164)
165. *State v. Arnold*, 280 Ga. 487 (2006). [↑](#endnote-ref-165)
166. *Semega v. State*, 302 Ga. App. 879 (2010); *Mason v. State*, 244 Ga. App. 347 (2000). [↑](#endnote-ref-166)
167. *Moon v. State*, 288 Ga. 508 (2011); *Wooten v. State*, 250 Ga. App. 686, 687 (2001). [↑](#endnote-ref-167)
168. *Worthy v. State*, 223 Ga. App. 686, 687 (2001); *Darden v. State*, 212 Ga. App. 345, 347 (1994). This remedy is available even where the juror did not initiate the contact with friends or family of interested parties. *Gurr v. State*, 238 Ga. App. 1, 4 (1999). [↑](#endnote-ref-168)
169. *State v. Arnold*, 280 Ga. 487 (2006). [↑](#endnote-ref-169)
170. *Johnson v. State*, 289 Ga. 498, 501 (2011). §15-12-172 vests the trial court with broad discretion “to discharge a juror and replace him or her with an alternate at any time (as long as the court) has a sound legal basis.” “A sound basis may be one which serves the legally relevant purpose of preserving public respect for the integrity of the judicial process. Where the basis for the juror's incapacity is not certain or obvious, some hearing or inquiry into the situation is appropriate to the proper exercise of judicial discretion. Dismissal of a juror without any factual support or for a legally irrelevant reason is prejudicial.” *Jackson v. State*, 336 Ga. App. 70, 73 (2016), citing *State v. Arnold*, 280 Ga. 487, 489 (2006). Same result in *Green v. State*, 298 Ga. App. 301, 302 (2009). It is permissible to excuse a juror who is found to be a friend of the defendant on Facebook but who did not acknowledge in voir dire that the juror knew the defendant. *Smith v. State*, 335 Ga. App. 497, 498 (2016). [↑](#endnote-ref-170)
171. *Darden v. State*, 212 Ga. App. 345, 346 (1994)—improper conduct by the juror is not required. *Payne v. State*, 195 Ga. App. 523, 524 (1990). [↑](#endnote-ref-171)
172. *Porter v. State*, 278 Ga. 694 (2004); *State v. Arnold*, 280 Ga. 487 (2006). [↑](#endnote-ref-172)
173. *Edge v. State*, 345 Ga. App. 794 (2018). [↑](#endnote-ref-173)
174. OCGA §17-9-1(b); *Ga. Crim. Trial Prac.* (2016-2017 ed.), §21-1.

     “OCGA §17-9-1(a) provides for a directed verdict as follows:

     ‘Where there is ***no conflict*** in the ***evidence*** and the ***evidence*** introduced with all ***reasonable deductions*** and ***inferences*** therefrom shall **demand** a ***verdict*** of ***acquittal*** or ***“not guilty*”** as to the ***entire offense*** or to some particular ***count or offense***, the ***court*** may ***direct*** the ***verdict*** of acquittal to which the defendant is entitled under the evidence and may allow the trial to proceed only as to the counts or offenses remaining, if any.’ In *Lee v. State*, 247 Ga. 411, 412 (6) (1981), the court pointed out that a trial judge must grant a motion for a directed verdict of acquittal ‘unless viewing the evidence in the *light most favorable to the prosecution*, a *rational trier of fact* could find the essential elements of the crime beyond a reasonable doubt. . . .’

     . . . Even where there is a *conflict in the evidence*, it is the duty of the trial judge to grant a motion for a directed verdict of acquittal *if* the *evidence* will *not support* a *conviction*. . . . In determining whether to grant a motion for directed verdict, the trial judge may properly consider *inferences* and *presumptions* found in our *law*.” [↑](#endnote-ref-174)
175. *Waits v. State*, 282 Ga. 1 (2007). [↑](#endnote-ref-175)
176. *Laguerre v. State*, 301 Ga. 122, 125 (2017), citing *Harvey v. State*, 296 Ga. 823, 830 (2015). “The trial judge is not required to make explicit findings of “manifest necessity” nor to articulate on the record all the factors which informed the deliberate exercise of his discretion. However, the record must show that the trial court actually exercised its discretion. For this reason, we have instructed trial courts to give careful, deliberate, and studious consideration to whether the circumstances demand a mistrial, with a keen eye toward other, less drastic, alternatives, calling for a recess if necessary and feasible to guard against hasty mistakes. Where it is clear from the record that the trial court actually exercised its discretion in deciding to grant a mistrial, the Double Jeopardy Clause generally will not bar retrial.” *Harvey*, at 832. [↑](#endnote-ref-176)
177. “While a review of the authorities does not persuade us that we should mandate the trial court to engage in an on-the-record colloquy with a defendant to inquire of the non-testifying defendant whether he desires to waive his right to testify, we acknowledge that the better practice would be for the trial court to include this inquiry as a matter of routine in order to avoid a post-conviction attack of the nature raised in this appeal.”(Citation omitted.) *Barron v. State*, 264 Ga. 865, 866, n. 2 (452 S.E.2d 504) (1995). *Newby v. State*, 272 Ga. App. 507 (2005) and *Spencer v. State*, 287 Ga. 434, 438-439 (2010) and *Terrell v. State*, 304 Ga. 183, n. 2 (2018)-not required but it is a “better practice.” Compare *U.S. v. Teague*, 953 F.2d 1525, n.8 (11th Cir.1992). [↑](#endnote-ref-177)
178. *Terrell v. State*, 304 Ga. 183 (2018). [↑](#endnote-ref-178)
179. *Arnold v. State*, 193 Ga. App. 206 (1989); *U.S. v. Gilliland*, 586 F.2d 1384, 1389 (10th Cir, 1978). [↑](#endnote-ref-179)
180. *Harris v. State*, 296 Ga. App. 465 (2009); *Jones v. State*, 257 Ga. 753 (1988); *U.S. v. Reed*, 700 F.2d 638, n. 11 (11th Cir. 1983). [↑](#endnote-ref-180)
181. *Harris v. State*, 333 Ga. App. 118, 121 (2015). [↑](#endnote-ref-181)
182. *State v. Cooper*, 324 Ga. App. 32 (2013); See *Tweedell v. State*, 218 Ga. App. 518, 519 (1995) (trial court did not abuse its discretion by allowing defendant to reopen his case where counsel inadvertently failed to call the defendant as a witness). [↑](#endnote-ref-182)
183. *Butler v. State*, 163 Ga. App. 475, 478 (1982). [↑](#endnote-ref-183)
184. *Payne v. State*, 290 Ga. App. 589 (2008); *Peterson v. State*, 284 Ga. 275 (2008). [↑](#endnote-ref-184)
185. *Anderson v. State*, 262 Ga. 26 (3) (413 S.E.2d 732) (1992), provides:

     “But we think it is frequently desirable that instructions which have been reduced to writing be not only read to the jury but also handed over to the jury. . . . We see no good reason why the members of the jury should always be required to debate and rely upon their several recollections of what a judge said when proof of what he said is readily available.”

     See also *Fletcher v. State*, 277 Ga. 795 (4) (596 S.E.2d 132) (2004).

     In DEATH PENALTY cases, see OCGA 17-10-30(c) (***requiring*** certain statutory instructions to be given to the jury both in charge ***AND IN WRITING***). [↑](#endnote-ref-185)
186. On Lesser Included Offenses, see OCGA §16-1-6, Conviction for lesser included offenses, *Ga. Crim. Trial Prac.* (2016-2017 ed.), §§24-5, 24-6, and Appendix A with helpful chart. “[W]ith regard to giving a defendant's requested charge on a **lesser** **included** offense[,]. ...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. 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.” *Turner v.* State, 342 Ga. App. 882, 885 (2017).  “A trial judge never errs in failing to instruct the jury on a **lesser** **included** offense where there is no written request to so charge. [And,] [a]n oral request to charge does not alter this mandate.” *McMurtry v. State*, 338 Ga. App. 622, 625 (2016). Where the defendant denies being present when the crime was committed, it is not error for the trial court to refuse to charge on a lesser included offense. *Greene v. State,* 263 Ga. 466, 467 (1993). See *Bailey v. State*, 301 Ga. 476, 480-481 (2017) (murder/voluntary manslaughter); *Patterson v. State*, 332 Ga. App. 221, 228-229 (2015) (aggravated assault/reckless conduct); *Smith v. State*, 322 Ga. App. 433, 438 (forgery 1st Degree/forgery 2nd degree); *Hawkins v. State*, 242 Ga. App. 603, 604 (2000) (armed robbery/theft by receiving); [↑](#endnote-ref-186)
187. *Ross v. State*, 343 Ga. App. 810 (2017) [↑](#endnote-ref-187)
188. *Edge v. State*, 261 Ga. 865 (1992). An “*Edge* problem” occurs where there is a murder charge and there is a request for a charge on the lesser included offense of voluntary manslaughter. By definition, a homicide is treated as a voluntary manslaughter where there is evidence of provocation or passion and a killing cannot be both a murder and a voluntary manslaughter. The “*Edge* problem” occurs where the charge given by the judge tells the jury to consider murder and then consider voluntary manslaughter. As noted, if a killing constitutes murder, it could not also be a voluntary manslaughter and any charge which instructs the jury to consider murder before considering manslaughter would “virtually eliminate voluntary manslaughter as a separate form of homicide….” *Edge*, at 867. Therefore, your charge should avoid words such as “then” or “only after.” See *Morgan v. State*, 290 Ga. 788 (2012) for a good discussion of *Edge* and a proper charge where a charge on voluntary manslaughter is requested. But see *Wallace v. State*, 294 Ga. 257, 258-259 (2013) if the underlying felony for felony murder is a charge of possession of firearm by a convicted felon or a form of armed robbery because *Edge* may not apply where the underlying felony is not “an integral part of the killing”). These principles are not applicable to cases where defendant charged with armed robbery and requests lesser included of robbery. *Minor v. State*, 328 Ga. App. 128, 134-135 (2014), citing *Davis v. State*, 264 Ga. 221, 227 (2003) (armed robbery and aggravated assault) and *Kirk v. State*, 210 Ga. App. 440-443-444 (1993) (armed robbery and robbery by intimidation) and *Parks v. State*, 241 Ga. App. 381, 384 (1999) (rape and aggravated sodomy). [↑](#endnote-ref-188)
189. *Talton v. State*, 254 Ga. App. 111, 112 (2002). [↑](#endnote-ref-189)
190. *Talton v. State*, 254 Ga. App. 111 (2002) but see *Flournoy v. State*, 294 Ga. 741, 743-745 (2014) which held that while the holding in *Talton* remains good law, any error was cured when the court sent the indictment out with the jury and instructed the jury that they must find defendant guilty beyond a reasonable doubt “as alleged in the indictment.” [↑](#endnote-ref-190)
191. *Overstreet v. State*, 250 Ga. App. 336, 339 (2001). [↑](#endnote-ref-191)
192. *Meddings v. State*, 346 Ga. App. 294, 299 (2018) citing *Thorpe v. State*, 285 Ga. 604, 611 (2009). [↑](#endnote-ref-192)
193. *Overstreet v. State*, 250 Ga. App. 336, 339 (2001); *Nicholson v. State*, 265 Ga. 711 (1995); *Nunez v. State*, 237 Ga. App. 808, 810 (1999); *Griffin v. State*, 292 Ga. 321, 326 (2013). [↑](#endnote-ref-193)
194. *Carder v. State*, 327 Ga. App. 464, 467 (2014); *Farley v. State*, 265 Ga. 622, 625 (1995); *Dimauro v. State*, 341 Ga. App. 710, 716 (2017). [↑](#endnote-ref-194)
195. *Escamilla v. State*, 344 Ga. App. 654, 656 (2018), citing *Tarvestad v. State*, 261 Ga. 605, 606 (1991). [↑](#endnote-ref-195)
196. *Edwards v. State*, 255 Ga. 149, 150 (1985) (“While evidence of good character is a substantive fact, which should be considered by the jury along with other facts tending to bear on the question of guilt or innocence, evidence of good character is not a substantive defense.”); *Williams v. State*, 207 Ga. App. 418, 420 (1993); *Coop v. State*, 186 Ga. App. 578, 580 (1988). [↑](#endnote-ref-196)
197. *Brown v. State*, 268 Ga. App. 24, 27 (2004); *Jones v. State*, 188 Ga. App. 240 (1988); *Williams v. State*, 171 Ga. App. 34, 35 (1984). A defense of alibi does not raise the issue of reliability of identification. *Brown*, supra. [↑](#endnote-ref-197)
198. *Wright v. State*, 300 Ga. 185, 189 (2016). [↑](#endnote-ref-198)
199. *Walker v. State*, 281 Ga. 521, 524-525 (2007). [↑](#endnote-ref-199)
200. *Wright v. State*, 300 Ga. 185, 189 (2016); *Walker v. State*, 281 Ga. 521, 524 (2007). [↑](#endnote-ref-200)
201. This also helps prevent uncharged, unexpected verdict problems. See *State v. Freeman*, 264 Ga. 276, 278 (444 S.E.2d 80) (1994). *See* *Washington v. State*, 333 Ga. App. 236 (2015). [↑](#endnote-ref-201)
202. OCGA §17-8-71. [↑](#endnote-ref-202)
203. OCGA §17-8-70 and USCR 13.3. [↑](#endnote-ref-203)
204. **OCGA §17-8-72** (misd)**; §17-8-73** (felony)**; §17-8-74** (extension)**; USCR 13.1** provides, “**Time limitations**. Counsel shall be limited in their arguments as follows: (A) **Felony** cases punishable by the **death penalty** or **life** in prison - **2 hours** each side. (B) **Any other felony** case - **1 hour** each side. (C) **Misdemeanor** case - **30 minutes** each side.”

     But see USCR 13.2, Extensions [of Argument] wherein provides that, ***before arguments begin***, counsel may apply to the court for an extension of the time prescribed for argument. *See also Ga. Crim. Trial Prac.* (2016-2017 ed.), §23-3, Time limit on argument. [↑](#endnote-ref-204)
205. Court is required to use the first (or next) alternate juror to replace a juror who dies, becomes ill, or otherwise is incapable of serving to verdict. O.C.G.A. § 15-12-172. [↑](#endnote-ref-205)
206. *Andrews v. State*, 222 Ga. App. 129 (1996). [↑](#endnote-ref-206)
207. *Pullin v. State*, 258 Ga. App. 37, 42 (2002); *Wyley v. State*, 169 Ga. App. 106, 108 (1983). [↑](#endnote-ref-207)
208. Above ORDER of arguments is in all criminal cases pursuant to OCGA §17-8-71. In the “argument in between” (b) above, two (2) lawyers may present argument for a party. “Last say” argument (c) above is limited to one attorney per party presenting argument. *Sheriff v. State*, 277 Ga. 182 (587 S.E.2d 27) (2003) construing identical OCGA §§9-10-182 (civil) and 17-8-70 (criminal) and USCR §13.3.

     Counsel may refer to LAW that judge will give in charge during closing but should not read law in jury’s presence that judge will not give in charge. *Conklin v. State*, 254 Ga. 558 (10 ) (b) (331 S.E.2d 532) (1985).

     Use of PowerPoint presentation in closing argument: In criminal cases, it is within the trial court’s discretion whether to allow demonstrative devices in closing. *Grant v. State*, 245 Ga. App. 652 (2), 538 S.E.2d 540 (2000). [↑](#endnote-ref-208)
209. Alternates are brought back with regular jury for any proceedings in court; they are kept available and qualified to replace a regular juror who becomes sick or disqualified during deliberations. [↑](#endnote-ref-209)
210. OCGA §17-8-58: Failure to object to jury charge before jury retires to deliberate precludes appellate review unless charge constitutes “plain error which affects substantial rights of the parties.” *Collier v. State*, 288 Ga. 756 (2011) [↑](#endnote-ref-210)
211. Be careful to **comply** with **“CONTINUING WITNESS RULE,”** which **precludes the court from allowing written testimony to go out with the jury** to be read again during deliberations. *Hinton v. State*, 233 Ga. App. 213 (1) (504 S.E.2d 49) (1998); *Buchanan*, 282 Ga. App. 298 (2006); *Goggins v. State*, 330 Ga. App. 350 (2014); Milich, *Ga. Rules of Evidence* (2nd ed.), §19.8; and ***excellent*** Milich, *Courtroom Handbook on Ga. Evidence* (2015 ed.), under heading “Continuing Witness Rule” [↑](#endnote-ref-211)
212. Be careful to **comply** with **“CONTINUING WITNESS RULE,”** which **precludes the court from allowing written testimony to go out with the jury** to be read again during deliberations. *Hinton v. State*, 233 Ga. App. 213 (1) (504 S.E.2d 49) (1998); *Buchanan*, 282 Ga. App. 298 (2006); *Goggins v. State*, 330 Ga. App. 350 (2014); Milich, *Ga. Rules of Evidence* (2nd ed.), §19.8; and ***excellent*** Milich, *Courtroom Handbook on Ga. Evidence* (2015 ed.), under heading “Continuing Witness Rule.” The continuing witness rule is an important rule that is not found within Georgia’s statutes. The rule was borne via appellate decisions, and it is clear that it survived the enactment of the new evidence statutes. *Rainwater v. State*, 300 Ga. 800, n. 3 (2017). The continuing witness rule has been defined as follows:

     In Georgia, the continuing witness objection is based on the notion that written testimony is heard by the jury when read from the witness stand just as oral testimony is heard when given from the witness stand. But, it is unfair and places undue emphasis on written testimony for the writing to go out with the jury to be read again during deliberations, while oral testimony is received but once. The types of documents that have been held subject to the rule include affidavits, depositions, written confessions, statements, and dying declarations.

     *Rainwater v. State*, 300 Ga. 800, 803 (2017), citing *Davis v. State*, 285 Ga. 343, 348 (2009).

     “The ‘continuing witness rule’ prohibits writings from going out with the jury when the evidentiary value of such writings depends ‘upon the credibility of the maker.’” *Bryant v. State*, 270 Ga. 266, 270 (1998). [↑](#endnote-ref-212)
213. Prior convictions (particularly any convictions of the defendant) should be redacted to remove sentencing information relating to the length of the sentence or other matters that go beyond the fact that the crime was a felony and the witness/defendant was convicted of that offense. [↑](#endnote-ref-213)
214. OCGA §15-12-141, Jury deliberation rooms; furnishing food and nonalcoholic beverages: “. . . *While the jury is deliberating, the presiding judge may direct them to be furnished with such food and nonalcoholic beverages as the judge shall think proper*.”

     *See generally* *Ga. Crim. Trial Prac.* (2016-2017 ed.), Chapter 24, “Submitting the Case to the Jury,” especially, §24-19 Communicating with Jury; §24-20 Reading Testimony to Jury; §24-22 Recharge. [↑](#endnote-ref-214)
215. *Collymore v. State*, 298 Ga. 335 (2016). [↑](#endnote-ref-215)
216. In *Dowda v. State*, 341 Ga. App. 295, 298-299 (2017), a conviction was reversed when the jury sent out a note with the numeric breakdown on how the jury was voting and the trial court did not reveal the exact contents of the note to counsel. “The failure of the trial court to inform counsel of the contents of [a jury note] and to seek comment or input in the formulation of the court’s response [constitutes] a violation of [a defendant’s] right to counsel.” *Dowda*, citing *Lowery v. State*, 282 Ga. 68, 74-75 (2007); *Wells v. State*, 297 Ga. App. 153, 161 (2009); *Andrews v. State*, 293 Ga. App. 445, 446 (2008). **HOWEVER**, note that if a jury indicates that it is deadlocked, the trial court may “inquire how the jury stands numerically” but should not inquire as to the nature of the numeric division. Stated another way, the trial court may ask the numeric division on each side of the issue but cannot ask how many are for guilty and how many or for not guilty. If the jury volunteers the information, *Dowda* provides that the trial court commits **REVERSIBLE ERROR** by not sharing the note with counsel for both parties in open court and in the presence of the defendant. I always read the note verbatim and also allow counsel to read the note. **ALL NOTES MUST BE MARKED AS A COURT’S EXHIBIT AND BE RETAINED AND MADE A PART OF THE RECORD.** *Lowery v. State*, 282 Ga. 68, 76 (2007); *Grant v. State*, 295 Ga. 126, 129 (2014). [↑](#endnote-ref-216)
217. *Potts v. State*, 261 Ga. 716, 725 (1991). [↑](#endnote-ref-217)
218. *Brannon v. State*, 163 Ga. App. 340, 341 (1982). It might be advisable for the judge to remind the jurors that while the court recharged the jury on the particular point that was requested, that charge should be considered along with all of the other charges previously given to the jury. [↑](#endnote-ref-218)
219. *Weyer v. State*, 333 Ga. App. 706, 714 (2015), citing *Holloman v. State*, 291 Ga. 338 (2012). [↑](#endnote-ref-219)
220. *Weyer v. State*, 333 Ga. App. 706, 715 (2015). [↑](#endnote-ref-220)
221. *Collymore v. State*, 298 Ga. 335, 338 (2016). This was allowed because the yardstick was a “standard measuring device.” PLEASE BE CAREFUL in allowing things other than evidence actually admitted during the trial to be used by the jury because the factual particularities between the precedent and your particular case could cause reversal. [↑](#endnote-ref-221)
222. *Gibson v. State*, 272 Ga. 801, 802 (2000).  “The law is clear in this state that a trial court may, after the jury has had a case under consideration and indicates that it is unable to agree on a verdict, inquire how the jury stands numerically.” [Gibson v. State, 272 Ga. 801, 802(2), 537 S.E.2d 72 (2000)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000576222&pubNum=0000711&originatingDoc=Ided412ba5f9a11e49488c8f438320c70&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (citations and punctuation omitted). But “[t]rial courts should not, of course, inquire as to the nature of a jury's numerical division. And we encourage them to inform jurors not to reveal that information.” *Honester v. State*, 329 Ga. App. 406, 410 (2014), citing *Sears v. State*, 270 Ga. 834, 839 (1999). **BUT**, where the jury sends out ANY note, including one where the numeric division of the jury is included, it is reversible error for the judge not to share the note with the parties. *Dowda v. State*, 341 Ga. App. 295 (2017). [↑](#endnote-ref-222)
223. *Dowda v. State*, 341 Ga. App. 295 (2017). [↑](#endnote-ref-223)
224. “Once a defendant's jury is impaneled and sworn, jeopardy attaches, and he is entitled to be acquitted or convicted by that jury. If a mistrial is declared without a defendant's consent or over his objection, the defendant may be retried only if there was a ‘manifest necessity’ for the mistrial.” *State v. Stockhoff,* 333 Ga. App. 833, 837 (2015), citing *Julian v. State*, 319 Ga. App. 808, 810 (2013). *Thornton v. State*, 145 Ga. App. 793, 795 (1978). “The decisive factor is not the length of the deliberations but the inability of the jury to reach a verdict.” *Phillips v. State*, 238 Ga. 632, 634 (1977) (declaring mistrial after only 2.5 hours of deliberation is not per se inappropriate). *Honester v. State*, 329 Ga. App. 406, 409-411 (2014); *McGee v. State*, 287 Ga. App. 839 (2007); *State v. Stockhoff*, 333 Ga. App. 833 (2015) (see last sentence of the *Stockhoff* opinion). [↑](#endnote-ref-224)
225. *State v. Grayson*, 332 Ga. App. 862 (2015) (“Consent to the grant of a mistrial can be express or implied [, and a]lthough [Grayson] did not expressly consent to a mistrial, he impliedly consented by failing to object timely to the mistrial declaration. It follows that the trial court erred in barring further prosecution of [Grayson].”), citing *State v. Johnson*, 267 Ga. 305, 305-306 (1996). [↑](#endnote-ref-225)
226. See *Ga. Crim. Trial Prac.* (2016-2017 ed.), §24:26. [↑](#endnote-ref-226)
227. *Burchette v. State*, 278 Ga. 1 (2004). [↑](#endnote-ref-227)
228. *Driver v. State*, 155 Ga. App. 726, 728 (1980). [↑](#endnote-ref-228)
229. “[T]he **proper procedure** henceforth is for the **trial court** and **counsel** to **review** the **verdict** **prior** to its **publication** in **open court**, and if the verdict is not proper in that it finds the defendant guilty of an offense with regard to which the trial court did not instruct the jury, the trial court should return the jury for further deliberation with direction to return a verdict within the range of the instructions originally given to it.”  *State v. Freeman*, 264 Ga. 276, 278 (1994). *See also Stubbs v. State*, 220 Ga. App. 106 (1996). **Harsh results** of not following procedure shown in *Prater v. State*, 273 Ga. 477 (2001); *Washington v. State*, 333 Ga. App. 236 (2015). [↑](#endnote-ref-229)
230. *Blevins v. State*, 343 Ga. App. 539, 549-550 (2017). *Milam v. State*, 255 Ga. 560, 562 (1986). [↑](#endnote-ref-230)
231. *State v. Springer*, 297 Ga. 376 (2015); *Dumas v. State*, 266 Ga. 797 (1996); *State v. Owens*, 296 Ga. 205 (2014). This issue is extremely fact-specific. If one crime requires “malice aforethought” and the other crime is committed “without malice aforethought,” those two guilty verdicts are mutually exclusive and the court should reject the verdict and require the jury to deliberate further. *Dumas*, supra. The issue of mutually exclusive verdicts is NOT APPLICABLE where there are guilty verdicts on one count and not guilty verdicts on others. It only applies where there are guilty verdicts on two separate counts of the indictment. *Fletcher v. State*, 307 Ga. App. 131, 134-135 (2010). Where the jury finds the defendant guilty of both murder and voluntary manslaughter, the “modified merger” rule of *Edge v. State*, 261 Ga. 865 (1992) applies and the defendant must be sentenced on the offense of voluntary manslaughter. *Sanders v. State*, 281 Ga. 36, 37 (2006). [↑](#endnote-ref-231)
232. I ask the defendant to stand to receive the verdict but there is no legal requirement for the defendant to stand when the verdict is published. BE AWARE if the defendant has been restrained in some way to ensure that the restraints are not made known to the jury. If defendant is shackled, require him/her to remain seated. [↑](#endnote-ref-232)
233. *See* *Ga. Crim. Trial Prac.* (2016-2017 ed.), §25-4, Polling the Jury.

     *Rinker v. State*, 228 Ga. App. 767 (492 S.E.2d 746) (1997), stated, “‘In criminal cases the right to poll the jury is not discretionary, and the denial of that right when timely requested is reversible error. . . . A request for poll is timely when made after the verdict is read. It is not timely made after the jury disperses or after sentence is passed.’ (Citations and punctuation omitted.) (quoting *Favors v. State*, 234 Ga. 80, 88 (6) (1975)).” NOTE: If jury not dispersed during sentencing hearing, then a request will be timely during it until sentence is passed. [↑](#endnote-ref-233)
234. Our bailiffs are historically quick to apply restraints on the defendant following a conviction. I would strongly urge you to ask that they not apply restraints until after the jury leaves the courtroom. The reaction from jurors to the reality of the consequences of their verdict is generally one of shock and unless there is a compelling reason from a security standpoint, I have convinced my bailiffs to wait until the jury has left the courtroom before they apply restraints. [↑](#endnote-ref-234)
235. This is my personal instruction. I am aware that different judges handle the dismissal of the jury in different ways. Just ensure that you do not thank the jury for their verdict—very different from thanking them for their service. I do not allow anyone to approach the jurors while they remain on courthouse property to ensure that if a friend or family member is upset about the verdict, I can do something about it. [↑](#endnote-ref-235)
236. OCGA §17-10-2, §17-9-2 judge shall conduct presentence hearing in all felony cases. [↑](#endnote-ref-236)
237. **OCGA §17-10-2(a)(1)** “...upon the return of a verdict of “guilty” by the jury in any felony case, the judge shall dismiss the jury....” then proceed with sentencing. Dismissal of jury not mandatory and failure to dismiss not error (at least Defendant has no right to complain). *Whitley v. State*, 137 Ga. App. 245 (2) (223 S.E.2d 279) (1976); *Thomas v. State*, 180 Ga. App. 575 (4) (349 S.E.2d 807) (1986); *Jenkins v. State*, 235 Ga. App. 547 (3) (510 S.E.2d 87) (1998). But see *supra* endnote on possible extension of time within which poll of jury required if jury remains in the courtroom and is not dismissed. [↑](#endnote-ref-237)
238. *O’Kelley v. State*, 284 Ga. 758 (2008). [↑](#endnote-ref-238)
239. No longer unilateral obligation of State to notify Δ before trial about evidence in aggravation. But, if Δ opts into mutual discovery, then this applies to sentencing hearing in all felony criminal cases. OCGA §17-16-2(e). [↑](#endnote-ref-239)
240. If mutual discovery, then OCGA §17-16-4(a)(5) places duty on State to provide Defendant with notice of such evidence usually no later than 10 days prior to trial. [↑](#endnote-ref-240)
241. If mutual discovery, then OCGA §17-16-4(b)(3) requires Defendant to provide State a list of witnesses usually no later than 5 days prior to trial and other mitigation evidence by announcement of verdict. [↑](#endnote-ref-241)
242. *See Hill v. State*, 263 Ga. 37 (15) (427 S.E.2d 770) (1993); *Ingram v. State*, 253 Ga. 622 (14) (323 S.E.2d 801) (1984); *Moore v. State*, 240 Ga. 807, 819 (243 S.E.2d 1) (1978). [↑](#endnote-ref-242)
243. Per OCGA §17-10-2(a)(2), above ORDER OF ARGUMENT shall be used in all criminal cases “[e]xcept in cases where the death penalty may be imposed . . . .” [↑](#endnote-ref-243)
244. Each judge is different as to whether he/she wants to make a profound statement about the evidence, the defendant, the victim or any other topic. There is ABSOLUTELY no requirement that the court make any statement about the case whatsoever and if it is not a part of your normal personality, just do the business of sentencing. [↑](#endnote-ref-244)
245. This statute was amended, effective 7/1/2018. [↑](#endnote-ref-245)
246. *Jackson v. State*, 338 Ga. App. 509, 511 (2016). [↑](#endnote-ref-246)
247. (e) As used in this Code section, the term “forcible felony” means any felony which involves the use or threat of physical force or violence against any person and further includes, without limitation, murder; murder in the second degree; burglary in any degree; robbery; armed robbery; home invasion in any degree; kidnapping; hijacking of an aircraft or hijacking a motor vehicle in the first degree; aggravated stalking; rape; aggravated child molestation; aggravated sexual battery; arson in the first degree; the manufacturing, transporting, distribution, or possession of explosives with intent to kill, injure, or intimidate individuals or destroy a public building; terroristic threats; or acts of treason or insurrection. [↑](#endnote-ref-247)
248. The numbers in parenthesis are the paragraph numbers of the new sentencing forms. There is no requirement that you use them but I do and the clerks who prepare our sentences are very appreciative. [↑](#endnote-ref-248)
249. §17-10-6.2; *Watkins v. State*, 336 Ga. App. 145 (2016); *Jackson v. State*, 338 Ga. App. 509 (2016). The “sexual offenses” which are applicable under §17-10-6.2 are: (1) Aggravated assault with the intent to rape, in violation of Code Section 16-5-21; (2) False imprisonment, in violation of Code Section 16-5-41, if the victim is not the child of the defendant and the victim is less than 14 years of age; (3) Sodomy, in violation of Code Section 16-6-2, unless subject to the provisions of subsection (d) of Code Section 16-6-2; (4) Statutory rape, in violation of Code Section 16-6-3, if the person convicted of the crime is 21 years of age or older; (5) Child molestation, in violation of subsection (a) of Code Section 16-6-4, unless subject to the provisions of paragraph (2) of subsection (b) of Code Section 16-6-4; (6) Enticing a child for indecent purposes, in violation of Code Section 16-6-5, unless subject to the provisions of subsection (c) of Code Section 16-6-5; (7) Sexual assault against persons in custody, in violation of Code Section 16-6-5.1; (8) Incest, in violation of Code Section 16-6-22; (9) A second or subsequent conviction for sexual battery, in violation of Code Section 16-6-22.1; or (10) Sexual exploitation of children, in violation of Code Section 16-12-100, unless subject to the provisions of paragraph (2) or (3) of subsection (f) of Code Section 16-12-100. ***Noticeably absent from this list are the offenses of rape, aggravated sodomy and aggravated child molestation.*** That omission was not accidental. [↑](#endnote-ref-249)
250. This is my best attempt to track the language of the statutes and comply with some of the appellate decisions on this issue. *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). [↑](#endnote-ref-250)
251. Asking the defendant whether he/she is eligible gives the court the ability to enforce the sentence if it is later learned that the defendant was dishonest about his/her prior conviction. *Smith v. State*, 322 Ga. App. 549 (2013). [↑](#endnote-ref-251)
252. Asking the defendant whether he/she is eligible gives the court the ability to enforce the sentence if it is later learned that the defendant was dishonest about his/her prior conviction. *Smith v. State*, 322 Ga. App. 549 (2013). [↑](#endnote-ref-252)
253. If defendant is shown to have “significant financial hardship” as defined in §42-8-34(e)(3)(iii), the court must waive fine, reduce fine to sum the defendant can pay or convert the fine, surcharges, or fees to community service as computed in §42-8-34(e)(3)(B) and §17-10-1(d). [↑](#endnote-ref-253)
254. . See O.C.G.A.§§17-14-7(b), 17-14-9 and 17-14-10 [↑](#endnote-ref-254)
255. OCGA §42-8-34.1(a). *Singleton v. State*, 332 Ga. App. 484 (2015). [↑](#endnote-ref-255)
256. *Fox v. State*, 272 Ga. 163 (1) (559 S.E.2d 155) (2000)(Court held ***invalid*** ***special condition of probation*** in which ***Δ waived Fourth Amendment rights*** because ***not properly obtained as part of plea bargaining process.*** Court then considered whether reasonable grounds existed to justify search despite invalidly imposed condition of probation and found “when a probationer has not consented to a search, a warrantless search of probationer’s home must be based upon reasonable grounds to believe that the probationer has contraband in the home or is engaged, in some criminal activity there.”); *Harrell v. State*, 253 Ga. App. 440 (559 S.E.2d 155) (2002); *Brooks v. State*, 285 Ga. 424, 425 (677 S.E.2d 68) (2009). After *Fox*, *United States v. Knights,* 534 U.S. 112 (122 S. Ct. 587) (2001), upheld under Fourth Amendment warrantless search of probationer’s apartment by officer for investigatory (v. probationary) purposes that was (1) ***authorized*** by ***probation condition*** in sentence of which probationer had received proper unambiguous ***notice*** and (2) ***supported*** by ***reasonable suspicion***. See *Samson v. California*, 547 U.S. 843 (126 S. Ct. 2193) (2006); *United States v. Neely*, 217 Fed. Appx. 849 (11th Cir. Ga. 2007), *United States v. Yuknavich*, 419 F.3d 1302 (11th Cir. Ga. 2005), and *Padgett v. Donald,* 401 F.3d 1273 (11th Cir. Ga. 2005); *Jones v. State*, 282 Ga. 784 (1) (653 S.E.2d 456) (2007). [↑](#endnote-ref-256)
257. OCGA §42-8-34.1(a). *Singleton v. State*, 332 Ga. App. 484 (2015). [↑](#endnote-ref-257)
258. This law already exists for First Offender sentences but, probably through oversight, the prohibition is not a part of the Conditional Discharge Act. [↑](#endnote-ref-258)
259. The Sex Offender attachment to the new sentencing orders is detailed and significant and it is a better practice to go over the form in detail on the record to ensure there are no questions of whether the defendant was advised of the conditions in the event of an alleged revocation. [↑](#endnote-ref-259)
260. OCGA §16-11-129(e)(2). [↑](#endnote-ref-260)
261. A prior First Offender sentence (§42-8-60) or Conditional Discharge sentence (§16-13-2) does not count as a prior felony conviction under §17-10-1(a)(1)(B). [↑](#endnote-ref-261)
262. This is absolutely not required but I have found it helpful to address any questions or concerns while the defendant is in the courtroom to ensure that I was clear in my sentence and addressed all of the issues that needed to be addressed. This procedure has proven invaluable over my career. If the defendant is transferred to the DOC and you have a slight clarification that needs to be made or a misstatement that needs to corrected, a Court Production Order will be required at great expense and burden to all involved. [↑](#endnote-ref-262)
263. Although not technically required, a defendant seeking to file an out-of-time appeal will have a difficult time arguing that he/she did not know he/she had a right of appeal that was time sensitive if the court so advises the defendant on the record. See *Ingram v. State*, 300 Ga. App. 834, 836 (2009). [↑](#endnote-ref-263)
264. See *Bell v. Hopper*, 237 Ga. 810 (1976). [↑](#endnote-ref-264)
265. *See* OCGA §9-14-42 (c) and (d). [↑](#endnote-ref-265)
266. OCGA §9-14-42(c) states, “Any action brought pursuant to this article shall be filed within one year in the case of a misdemeanor, except as otherwise provided in Code Section §40-13-33 . . . .” OCGA §40-13-33 provides that in the case of misdemeanor traffic offenses, a defendant has 180 days to make any challenges, including a challenge for habeas corpus relief. The code section "limits such attacks to within the first 180 days after the conviction has been finally adjudicated, even if a habeas petition could be brought and would be successful." *Earp v. Brown*, 260 Ga. 215, 216 (2) (a) (391 S.E.2d 396) (1990); see generally *Earp v. Boylan*, 260 Ga. 112 (390 S.E.2d 577) (1990). [↑](#endnote-ref-266)
267. *Owens v. State*, 303 Ga. 254, 258-260 (2018); U.S.C.R. 41.2. [↑](#endnote-ref-267)