

**APPELLATE COURT OPINION SUMMARIES  
OPINIONS FROM MARCH 1-18, 2005.**

**United States Supreme Court:**

Shepard v. United States, 2005 U.S. LEXIS 2205 (March 7, 2005).

This case addressed some particular federal sentencing rules probably not relevant to state criminal law practice. Basically, Shepard pled guilty to possessing a firearm as a convicted felon, and Title 18 USC Section 924 (e) (also known as the “Armed Criminal Career Act”) mandates a minimum 15-year prison sentence for anyone possessing a firearm after three prior convictions for serious drug offenses or violent felonies. Burglary is a serious violent felony if committed in a building or enclosed space (not a car or boat). In Taylor v. US, 495 US 575 (1990), the Supreme Court held that a court sentencing under the ACCA could look to statutory elements, charging documents, and jury instructions to determine whether an earlier conviction after trial was for generic burglary. The District Court refused to sentence Shepard under the ACCA and the First Circuit reversed on appeal, holding that police reports and complaint applications may count as “sufficiently reliable evidence for determining whether a defendant’s plea of guilty constitutes an admission to a generically violent crime.”

The US Supreme Court granted certiorari to resolve divergent opinions among federal circuits and to determine whether a sentencing court can look to police reports or complaint applications to determine whether an earlier guilty plea necessarily admitted, and supported a conviction for, generic burglary. It held that a sentencing court may look to those materials, and that a later court determining the character of a burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.

Wilkinson v. Dotson, No. 03-287, 2005 U.S. LEXIS 2204 (March 7, 2005).

Two state prisoners brought Section 1983 actions claiming that Ohio’s state parole procedures violate the Federal Constitution and seeking declaratory and injunctive relief. The Court granted certiorari to determine whether the petitioners could bring their action under Section 1983 or whether they were limited to seeking relief under the federal habeas corpus statutes. Because neither prisoner sought an injunction ordering immediate or speedier release into the community and a favorable judgment would not necessarily imply the invalidity of their convictions or sentences, neither of the prisoners’ claims lay at “the core of habeas corpus,” and neither fell into the implicit habeas exception, they could bring a Section 1983 action for declaratory and injunctive relief challenging the constitutionality of state parole procedures.

**Georgia Supreme Court:**

Tabor v. State, S05A0214, 2005 Ga. LEXIS 149 (March 7, 2005).

Tabor filed a pre-trial application for a writ of habeas corpus, claiming unlawful detention and asserting defenses to his charges of carrying a weapon in a school zone. The petition was denied

and he directly appealed to the Georgia Supreme Court, which affirmed the lower court's opinion; he can and should raise those defenses in the trial of his case, not in a habeas petition.

Whitmer v. Conway, S05A0304, 2005 Ga. LEXIS 150 (March 7, 2005).

Whitmer brought a pre-trial petition for habeas claiming he was illegally detained (specifically, that documents and personal property allegedly establishing his innocence had not been provided to him and/or had been destroyed in violation of rules by the Georgia Department of Corrections). His petition was dismissed. The Supreme Court affirmed the dismissal: Whitmer's complaints appeared to have been raised for the first time on appeal; did not address his alleged illegal detention or the substantive findings by the habeas court; and were not supported by any evidence or citations to authority.

Mathis v. State, S05A0465, 2005 Ga. LEXIS 152 (March 7, 2005).

Mathis was convicted of the malice murder of his wife and appealed. The Supreme Court affirmed his conviction, rejecting his claim that the evidence was insufficient to authorize a guilty verdict (the victim's sister and son testified that they were in the next room and heard the victim ask Mathis ask for the money from the sale of her car, then asked that he take the gun away from her head. After shots were fired, they saw Mathis leave the room with a gun in his hand). The trial court did not err in refusing to instruct the jury on accident; the defendant must present slight evidence that he did not act with criminal intent or negligence in order to justify the charge, but Mathis did not do so (he admitted to shooting his wife but claimed he could not recall the circumstances). The trial court did not err by admitting hearsay testimony through the necessity exception. The victim's sister testified that a few days before the shooting, the victim told her that she thought Mathis might kill her. Since this does not meet the statutory definition of hearsay ("hearsay evidence is that which does not derive its value solely from the credit of the witness but rests mainly on the veracity and competency of other persons." OCGA 24-3-1(a)), it was admissible. A long-time friend of the victim testified that a month before the shooting, the victim told her that Mathis threatened to kill her if she ever left him, and the trial court properly admitted it because the victim was unavailable and the statement bore guarantees of trustworthiness.

Wilson v. State, S05A0571, 2005 Ga. LEXIS 153 (March 7, 2005).

Wilson was convicted of malice murder and sentenced to life without the possibility of parole, and he appealed. The evidence was sufficient to authorize a conviction (A witness saw Wilson and a woman struggling in a parking lot and returned with police to find the deceased, half-naked victim, who was later shown to have died from manual strangulation). The trial court did not err in refusing to give a charge on accident when the defendant claimed the victim died from ingesting drugs found on the floor of his car; Wilson could not show that he acted without criminal intent, was not engaged in a criminal scheme, and was not criminally negligent.

Preer v. Johnson, S04A2035, 2005 Ga. LEXIS 154 (March 7, 2005).

This was an interlocutory appeal in a habeas case addressing the proper procedure when a petitioner is transferred during the pendency of his petition. Preer initially filed his petition in Muscogee

County (where he was then incarcerated) and was later transferred to a prison in Gwinnett County. The habeas case was transferred to the Superior Court of Gwinnett County over Preer's objection. OCGA 9-14-43 is clear that a habeas petitioner must file in the county where he is presently detained, but is silent on what should happen to the petition if the petitioner is subsequently transferred to another county for detention. Citing Smith v. Garner, 236 Ga. 81, 85 (1976) for the proposition that a prisoner's custodian must answer the habeas petition ("generally venue in habeas corpus cases involving restraint of the personal liberty of a prisoner within the state lies in the county where the actual physical detention exists"), the Georgia Supreme Court held that a habeas petition may be transferred so long as the petitioner's transfer is not done to frustrate habeas relief.

\* State v. Hattney, S04A2017, 2005 Ga. LEXIS 157 (March 7, 2005).

Keenard Hattney and Stenson White were jointly indicted and tried for several crimes, including murder. The trial court granted the defendants' motion to suppress an out-of-court identification of each of them pursuant to a single photograph lineup. However, it denied their motion to suppress an in-court identification of them by Oliver, ruling that it would evaluate whether Oliver, as the State claimed, had known Hattney and Oliver for an extended period of time and whether, if he had, his in-court identification would be permitted. The State appealed from the suppression of the out-of-court identification. The Supreme Court held that the same reasons given by the trial court for denying the motion to suppress the in-court identification also apply to the out-of-court identification (under Neil v. Biggers, 409 US 188, 198 (1972), "it is the likelihood of misidentification which violates a defendant's right to due process"). The Georgia Supreme Court reversed the trial court's suppression of the out-of-court identification, and remanded the case.

\* Speight v. State, S04A1983, 2005 Ga. LEXIS 159 (March 7, 2005).

Speight was convicted of aggravated assault and felony and she appealed, claiming that her trial counsel was ineffective and that the delay in the hearing of her direct appeal violated due process. The Supreme Court remanded her case for appointment of qualified appellate counsel, because although she was represented by a pro bono attorney (who practices only in New York), the record showed that Speight requested appointed appellate counsel and counsel has never been appointed.

Reed v. State, S04A1511, 2005 Ga. LEXIS 160 (March 7, 2005).

Ronald Reed was convicted of malice murder, cruelty to a child in the second degree, possession of a firearm during the commission of a felony, and tampering with evidence. Reed appealed, and the Supreme Court affirmed his conviction nonetheless. Reed claimed that the trial court erred in rejecting his Batson challenges, but this was without merit; the State's use of peremptory strikes against two veniremen were gender-neutral (one served in Vietnam and had likely killed someone during that conflict, and the other had strange mannerisms, was inattentive, and did not own a gun). The trial court did not err by admitting a portion of the defendant's statement that pointed to prior difficulty with the victim; it was relevant and material to the charges and only incidentally put the defendant's character at issue. The trial court was within its discretion to exclude a witness's testimony that the victim was "probably" under the influence of drugs, but rather could only testify to behavior he actually witnessed. Reed claimed error in the omission of a portion of the jury instruction regarding the voluntariness of his statement, but his request was not made in writing and

Reed consented to the trial court's suggestion regarding the jury charge on voluntariness. Furthermore, there was overwhelming evidence both of the voluntariness of Reed's statement and of his guilt, so any error was harmless. Last, the failure to charge the jury on misdemeanor involuntary manslaughter was not error because the act of displaying a loaded gun to his allegedly intoxicated girlfriend, while driving and in the presence of her young child was not a "lawful act done in an unlawful manner."

\* Abdulkadir v. State, S04G0747, 2005 Ga. LEXIS 161 (March 7, 2005).

The defendant was convicted of child molestation and aggravated child molestation. The Court of Appeals affirmed, and certiorari was ultimately granted to consider that court's ruling that the proscriptions set forth in Georgia's rape shield statute are applicable in prosecutions for child molestation. Because the language of the rape shield statute limits its application to prosecutions for rape, the Supreme Court held that the Court of Appeals erred when it held otherwise. "A court of law is not authorized to rewrite the statute by inserting additional language that would expand its application to include such other crimes." However, the Court also held that the trial court properly applied the rape shield statute because, in addition to being prosecuted for child molestation, appellant was prosecuted for (though acquitted of) rape. While it disapproved of the ruling allowing application of the rape shield statute in prosecutions for crimes other than rape, the Supreme Court affirmed Abdulkadir's conviction. The Supreme Court also declined to require a new trial whenever the rape shield statute is applied to a prosecution in which a defendant is acquitted of rape charges but convicted of other charges.

Perkinson v. State, S04P1845, 2005 Ga. LEXIS 168 (March 14, 2005).

This was an appeal in a death penalty case. Perkinson was convicted of malice murder, three counts of felony murder, aggravated battery, two counts of aggravated assault, two counts of false imprisonment, theft by taking, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon. He appealed, and the Supreme Court affirmed the judgment but vacated one statutory aggravator, which the court noted did not affect defendant's death sentence.

The evidence was sufficient to authorize the conviction (the surviving victim identified the defendant as one of those who abducted and shot him and his friend [his friend's symptoms being fatal]). The trial court did not err by denying Perkinson's motion for directed verdict on the issue of his mental retardation because there was a conflict in the evidence presented on that issue. The Supreme Court disapproved of the phrase in the pattern charge on mental retardation, "at the time of the commission of the offense," the judge properly instructed the jury about the statutory definitions of mental retardation and the charge was harmless. Pretrial publicity was not so inflammatory as to require that the trial court grant Perkinson's motion for a change of venue. Because the defendant raised the issue of his possible mental retardation, the trial court did not err by allowing the State pretrial access to his school records. Perkinson acquiesced to his absence from an in-chambers conference at which his attorneys were present. It was harmless error to admit a reconstructed videotape of some important scenes involved in the crimes because it was relatively short and not a reenactment of the crime itself. The district attorney's incorrect statements of law that a sentence of life imprisonment with the possibility of parole "can be only used if there are no aggravating

circumstances” and that the defendant was trying to hide behind a mental retardation claim were harmless because the trial court correctly instructed the jury on sentencing issues. The sentence was not disproportionate or excessive. The jury’s wording of one statutory aggravator was, however, incorrect (the jury must find that a crime “was *outrageously or wantonly vile, horrible, or inhuman* in that it involved torture,” not that it was “horrible or inhuman, in that it involved [] torture”). That statutory aggravator was vacated, but it did not affect the sentence as the jury properly found two other aggravating circumstances.

Cox v. State, Kellogg v. State, S04A2060, S05A0033, S05A0032, 2005 Ga. LEXIS 170 (March 14, 2005).

Cox and Kellogg (and a third man) were indicted and tried together for murder and possession of a firearm in the commission of a felony and were convicted. They appealed and their cases were consolidated into one opinion. After his attorney filed a notice of appeal in the trial court, Cox filed a pro se motion for new counsel. However, jurisdiction had already passed to the appellate court so he had to proceed with his current attorney.

The evidence was sufficient to authorize a guilty verdict against Cox (eyewitnesses testified that they saw Cox shoot the victim). The trial court did not err by allowing the jury to view the crime scene. Cox was given the benefit of the judge’s recharge in response to the jury’s question about the difference between felony and malice murder, because its verdict against him was not published until the jury heard the recharge and retired for future deliberations. The trial court did not err in failing to dismiss a potential juror for cause; though the juror confessed he might “lean” toward the State because of his friends in prosecution in other counties, on further examination the court determined that the juror could be fair and impartial. The substitution of Cox’s counsel in an early stage of the trial did not violate his sixth amendment rights because Cox’s initial counsel’s medical problems necessitated that he withdraw from the case, and Cox failed to rebut the presumption that his trial counsel committed unreasonable errors that prejudiced his case.

The evidence was sufficient to authorize Kellogg’s conviction (eyewitness testimony established him as a party to the crime in which Cox shot the victim). The trial court did not err in failing to strike a juror for cause because that juror ultimately indicated his ability to be fair and impartial (see above). Though Kellogg claimed that it was error to dismiss his pre-trial motions filed after his arraignment as untimely, the Supreme Court held that Kellogg waived his procedural right under Uniform Superior Court Rule 31.1 by failing to file his pre-trial motions prior to the arraignment held in connection with the initial trial in 2001, at which time he was living in Tennessee as a “fugitive.” Furthermore, most of the motions filed would have been rendered moot by further proceedings, so any error was harmless. Justices Hunstein and Fletcher concurred regarding this last portion of the decision; though nothing in Georgia law requires a defendant to file pre-trial motions before another defendant’s arraignment, Kellogg failed to demonstrate any harm in the denial of his pre-trial motions.

### **Court of Appeals of Georgia:**

\*In the Interest of R.G., A05A0491, 2005 Ga. App. LEXIS 270 (March 17, 2005).

R.G. appealed from a trial court decision adjudicating her delinquent for speeding. The juvenile court erred in adjudicating R.G. delinquent because the case was never transferred to the delinquency calendar. The Court of Appeals also found that there was insufficient evidence to convict R.G. for speeding where the deputy did not testify and no evidence was presented in support of the complaint. The juvenile court also erred in confiscating R.G.'s Texas driver's license because Georgia has no authority to suspend or revoke the driver's license of a non-resident.

\*Ellzey v. State, A04A1795, 2005 Ga. App. LEXIS 258, (March 17, 2005).

Following a jury trial, Ellzey was convicted of criminal attempt to traffic in methamphetamine and appealed. The conviction was reversed because the trial court failed to charge the jury on entrapment where there was evidence that the idea for the commission of the crime came from the agent, there was evidence of undue persuasion by the agent's confidential informant who called Ellzey many times to negotiate, and there was evidence that Ellzey was not predisposed to commit the crime (he claimed that he only planned to lend the informant money and even offered to bring a money order instead of cash). The case can, however, be retried, as there was sufficient evidence to support the verdict, as Ellzey gave almost \$6,000 to the agent and was arrested with two ounces of methamphetamine in his pocket. The ineffective assistance of counsel claim based on not receiving the entrapment charge was rendered moot.

\*Wilson v. State, A04A2260, 2005 Ga. App. LEXIS 265 (March 18, 2005).

Wilson appealed from the trial court's denial of his motion to suppress after he was charged with possession of marijuana with the intent to distribute. In granting Wilson's interlocutory appeal, the Court of Appeals ruled that when Wilson exited his car and was patted down, the officer had no suspicion that Wilson was in the drug trade or that there was any threat to his safety. If the pat down was justified the officer was still not authorized to reach into Wilson's pocket and remove rolling papers which he did not think was contraband or a weapon. Wilson's incriminating statements and marijuana were tainted and should have been suppressed.

\*Turman v. State, A04A2157, 2005 Ga. App. LEXIS 237 (March 11, 2005).

Turman appealed from his conviction for aggravated assault, aggravated battery, and possession of a firearm during the commission of a crime. The trial court erred in denying Turman's right to counsel where Turman's retained counsel was hospitalized and whose absence was beyond Turman's control. Counsel appointed by the trial court was unprepared when forced to proceed at short notice. Turman's complaint regarding the denial of his motion for a continuance and denying his competency motions as untimely were rendered moot.

\*In the Interest of K.S., A04A2134, 2005 Ga. App. LEXIS 195 (March 3, 2005).

A mother appealed from a finding that her child was deprived and at the risk for sexual abuse. There was no evidence to support a finding of deprivation where there was no evidence that mother lacked parenting skills or that child was not properly cared for. Rather, the finding of deprivation was based on the mother's mental or physical impairment, of which there was no reliable or competent evidence. There was nothing to suggest that child was in danger of sexual abuse by

being left with maternal grandparents where there was no evidence that the mother and her siblings were ever molested by their father (case against him was closed in 1998 for lack of evidence).

\*State v. Tousley, A04A1880, 2005 Ga. App. LEXIS 193 (March 3, 2005).

Tousley was charged with driving under the influence and failure to maintain lane. The State Court granted his motion to suppress breath test results and to exclude the horizontal gaze nystagmus (HGN) test and the State appealed. The court erred in excluding the HGN test based on the belief that the officer did not follow guidelines when administering the test. The officer may have incorrectly performed a part of the test which resulted in two out of six points on the test. The other four points, which are all that are required for admissibility, were obtained from proper administration of the test. Admissibility is for the judge to determine, but the defendant can try to convince the jury that the test should not carry much weight based on reliability. As such, the results of the breathalyzer should not have been suppressed and so the order to suppress was vacated. The case was remanded.