MUNICIPAL COURT
Judges Bulletin

Summer 2006 • The Georgia Council of Municipal Court Judges Newsletter • Vol. 7, No. 2

TABLE OF CONTENTS

Thank You Council of Municipal Court Judges

The family of David Miller Pierce is grateful to God for his life, for your friendship and your kindness and prayers.

Thank you so much for the beautiful Fiddleleaf Fig plant you sent in memory of David. Your friendship, prayers and concern are deeply appreciated during this difficult time.

Sincerely, Susan Pierce

President's Corner

Michael P. Cielinski
Recorder's Court of
Columbus-Muscogee County

I have begun this letter three times since last week. The first time I had just been notified of Judge David Pierce's illness, the second was the day he died and the third was the day of his funeral. Today is the fourth day since his funeral. Judge Pierce was not a good Judge, he was a great Judge. Any President of this Council, who asked him to do something, did not need to ask again. It was done. All of us can take a lesson from him. Let us commit ourselves to doing those things we do best, being the best judges we can be.

We stand at a crossroads today. Soon, hopefully we will have a seat at the Judicial Council of the State of Georgia. My hopes in this area are very high. We have some very strong backing, which we have never had before. Look in the Georgia Courts Directory, or get the current members of the Council and ask them to support us being seated at the table. Chris Patterson of the AOC is going to help prepare talking points. It is imperative that all of us meet with the Judges on the Judicial Council of the State of Georgia, and members of the Superior, State and Magistrate Court Judges Council to actively seek their support. I urge you to do so. I will ask Chris to put the talking points out on listserv upon completion. We all know that our class of courts is not at the table. We represent over 300 Judges. Yet we have little or no say in some of the decisions which affect us. For example, the proposed Rule dealing with the Maintenance of Non-Criminal Evidence and Criminal Evidence, which was adopted by the Judicial Council in June, we had very little input. These rules will impact your court and how you do business.

The Executive Committee is also examining the possibility of hiring a lobbyist. The Magistrate Court's (Chief Magistrates) now have a retirement system. The Magistrate courts also have a seat at the Judicial Council. Many of these things happened; it is my belief, because they had a lobbyist. A lobbyist will cost money. We are examining various options to obtain a lobbyist and will keep you informed.

Let us all move forward to be the best for the Court and community. Always remember that for many of the citizens of this State we are the only contact they ever have with a Judge. Their impression of your court will stay with them forever - good, bad or indifferent. We all know we can not make everyone happy. One person thinks we did not punish enough. The other side thinks they were dealt with harshly. We are there to see justice done and many citizens do not realize this is our job. Let us commit this year to see that justice is done. It is the best way to get the respect we deserve and to honor the memory of Judge Pierce.

EXECUTIVE COMMITTEE

Judge Michael P. Cielinski
President
PO Box 1882
Columbus, GA 31902-1882
706-653-0354/F 322-1722

Judge Bill Clifton
President-Elect
577 Mulberry Street, Suite 710
Macon, GA 31201
478-750-8600/F 750-8686

Judge John A. Roberts
Vice President
462 E. Paces Ferry Road, NE
Atlanta, GA 30305
404-841-0661/F 841-0775

Judge Kathryn Gerhardt
Secretary
PO Box 4866
Macon, GA 31208-4866
478-745-9661/F 745-9824

Judge Charles A. Gravitt, Sr.
Treasurer
118 Main Street
Jonesboro, GA 30236
770-478-1114/F 471-1091

Judge John Kinsley Edwards, Jr.
Immediate Past President
PO Box 1661
Valdosta, GA 31603-1661
229-671-2600/F 671-3441

District 1
Judge Tammy Stokes
Recorder's Court of Chatham County
Chatham County Courthouse
133 Montgomery Street, Rm. 104
Savannah, GA 31401
912-652-7429/F 652-7412

Judge Willie Titus Yancey, II
Thunderbolt
2821 River Drive
Thunderbolt, GA 31404
912-629-4669/F 629-4668

District 2
Judge Willie C. Weaver, Sr.
Albany
911 Pine Avenue
PO Box 646
Albany, GA 31702-0646
229-438-9455/F 438-0674

Judge Henry E. Williams
Lumpkin
1101 Valley Road
PO Box 71747
Albany, GA 31708-1747
229-888-2600/F 888-3330

District 3
Judge S.E. Moody, III
Montezuma
PO Box 220
Perry, GA 31069
478-988-3114/F 988-0063

position vacant

District 4
Judge Angela T. Butts
Recorder's Court of DeKalb County
3630 Camp Circle
Decatur, GA 30032-1394
404-294-2635/F 294-2148

Judge Warren W. Hoffman
Stone Mountain
922 Main Street
Stone Mountain, GA 30083
404-377-9277/F 377-3006

District 5
Judge Elaine Lynn Carlisle
Atlanta
150 Garnett Street, SW
Atlanta, GA 30303
404-954-6794/F 658-6994

Judge Calvin S. Graves
Atlanta
150 Garnett Street, SW
Atlanta, GA 30303
404-658-7049/F 658-6586

District 6
Judge John Clayton Davis
Morrow
2670 Emerald Drive
Jonesboro, GA 30236
770-715-5912/F 320-8930

Judge David J. Turner, Jr.
Manchester
PO Drawer 450
Manchester, GA 31816-0450
706-846-8427/F 846-5241

District 7
Judge Robert L. Whatley
Austell
3959 Janet Street
Lithia Springs, GA 30122
770-941-5833

Judge Diane M. Busch
Marietta
800 Kennesaw Ave., NW, Suite 400
Marietta, GA 30060
770-424-4343/F 424-1892

District 8
Judge Thomas C. Bobbitt, III
Jeffersonville
101 N. Jefferson Street, C55
PO Box 1676
Dublin, GA 31040-1676
478-272-5010/F 275-0035

Judge Charles W. Merritt, Jr.
Madison
155 S. Main Street
Madison, GA 30650
706-342-9668/F 342-9843

District 9
Judge Kenneth E. Wickham
Norcross
65 Lawrenceville Street
Norcross, GA 30071
770-714-6894

Judge William F. Brogdon
Lawrenceville
PO Box 390997
Snellville, GA 30039
770-978-1181/F 978-1145

District 10
Judge Chip Hardin
Tignall
105 Andrew Drive
Washington, GA 30673
706-678-4404/F 678-4404

Judge C. David Strickland
Porterdale
PO Box 70
Covington, GA 30015-0070
770-786-5460/F 786-5499

Farewell from Judge Edwards

After almost ten years of service as a municipal court judge, it with sadness that I say farewell to this Council and move to my new position as judge of the State Court of Lowndes County. It has been an honor to meet and learn from so many municipal court judges over the past decade. I have made many good friends who serve in their courts with dignity and a respect not only for the law but for the people who appear before them. I have also mourned the loss of truly outstanding judges like David Pierce and William "Bill" Coolidge who served this Council and their courts with distinction. These men worked daily for the betterment of municipal court judges across our State and our court system in general. I can only hope to measure up to such fine judges one day.

I have thoroughly enjoyed my service to this Council on numerous committees and as a district representative, Vice-President, President-Elect and President. I leave you in the fine and capable hands of your new President, Judge Michael Cielinski, who I know from personal experience is truly committed to this Council and seeks the very best for its judges.

I am proud to have come from this judicial background. I know that it has prepared me well for the challenges which lie ahead. I wish you all only the best.

Sincerely,
John K. Edwards, Jr
Municipal Court for the City of Valdosta

In Memoriam

Judge David M. Pierce

Minutes of the Winter Meeting

The spring meeting of the Executive Committee of the Georgia Council of Municipal Court Judges was held on April 21, 2006, at the Administrative Office of the Courts (AOC) in Macon, Georgia, following lunch sponsored by the Council. Judge Edwards called the meeting to order at 1:00 p.m. He welcomed all Executive Committee members and others in attendance.

Approval of Minutes

The first item of business was the consideration of the minutes from the winter meeting held in Atlanta on February 23, 2006. Upon motion duly made by Judge Bobbitt and seconded by Judge Ward, the minutes were approved as submitted.

Financial Reports

Judge Edwards then called for the financial reports. Ms. Marla Moore, reporting for Chris Patterson, noted as of March 31, 2006, $6,187.29 of the State appropriated funds for fiscal year 2006 had been spent, leaving a balance of $13,346.28. Ms. Moore noted all FY06 year expenditures are to be expended by June 16, 2006. The PeopleSoft system is being upgraded statewide and will be shutting down the first 10 working days of July. With this being said, she advised the Council should consider encumbering remaining FY06 funds towards printing i.e. the newsletter. After a brief discussion, Judge Bobbitt moved to encumber remaining FY06 funds for printing. With a second from, Judge Cielinski the motion passed with all in favor.

Judge Ward provided the private funds report and noted expenditures as of March 31, 2006 totaled $10,562.19, including $1,050.25 for the 2006 Legislative breakfast. The Council has had fewer funds deposited since the last financial report was given because very few judges pay dues this time of year. The Council currently has a balance in private funds of $50,006.80. Judge Ward also reported he had received a letter from the American Bar Association requesting a donation for this year. He reminded members last year a donation was made in memorial of Judge William Coolidge, III. After a brief discussion, members decided not to donate any funds at this time.

In final, Judge Ward announced he would not seek re-election as Treasurer. He nominated Judge Charles Gravitt of Lake City as his successor for the post.

Presidents Report

Judge Edwards announced the meeting schedules associated with the Survey Update Seminar in June. The Executive Committee will have a luncheon meeting on Wednesday, June 28th at 12:00 p.m., the Business meeting will be held Thursday, June 29th at 10:00 am, and the Training Council will meet for a lunch meeting Friday, June 30th at 12:00 pm. Next, he announced participants for the Georgia Judicial Leadership Academy scheduled for November 8-10, 2006 at The Windsor Hotel in Americus Georgia were still being sought. The Council has six seats designated for the seminar. Judges Cielinski and Still have tentatively agreed to attend. Judge Calvin Graves volunteered to participate as well. In final, Judge Edwards stated the Georgia Commission on Access and Fairness in the Courts and the State ADA Coordinator's Office is presenting a working conference on Cognition Issues in the Courts, May 16-17 at the State Bar of Georgia. An announcement was posted to the listserv, including registration information for those who wish to attend. The conference is being offered at no cost and the Training Council has approved five hours training credit towards judicial certification.

Report from AOC

Judge Edwards introduced Ms. Debra Nesbit, Associate Director for Legislative and Governmental Affairs, AOC, who provided a legislative update for the 2006 session. Ms. Nesbit began by thanking the municipal judges for their support of the AOC during this session. She reported the agency received a million dollar cut directly to their FY07 budget. Chief Justice Leah Sears fought hard to keep the budget in tact, as did Glen Richardson, Speaker of the House. Ms. Moore

continued on page 5

Congratulations

New Officers of the Council of Municipal Court Judges 2006-2007

Judge Michael P. Cielinski, President
Recorder's Court of Columbus-Muscogee County

Judge Bill Clifton, President-Elect
Municipal Court of Forsyth

Judge John A. Roberts, Vice-President
Municipal Court of Lithonia

Judge Kathryn Gerhardt, Secretary
Municipal Court of Macon

Judge Charles A, Gravitt, Sr.,
Treasurer
Municipal Court of Lake City

added a survey was sent out to the judges regarding ranking services of the AOC. She requested the Council to please return them via U.S. mail or complete the survey on the web at www.georgiacourts.org

Next, Ms. Nesbit passed out a legislative wrap-up and noted a final report would be disseminated after May 9th, the last day for the Governor to sign or veto Bills. She briefly reported on a few of the bills included in the packet. They were as follows:

Fulton County has created five new cities, Johns Creek, Leesburg, Milton, Chattahoochee Hill Country and South Fulton. At some point judges are likely to be appointed in these cities.

HB 1209 - Dept. of Public Safety; motorcycle enforcement program; provisions for payment This bill requires that all fines paid for traffic violations written by the newly-created motor cycle enforcement unit of the Department of Public Safety be remitted to the Department for the purpose of maintaining the motor cycle enforcement program. This requirement does not apply to any fees or costs associated with the payment of a fine and only apply to violations that occurred on an "urban interstate system." For the purposes of this bill, "urban interstate system" means any portion of I-285 and the portions of I-75, I-85, and I-20 that are within the perimeter.
Effective date: July 1, 2006.
Judge Bobbitt noted this Bill has a sunset provision.

HB 1436 - Wine; restaurant patrons; resealed partially consumed bottle; authorize
This bill allows a restaurant patron to remove a partially consumed bottle of wine that had been purchased along with a meal. The restaurant will reseal the bottle in a bag, and the patron must put the bottle in the glove compartment or trunk of the car when leaving. As long as these conditions are met, possession of this open bottle will not constitute an open container violation.
Effective date: July 1, 2006.

HB 718 - Pretrial intervention and diversion programs; authorize certain courts to administer
This bill allows prosecuting attorneys for state courts, probate courts, magistrate courts, and municipal courts to create and administer Pretrial Diversion Programs.
Effective date: July 1, 2006.

Ms. Nesbit noted Judge Bobbitt testified at the committee meeting on this bill and made some clarifications.

HB 1044 - Firearms; carrying and possession; municipal and city court judges; amend provisions
This bill allows permanent part-time municipal court judges to carry firearms.
Effective date: July 1, 2006.

HB 1288 - Municipal court clerks; required training; provide
This bill requires municipal court clerks to complete at least 16 hours of training in their first year of employment and a minimum of 8 hours per year after that. Effective date: July 1, 2006.

SB 44 - Corrections; contracts with private detention/diversion centers; regulations
This bill allows for the Board of Corrections to enter into contracts with private probation companies. This bill provides for county and city operated probation departments to be registered and regulated by the County and Municipal Probation Advisory Council under the same terms the private probation companies are regulated. Effective date: July1, 2006. Judge Ward noted, it is estimated more than 110 courts will come under the umbrella of the County and Municipal Probation Advisory Council.
SB 203 - Public Defenders; indigent defense services; attorney's fees/cost recovered
This bill allows local court officers to collect the fees for victim's assistance programs, which may be distributed directly to the programs (if qualified) instead of the money going through the Superior Court Clerks Cooperative Authority. This bill also clarifies the fee collection for Probate Courts, gives Superior Court Clerks Cooperative Authority auditing authority over judges and courts, allows for a county or municipality to recover payment of indigent defense that was given to a defendant who was not indigent, and allows for work release programs to be a condition of probation. Effective date: July 1, 2006. Ms. Nesbit noted Section 4 gives the Clerks Authority broad authority and the power to audit.

In final Judge Bobbitt noted **HB 1501 - County ordinance violations; maximum fines; change provisions** which is mainly for metro areas. This bill increases the maxi-

continued on page 6

mum fine for alcoholic beverage license violations to $2500. It only applies to counties or municipalities that issue more than 300 such licenses (currently Fulton County only). Effective date: July 1, 2006.

Report from the Training Council

Judge Bobbitt reported with the passing of HB 1288 the Training Council would be responsible for implementing training for the clerks. He noted, the Georgia Municipal Association (GMA) and Chairman Ralston worked together to get this vehicle in place. The Training Council is appointing a five member Clerks Advisory Committee to assist with the process; they will be invited to attend the June meeting.

Next, he reported ICJE and the Training Council are concerned with the declining number of judges registering for courses. This has a direct impact on the training budget. An accurate accounting of the municipal judges and courts currently in operation is needed. The Council is willing to support the AOC and GMA in this endeavor. In final, Judge Bobbitt reported the passage of HB 718 necessitates the establishment of pretrial diversion training.

Committee Reports

The following committee reports were then given:

(1) Benchbook. Judge Bobbitt reported the benchbook will be full reprint next year instead of a supplement.

(2) Bylaws. Judge Edwards reported for Judge Still. Legislation to change the bylaws of the Training Council regarding appointments did not pass this year. This legislation will be re-introduced at the next legislative session.

(3) Golf Tournament. Ms. Murphy reported for Judge Adams on the status of the tournament. Judge Adam is working with Judge Lawrence Dillon of Chatham County to solidify the arrangements. The tournament will be held Thursday, June 29 at 1:30 pm. The tournament course will be announced at a later date.

(4) Legislative. Judge Edwards noted in the absence of Judge Barrett, Ms. Nesbit's legislative report will serve in the stead of a Legislative Committee report.

(5) Newsletter. LaShawn Murphy reported for Judge Washburn that the next edition of the newsletter has been drafted and awaiting approval from the editor. Members should have copies by month's end.

(6) Nominations. Judge Pierce reported the notice of election and nominations have been sent out to the Council. A copy of the memo was included in the agenda [tab three]. Nominations are actively being sought. There will be a vacancy for the Vice President post. Interested parties should contact Judge Pierce.

(7) Uniform Rules. Judge Edwards reported he is still working towards finalizing the Uniform Rules.

After committee reports, Judge Edwards called for reports on liaisons with other agencies. The following reports were given:

(1) Judicial Council. Judge Edwards reported the next meeting of the Judicial Council is scheduled on June 6, 2006 at the Desoto Hilton in Savannah, Georgia.

(2) Probation Advisory Council. Judge Ward skipped the normal presentation of statistics regarding probation. At the February meeting, Ms. Ashley Garner gave a report on how productive the Council's meeting on regulatory compliance matters were. The next meeting is scheduled for May 18, 2006 at the AOC Macon office. He further reported SB44 passed and becomes effective July 1, 2006. This bill places municipal and county probation under the authority of the Council. It is estimated the bill will enlarge the Council by more than 110 courts.

(3) Georgia Municipal Association. Judge Bobbitt reported eminent domain, annexations, indigent defense, and decriminalization of traffic offenses continue to be issues of particular interest to GMA.

(4) Supreme Court Commission on Interpreters. Judge Edwards reporting for Judge Still expressed the need for use of "Certified Interpreters" in court proceedings. This information needs to be disseminated through out the Council.

Old Business

GCAC Technology Strategic Plan

Under the heading of Old Business, Judge Edwards called upon Mr. George Nolan, Director for the Georgia Courts Automation Commission (GCAC) to review the draft of the Information Technology Strategic Plan for the Council of Municipal Court Judges. Mr. Nolan passed out copies of the drafts of the Data Definition Summary Report and the Information Technology Plan

continued on page 7

Minutes continued

for review. He explained municipal court representatives meet September 27-30, 2005 for the first of two sessions to (1) Determine the functions, stakeholders, interactions and dependencies of the Municipal Courts, (2) Determine the information requirements and associated data definitions required to support these functions performed by the Municipal Courts, (3) Align the information origination points and the security of the identified data definitions to the appropriate stakeholders, and (4) Achieve consensus on those points with respect to a general overview of the operations of the Municipal Courts. He further explained the reports intent is to provide all levels of courts an overview of the high-level functions and process of the Municipal Courts of Georgia and the related information flows and data definitions required for the courts to conduct its business within the courts as well as interactions outside the court. He explained there were five high-level functions identified for the municipal court. They are as follows: Administration/ Ongoing Efforts, Pre-Arraignment, Pre-Court, In Court, and Post Court. These functions are explained in detail in the report.

The second session was the strategic planning for information technology. Mr. Nolan explained in this session input from a broad group of municipal court's leadership met to: (1) Confirm the contents of the Data Definition Summary Report, (2) Finalize the municipal courts customer interactions, (3) Identify the services and programs currently supported by the municipal courts to support IT needs, (3) Gain understanding of the municipal court's IT priorities of current and future information and service needs, (4) Establish a strategic map for the Municipal IT organization, and (5) Align and prioritize the services and programs with the strategic map. With the completion of this effort along with the data requirements and definitions effort, a strategic vision and map for 2006 through 2008 was developed that will enable the Municipal Court to begin to prioritize and deliver the IT services that will best support the court across the judicial system. This is a statewide information technology initiative for the sharing of data. The goal is to have information in standards to be able to share with courts, agencies and anyone who needs it.

In final, Mr. Nolan requested the members to review the document(s). These reports are available on GCAC's website in 'read only' format. The reports are in draft form and will not be released until a finalized version is approved. It is his goal to have the Data Definition Summary in final by the end of May and the Strategic Plan by the end of June. Mr. Nolan ended by stating, the next step in the process is a strategic business plan. Judge Edwards asked the members to take the draft reports and review them for any changes and or additions. Anyone with changes should notify him.

New Business

As an item of new business, Judge Bobbitt led discussion on the future of the municipal courts. He emphasized the need for strategic planning and also asked the membership to consider acquiring a paid lobbyist to promote or secure passage of legislation affecting the municipal courts. The sentiment was also expressed if the Council of Municipal Court Judges does not have someone campaigning for their cause they are likely to get left behind. Judge Bobbitt called for the establishment of a committee to proactively shape the Council's future. He further advised the lobbyist could be funded through the Council's private funds. Judge Edwards moved to establish a long range planning committee to research obtaining a lobbyist. With a second by Judge Pierce, the motion passed with all in favor. Judge Edwards appointed the following members to the committee: Judges Michael Cielinski, Thomas Bobbitt, and Calvin Graves. Judges Diane Busch and Clayton Davis agreed to assist with the committee as well.

Judge Edwards then announced that the next meeting of the Executive Committee will be held in Savannah, Georgia on June 28, 2006 in conjunction with the Survey Update Seminar. There being no further business, the meeting was adjourned.

Respectfully submitted by,

LaShawn Murphy, AOC
For Kathryn Gerhardt, Secretary

Financial Report

JULY 1, 1999 THROUGH MARCH 31, 2006

TOTAL MUNICIPAL BANK DEPOSIT		$60,778.99
Dues, Golf, Coffee Mugs Sales and Judge Association Dues		
REFUNDED AMOUNT		- $210.00
Seven $30.00 checks for overpayment of dues.1001,1002,1004,1005,1006 1007,1008. Check #1016 Voided.		
TOTAL COUNCIL DEPOSIT		**$ 60,568.99**
EXPENSES		
Bank Charges checks and deposit slips		-$104.50
Coffee Mugs		-$557.69
Legislative Breakfast	(ck.#1003 dated 02-09-01)	-$1014.88
Legislative Breakfast	(ck.#1009 dated 01-10-02)	-$710.54
Legal Fees	(ck.#1010 dated 05-13-02	- $ 65.92
Benchmark Trophy Center	(ck.#1011 dated 07-10-02)	-$774.44
Legislative Breakfast	(ck.#1012 dated 01-31-03)	-$821.25
President's Plaque	(ck.#1013 dated 10-03-03)	-$ 43.00
Judge Cielinski	(ck.#1014 dated 10-03-03)	-$ 58.32
Legislative Reception Deposit	(ck.#1015 dated 10-28-03)	-$625.00
Legislative Reception Final	(ck.#1017 dated 03-05-04)	-$1922.00
Judicial Council Reception	(ck.#1018 dated 08-19-04)	-$564.57
American Heart Association	(ck.#1019 dated 11-03 -04)	-$100.00
Legislative Breakfast	(ck.#1020 dated 01-26-05)	-$637.50
Legislative Breakfast	(ck.#1021 dated 02-03-05)	-$468.35
State Bar Donation	(ck# 1022 dated 05-16-05)	-$1000.00
Legislative Breakfast	(ck# 2001 dated 02-18-06)	-$892.50
Legislative Breakfast	(ck# 2000 dated 02-23-06)	-$157.73
PETTY CASH		-$50.00
PETTY CASH PAYMENT		
Long Distance Calls		$15.50
Office Supplies		$34.50
TOTAL EXPENSES		-$10,562.19
BANK BALANCE AS OF MARCH 31,2006		**$50,006.80**
BANK BALANCE AT LAST REPORT DECEMBER 31, 2005		**$50,871.03**

2006 - 2007 Meeting Schedule

Strategic Planning Session
August 11, 2006 @ 9:00am
Administrative Office of the Courts Macon Office
110 Holiday North Drive, Suite B
Macon, Georgia 31210

October Meeting *
Executive Committee Meeting - October 13, 2006 @ 1:00pm
Administrative Office of the Courts Macon Office
110 Holiday North Drive, Suite B
Macon, Georgia 31210

*The Municipal Judges Training Council meets prior to this meeting @ 9:00am

February Meeting
(Executive & Winter Business)
Legislative Breakfast/Winter Business Meeting
February 1, 2007
One Martin Luther King, Jr. Dr.
Sloppy Floyd Towers
Atlanta, GA 30334

7:30 am - 9:30 am Legislative Breakfast
(All Municipal Court Judges and the General Assembly invited to attend)

9:30 am - 12:00 Council Winter Business Meeting

1:00 pm - 3:00 pm Municipal Judges Training Council Meeting

April Meeting
Executive Committee Meeting - April 20, 2007
Administrative Office of the Courts Macon Office
110 Holiday North Drive, Suite B
Macon, Georgia 31210

June Meeting
in conjunction with the Traffic Seminar
(Executive Committee and Summer Business)
June 27- 29, 2007
Hyatt Regency Savannah
Savannah, Georgia

ICJE Faculty Recognition

The Institute of Continuing Judicial Education Faculty Recognition Medallions are given to Instructors that have taught three courses and have received a score of 4.5 or above on their evaluations.

Judge Thomas Bobbitt, III (left) and **Judge Maurice Hilliard** (right) are presented by **Judge Michael Cielinski** (middle) with ***Faculty Recognition Medallions*** on behalf of The Institute of Continuing Judicial Education.

Judge Ben Studdard (left) is presented by **Judge Thomas Bobbitt** with the ***Faculty Recognition Medallion*** on behalf of The Institute of Continuing Judicial Education

Proposed Uniform Rule — Evidence

The following proposal was presented at the June 6th Judicial Council meeting for recommendation and transmittal to the Supreme Court. At the meeting Judge Barrett W. Whittemore, Chair of the Judicial Council Records Retention Committee provided background information and insight into the rule development process. He then fielded questions from the Judicial Council. His report concluded with a recommendation to legislatively require local governing authorities to provide space specifically for the management of evidence in civil and criminal cases. The recommendation was approved for adoption by the Judicial Council.

These materials were provided to the Municipal Council Executive Committee for review and discussion at the latest quarterly meeting.

- Proposed Uniform Rule of the Superior, State, Juvenile, Probate, Magistrate, and Municipal Courts; Non-criminal and Criminal
- A model order for the handling of evidence
- A model evidence log

Please feel free to contact Executive Committee members regarding feedback on the proposed Uniform Rule on Evidence Maintenance.

As Approved by the Judicial Council of Georgia June 6, 2006

Proposed Uniform Rule of the Superior, State, Juvenile, Probate, Magistrate, and Municipal Courts

XX.xx _____ Maintenance of Non-criminal Evidence

The Clerk of Court or the Court Reporter in possession of documents, electronic documents, audio and video recordings of whatever form, exhibits, and other material objects or any other items admitted as evidence in a civil case shall maintain a log or inventory of all such items with the case number, party names, description of the item, the name and official position of the custodian, and the location of the storage of the items. Dangerous or contraband items shall be placed in the custody of the clerk of court and maintained in the courthouse or other such location as allowed by law and be available during court proceeding and accessible to the court reporter. All such items presented by the parties as evidence and admitted shall be identified or tagged by the Clerk of Court or Court Reporter with the case number and the exhibit number and recorded in the log or inventory. Within 30 days after disposition of the case, the Court Reporter shall transfer the items of evidence along with the evidence log or inventory to the Clerk of Court of the originating court. The Clerk of Court shall update the log or inventory to show the current custodian and the location of the evidence. Dangerous or contraband items shall be transferred to the sheriff or other appropriate law enforcement officer along with a copy of the log or inventory. The law enforcement officer shall acknowledge the transfer with a signed receipt and the receipt shall be retained with the log or inventory created and maintained the Clerk of Court. The Clerk of Court and the appropriate law enforcement officer shall each maintain a log or inventory of such items of evidence. In all cases, the Court Reporter shall be granted the right of access to such items of evidence necessary to complete the transcript of the case.

Evidence in the possession of the Clerk of Court or Court Reporter shall be maintained in accordance with the law. The designated custodian shall be responsible for recording on the evidence log the party, the date, and the type action taken for the release of any such items of evidence and the party to whom it was released and the destruction of any such items of evidence. Any party, Clerk of Court, Court Reporter, Prosecutor, or Sheriff who is the custodian of such items of evidence in a case shall petition the court prior to making a substitute photograph, photocopy, audio recording, digital recording, video recording, electronic image, or other equivalent in lieu of the original evidence. Upon granting of an order for substitution, the order shall be entered into the log or inventory.

Proposed Uniform Rule cont.

XX.xx _____ Maintenance of Criminal Evidence

The Clerk of Court or the Court Reporter, during the court proceedings, in possession of documents, electronic documents, audio and video recordings of whatever form, exhibits, and other material objects or any other items classified as evidence in a criminal case shall maintain a log or inventory of all such items with the case number, party names, description of the item, the name and official position of the custodian, and the location of the storage of the items. All such items classified by the parties as evidence shall be identified or tagged by the Clerk of Court or Court Reporter with the case number and the exhibit number and recorded in the log or inventory and shall be in the custody of the clerk of court and shall not be removed from the courthouse or other such location as allowed by law and be available during court proceeding and accessible to the court reporter. Within 30 days after disposition of the case, the Court Reporter shall transfer the items of evidence along with the evidence log or inventory to the Clerk of Court of the originating court. The Clerk of Court shall update the log or inventory to show the current custodian and the location of the evidence. Dangerous or contraband items shall be transferred to the sheriff or other appropriate law enforcement officer along with a copy of the log or inventory. The law enforcement officer shall acknowledge the transfer with a signed receipt and the receipt shall be retained with the log or inventory created and maintained the Clerk of Court. The Clerk of Court and the appropriate law enforcement officer shall each maintain a log or inventory of such items of evidence. In all such transfers, the items transferred shall be photographed or recorded by a visual image and placed into the court file. In all cases, the Court Reporter shall be granted the right of access to such items of evidence necessary to complete the transcript of the case.

Evidence in the possession of the Clerk of Court or Court Reporter, during court proceeding, shall be maintained in accordance with the law particularly as found in O. C. G. A. §17-5-55. The designated custodian shall be responsible for recording on the evidence log or inventory the party, the date, and the type action taken for the release of any such items of evidence and the party to whom it was released and the destruction of any such items of evidence. Any party, Clerk of Court, Court Reporter, Prosecutor, or Sheriff who is the custodian of such items of evidence in a case shall petition the court prior to making a substitute photograph, photocopy, audio recording, digital recording, video recording, electronic image, or other equivalent in lieu of the original evidence. Upon granting of an order for substitution, the order shall be entered into the case file and the log or inventory.

Sample Log

SUPERIOR COURT OF
____
COUNTY
Page 1 of _____

STATE OF GEORGIA VS. ______________________
CASE NO. ___________________________________
EVIDENCE/TRANSFER LOG
DATE CREATED: ___________________________
CREATED BY: ___________________________

EXH. #	DESCRIPTION	RELINQUISHED BY	DATE/TIME OF TRANSFER	RECEIVING AGENCY	RECEIVING AGENT	PHYSICAL LOCATION TRANSFERRED TO
		Signature of Relinquishing Clerk			Signature of Relinquishing Clerk	
		Type or Print Name			Type or Print Name	
		Signature of Relinquishing Clerk			Signature of Relinquishing Clerk	
		Type or Print Name			Type or Print Name	
		Signature of Relinquishing Clerk			Signature of Relinquishing Clerk	
		Type or Print Name			Type or Print Name	
		Signature of Relinquishing Clerk			Signature of Relinquishing Clerk	
		Type or Print Name			Type or Print Name	
		Signature of Relinquishing Clerk			Signature of Relinquishing Clerk	
		Type or Print Name			Type or Print Name	
		Signature of Relinquishing Clerk			Signature of Receiving Agent	
		Type or Print Name			Type or Print Name	
		Signature of Relinquishing Clerk			Signature of Receiving Agent	
		Type or Print Name			Type or Print Name	

Page ____ of ____

Daubert and Georgia's New Expert Witness Rule

Gregory T. Presmanes, BOVIS, KYLE & BURCH, LLC

Paper continued from Spring issue of The Bulletin.

Before the 2005 tort reform legislation, Georgia had declined to adopt the *Daubert* rule on several occasions on the ground that it was based on the Federal Rules of Evidence, which had not been adopted by the Georgia Legislature.[35] The Georgia Supreme Court granted certiorari twice to consider whether to adopt the *Daubert* rule, but ruled that certiorari was improvidently granted.[36]

Before the 2005 legislation, Georgia law provided much broader rules for expert testimony and did not require the trial court to be a gatekeeper. The basis for Georgia's historic rule on expert testimony was contained in OCGA § 24-9-67, which provided in pertinent part, The opinions of experts on any question of science, skill, trade or like questions shall always be admissible. Furthermore, questions going to whether there was a sufficient basis upon which to base an expert opinion went to the weight and credibility of the testimony, not its admissibility.[37] However, the Georgia Supreme Court adopted an exception to the general rule in a criminal case, *Harper v. State*.[38] In *Harper*, the Court evaluated the standard for determining whether the results of an interview, conducted while the defendant was under the influence of truth serum, were admissible. The Court rejected the *Frye* rule of counting heads, and instead held that it was proper for the trial judge to decide whether the procedure or technique in question had reached a scientific state of verifiable certainty. This verifiable certainty test, however, did not address the admissibility of the opinions of expert witnesses generally; instead, it addressed only the admissibility of the results of novel procedures and techniques.[39]

The Georgia Court of Appeals ruled that the *Harper* rule was not the same as the *Daubert* rule in the case of *Orkin Exterminating Co. v. McIntosh*.[40] In that case, the Court of Appeals held that the credibility of the conclusions drawn by the experts was for the jury to determine, and hence, they denied Orkin's motions for summary judgment and directed verdict. However, federal trial judges have used the *Daubert* rule to evaluate not only the methodology, but the conclusions and opinions of the experts, as well, notwithstanding Justice Blackmun's opinion that the *Daubert* rule was to be applied only to the methodology and not to the conclusions and opinions of experts.[41]

The new law passed by the Georgia Legislature in 2005 is OCGA § 24-9-67.1, which governs the admissibility of expert opinions in civil actions. It attempts to adopt Rules 702 and 703 of the Federal Rules of Evidence, with Rule 702, as amended in 2000, being the codification of the *Daubert* rule. Subsection (a) of the new Georgia statute is exactly the same as Rule 703. Subsection (b) of the statute is almost the same as Rule 702. Subsection (a) addresses the basis of opinion testimony by experts. It is contrary to Georgia's historic rule, which prevented an expert from relying on hearsay evidence and which required the basis of expert opinion to be admitted in evidence independently. Federal Rule 703, however, allows the expert to base his opinion on hearsay, if the facts or data upon which the opinion is based, are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, and the facts or data need not be admissible in evidence for the opinion or inference to be admitted.

There is an internal inconsistency in the new statute between subsection (a) and subsection (b)(1) of O.C.G.A. '24-9-67.1. Subsection (a) allows an expert to rely on facts or data [that] need not be admissible in evidence if of a type reasonably relied upon by experts in the field in forming opinions, but subsection (b), contrary to Federal Rule 702, and contrary to subsection (a), requires expert opinions to be based on facts and data which are or will be admitted into evidence at the hearing or trial. This contradictory language is likely to cause confusion.

Georgia has not adopted all of the Federal Rules of Civil Procedure or the Federal Rules of Evidence. Federal Rule 26(a)(2) of the Federal Rules of Civil Procedure contains the requirement for what must be included in the disclosure of expert testimony and directs the timing of such disclosures. To the contrary, however, Georgia has no similar provision. Instead, discovery of experts is governed by OCGA § 9-11-26(b)(4) of the Civil Practice Act. Essentially, that statute states that, in response to an interrogatory, a party must disclose experts. There are no specific details or requirements, and typically, neither side will give much information on their experts outside of depositions.

In determining whether the proposed expert testimony is relevant, the Georgia definition of relevancy is somewhat different than the Federal Rules of Evidence. The Georgia rule provides, Evidence must relate to the questions being tried by the jury and bear upon them either directly or indirectly.[42] On the other hand, Rule 401 of the Federal Rules of Evidence provides, Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. It remains to be seen as to whether or not these two differing definitions of relevancy will be interpreted differently.

The new statute provides for pretrial hearings to determine the admissibility of proposed expert testimony. Subsection (d) of OCGA § 24-9-67.1 provides that, upon motion of a party, the Court may hold a pre-trial hearing to determine whether a witness qualifies as an expert and whether the expert testimony satisfies the requirements of the rule. There is no comparable provision in Rule 702 of the Federal Rules of Evidence. However, if a hearing is held in federal court, it is typically held pursuant to Rule 104 of the Federal Rules of Evidence, a provision in the federal rules that has no parallel in Georgia. To the contrary, in *Kumho Tire Company*, the United States Supreme Court held that it was not necessary to have a hearing on a *Daubert* motion, but that the trial court has the discretion to decide how to consider the motion.[43] However, the trial court cannot simply disavow its ability to handle the *Daubert* issues. In the case

continued on page 11

of *McClain v. Metabolife International, Inc.*, the Court stated that, Although the trial court conducted a Daubert hearing, and both witnesses were subject to a thorough and extensive examination, the Court ultimately disavowed its ability to handle the *Daubert* issues. This abdication was in itself an abuse of discretion.[44] Thus, merely holding a hearing is not sufficient, and the court must apply the factors recommended by the United States Supreme Court in the *Daubert* case.

There is a unique provision of the new statute contained at OCGA § 24-9-67.1(f). That provision is as follows:

It is the intent of the legislature that, in all civil cases, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states.

It is unclear how this will be interpreted. Perhaps it will be necessary for Georgia courts to stay current with decisions in other states in order to determine whether an expert can testify in Georgia. Moreover, what interpretation will arise if decisions of other states reach inconsistent results? Also, if expert testimony is handled differently in another state, with different statutes, should that be relevant in Georgia? This is a very unusual provision, which to this writer's knowledge, does not exist in any other jurisdiction. The remainder of subsection (f) gives Georgia courts the right to draw upon opinions of the United States Supreme Court in the cases of *Daubert*, *Kumho Tire*, and *General Electric v. Joiner*, in considering expert witness testimony. However, the new statute in Georgia is not entirely consistent with either the *Daubert* or *Kumho Tire* cases. Therefore, problems may arise from drawing upon those decisions to interpret the Georgia statute insofar as it is not entirely consistent with those cases.

Even though much of the *Daubert* rule and OCGA § 24-9-67.1 are geared toward jury trials, they still apply in workers= compensation cases. Insofar as workers' compensation cases are concerned, the provisions of OCGA § 24-9-67.1 specifically apply to all civil actions, which includes workers' compensation cases.[45] Expert witnesses are allowed to give their opinions based upon facts as proved by other witnesses.[46] The expert witness may be allowed to base his or her opinion on facts or data made known either at the hearing or before the hearing.[47] An expert witness may be allowed to base his or her opinion on facts or data that are not admissible in evidence if they are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.[48]

An expert witness can be allowed to testify if expert testimony will assist the trier of fact to understand the evidence or determine a fact in issue.[49] An expert witness may be qualified as an expert by virtue of knowledge, skill, experience, training, or education.[50] An expert witness may be allowed to give opinion testimony if the testimony is based on sufficient facts or data which are or will be admitted into evidence; the testimony is the product of reliable principles and methods; and the witness has applied the principles and methods reliably to the facts of the case.[51]

Any party may request a pre-trial hearing to determine whether the witness qualifies as an expert and whether the expert's testimony satisfies the requirements of OCGA § 24-9-67.1(a) and (b).[52] Upon the filing of a motion by any party for a pre-trial hearing on such issues, the hearing and ruling must be completed no later than the final pre-trial conference.[53] However, this provision seems more geared toward jury trials. Therefore, in a workers' compensation case, the Board would probably rule on the motion before the trial, because there is no final pre-trial conference[53] in workers' compensation claims.

The State Board of Workers' Compensation will use the same four factors recommended by the United States Supreme Court in determining the reliability of proposed scientific opinion testimony as follows: (1) whether the theory can and has been tested; (2) whether it has been subjected to peer review; (3) the known or expected rate of error; and (4) whether the theory and methodology employed is generally accepted in the relevant scientific community.[54] The factors will be applied by the Board in accordance with the guidelines given by *Daubert*, and thus will be flexible and used to insure the overall reliability of a proffered expert=s methodology and conclusions, with the primary focus being on the principles and methods used, not on the conclusions generated.[55]

CONCLUSION

It will take years and many decisions from Georgia courts before we know the full impact of the *Daubert* decision, its progeny, and OCGA § 24-9-67.1. Constitutional challenges to the statute are a distinct possibility. In workers' compensation cases, however, the main reasons for requiring the trial judge to be the gatekeeper of expert testimony do not really apply, because there is no jury. Nonetheless, the State Board of Workers' Compensation is required to make the analysis and findings in accordance with the Daubert decision and OCGA § 24-9-67.1, either at the trial or beforehand, if a party makes such a motion.

NOTE: This writer would like to acknowledge and thank Robert E. Shields and Leslie J. Bryan for their excellent article in the October 2005 issue of the Georgia Bar Journal entitled Georgia's New Expert Witness Rule: Daubert and More.

[35]See, e.g., *Orkin Exterminating Co. v. McIntosh*, 215 Ga.App. 587, 592-93, 452 S.E.2d 159, 165 (1994).
[36]*Orkin Exterminating Co. v. Carder*, 258 Ga.App. 796, 575 S.E.2d 664 (2002), cert. granted on whether to adopt the *Daubert* rule (April 29, 2003), cert. vacated (September 8, 2003).
[37]*Chandler Exterminators, Inc. v. Morris*, 262 Ga. 257, 259, 416 S.E.2d 277, 278 (1992).
[38]*Harper v. State*, 249 Ga. 519, 292 S.E.2d 389 (1982).
[39]*Harper v. State*, 249 Ga. 519, at 525-26 (1982).
[40]*Orkin Exterminating Co. v. McIntosh*, 215 Ga.App. 587, 593, 452 S.E.2d 159, 165 (1994).
[41]*General Electric Co. v. Joiner*, 522 U.S.136, 146 (1997).
[42]OCGA § 24-2-1 (2005).
[43]*Kumho Tire Co.*, 526 U.S. 137 (1999).
[44]*McClain v. Metabolife International, Inc.*, 401 F. 3rd, 1233, 1238 (11th Circuit 2005).
[45]OCGA § 24-9-67.1(a).
[46]OCGA § 24-9-67.1(a).
[47]OCGA § 24-9-67.1(a).
[48]OCGA § 24-9-67.1(a).
[49]OCGA § 24-9-67.1(b).
[50]OCGA § 24-9-67.1(b).
[51]OCGA § 24-9-67.1(b) (1-3).
[52]OCGA § 24-9-67.1(d).
[53]OCGA § 24-9-67.1(d).
[54]*McLain v. Metabolife International, Inc.*, 401 F.3rd 1233 (1251), 11th Circuit 2005, citing *Daubert*, 509 U.S. at 593.
[55]*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594 (1993); see also, *Liriano v. Hobart Corp.*, 949 F.Supp. 171, 177 (S.D.N.Y. 1996). (In considering relevance and reliability factors under *Daubert*, the focus must be solely on principles and methodology, not on conclusions they generate.)

Will Your Little City and Judgeship Go the Way of Lithia Springs?

Judge Robert L. Whatley, City of Austell & formerly City of Lithia Springs

The little enclave of Lithia Springs in Douglas County has seen glory and turmoil after its legal birth in 1882[1] the city quickly became famous for hosting what was then the equivalent of the Worlds Fair. Known formally as the Piedmont Chautauqua and financed by Henry Grady and others, the town was touted worldwide and attracted many dignitaries and even a few presidents and would-be-presidents. Being blessed with mineral water later identified as Lithium, many came to drink and provided glowing testimonies of their return to health. The coming of a sumptuous hotel was vastly different in splendor for its day and the fair and its attractions brought people from all parts of the nation and world. A spur line from the Austell Southern Railroad made access easily attainable. But the burning of the hotel in 1912, the outbreak of World War I, the Depression and the financial setbacks suffered by the entrepreneurs caused the city to collapse. The legal history likewise has a troubled past leading up to the present. The history remains as the sound of an uncertain trumpet. Incorporated and chartered in 1882 as Salt Springs, the city later changed her name to Lithia Springs[2] and then increased its boundaries.[3] When the financial collapse came, the city held a referendum in response to a petition of the voters and a court order.[4] The town's meager assets were sold to finance the vote. The results of the court referendum were not recorded. Therefore some contend that the city was never dissolved. Indeed in a recent list of active municipalities published the town was included as active. Over the next few years the questions kept arising as to whether the city was really dissolved. The pro-city and the anti-city factions approached State Representative Alpha Fowler, Jr in l959 to resolve the matter and he drafted a charter with a referendum provision. The referendum failed and the matter was dropped. But in the early nineties, a movement began to question the legality of the city anew and a group of citizens petitioned the[6] court and after determining the results of the 1933 referendum were unavailable, the court ordered on April 2, 1993 yet another referendum to determine the wishes of the citizens. A referendum was held January 25, 1994 and carried by a vote of 329-239. Based on the results, an interim council was appointed and the first council was elected and sworn in on December 31, 1994. The city began operating and became fully functional as an ongoing body politic. Concurrent in time the Legislature became concerned about the many cites that was dormant, non-functioning and providing no services and passed a purge law[7] giving the Department of Community Affairs power pursuant to the enabling legislation. The Legislation provided that a city must provide at east three services out of a litany[8], including holding elections periodically and conducting meetings at certain intervals. If the cities failed to do this, they would be dissolved by operation of law on July 1, 1995; or upon application of a citizen if there were a question as to whether there was compliance.[9]

Meanwhile, the first official charter was granted by the Legislature.[10] With sparse resources, the city performed Public Works and Code Enforcement and contracted out many of the other required services. Contracts with county police, fire, and building departments were effectuated; others were attempted. Two citizens not satisfied with the substance and legality of the services filed a suit for Declaratory Judgment alleging that the substance of the services were not sufficient and the contracts for service were not fully authorized by law.[11] The court after fully examining carefully every purported service and contract ruled most services inadequate and granted summary judgment to the plaintiffs. An appeal ensued alleging compliance and adequacy. When the Court of Appeals reversed the trial court (November 30, 1999)[12] ruling that some of the services seemed adequate and remanded the trial court for jury determination.

Tiring of the struggle and the looming expenses, the council voted on August 17, 2000 to consent dissolution based on a referendum. The referendum failed by a margin of 349 on March 20, 2001. The vote was authorized by concurrence by the parties and appeared to be a straw vote authorized by the council. Straw votes are not favored in Georgia and only true referendums authorize in such cases as annexation,[13] abolishing offices,[14] consolidations,[15] repeal of ordinances,[16] voting methods,[17] water fluoridation[18] and picture shows on Sunday.[19] Liquor, tax referendum, and bond authorizations are too numerous to mention. The referendum appeared an after-the-fact ratification of the agreement of the parties; not a court ordered one. Predicated on the referendum, the judge dissolved the city on June 21, 2001 with the city turning over its assets to the county according to law (June 20, 2001).[20]

It is settled that dissolution must have the blessing of the Legislature.[21]

continued on page 14

Celebration of Life

David Miller Pierce May 29, 1945 - July 13, 2006

We will all miss Judge David Miller Pierce, Chief Judge of the Magistrate Court of Houston County and Judge of the Cities of Perry, Byron, and Roberta. Judge Pierce departed this life on July 13, 2006. He was 61. Born in Hawkinsville, Georgia, in 1945 to Mr. and Mrs. John Dupree Pierce, he attended Hawkinsville High School, where he was a scholar and all-state quarterback. From there he went on to Florida State University where he graduated in 1966 with a Bachelor of Arts in mathematics and later attended Emory University School of Law, receiving his Juris Doctor degree in 1969. While attending law school, his mother reintroduced him to his childhood neighbor, Susan Dean, and the two were soon married on August 3, 1968. Following law school, he joined the United States Air Force and served as a member of the Judge Advocate General Department, attaining the rank of Captain before receiving an honorable discharge in 1974. Judge Pierce and his wife then moved back to Perry, where they gave birth to their daughter Meredith. He was in private practice for 27 years, first with Nunn, Geiger & Pierce, and later Geiger & Pierce. Judge Pierce was highly regarded by his legal colleagues and the community at large, he was appointed to the City of Perry in 1980 and the Houston County Magistrate Court in 1997. Judge Pierce was an active participant in a variety of professional and community organizations. He served on the Executive Committees of the Council of Magistrate Court Judges and the Council of Municipal Court Judges. You could bet on Judge Pierce being present for Council meetings, he was a loyal member. It won't be the same attending the Council meetings and not have him there to greet you with a smile that would light the room. He also served on the Georgia Commission on Dispute Resolution and the Commissions Committee of Rules. As a member of the Perry United Methodist Church, he served as a member of the Administrative Board, Finance Committee, and Staff-Parrish Committee. He was also Chairman of the Board of Trustees and a member of the Christadelphian Sunday School class. Also active in Rotary, with 30 years of perfect attendance, his leadership roles included serving as President, District Director, Assistant Governor, Paul Harris Fellow, and Will Watt Fellow. Within his community, he has served as a Chairman of the Perry Area Chamber of Commerce, the Houston County Development Authority, The Westfield Schools Board of Trustees, and the Middle Georgia Military Affairs Committee, as well as serving on the Board of Governors for The Grand Opera House; Museum of Aviation Foundation, Robins Air Force Base; Board of Directors for the Robins Air Force Base Museum and The Air Force Association. Professionally, Judge Pierce was a member the State Bar of Georgia, American Bar Association, and Houston County Bar Association. In final, one can truly say he was a servant of the people…

Lithia Springs cont.

However the law a1so states that it may be dissolved using other "methods as may be provided by general law". House of Representatives Bill 571 (for repeal of charter) sought to dissolve the city but did not pass the House of Representatives. Thus it appears that the "other method" approved is a court dissolution without the intervention of the Legislature as long as the court order is recorded.[22]

In summary, after numerous lawsuits, four referendums, appellate intervention, numerous charters, and Legislative denial, the question which surfaced in 1933, appears as uncertain now as then.

[1]Ga. Laws 1882, p. 277
[2]Ga. Laws 1918, p. 1885
[3]Ga. Laws 1886, p. 230; Ga. Laws 1887, p. 497
[4]Ga. Laws 1933, p. 1050; Referendum order issued July 29, 1933
[5]Ga. Laws 1959, p. 2871; noted failed in Local Legislation Index
[6]Douglas County Superior Court case 92-8068(1992) and case 93-9315
[7] O.C.G.A paragraph 36-30-7.1. Ga. Law 1992, p. 2592
[8]These services were law enforcement, fire protection, road and street construction, solid waste management water supply and distribution, waste-water treatment, storm-water collection and distribution, electric or gas services, planning and zoning, recreational facilities; building, housing plumbing, electrical code and other code enforcement
[9]O.C.G.A 36-30-7.1 (J)
[10]Ga. Laws 1996, p 4319 (April 8, 1996), Second Charters Ga. Laws 1999, p, 4842; Home Rule, Ga. Laws 2000 p. 4704
[11]Douglas County Superior Court case CV00372 (filed February 26, 1997)
[12]*Lithia Springs v. Turley*, 241 Ga. App. 472, S. E. 2d 364(1999)
[13]O.G.C.A. 36-36-58
[14]O.G.C.A. 1-3-11
[15]O.G.C.A. 30-60-16
[16]O.G.C.A. 36-35-3 (a)(2)(A)
[17]O.C.G.A. 21-2-321
[18]O.C.G.A. 12-5-175
[19]O.G.C.A. 101-1-552
[20]O.G.C.A. 36-30-7.1(g)
[21]O.G.C.A. 36-35-2(e)
[22]Laws 2002, Vol. 11, p 5985

A Police Officer's Procedural Rights in Disciplinary Matters:

The Right to Privacy, Use Immunity, and the Scope of the Internal Affairs Investigation

By: Richard T. Alexander, Alexander & Cleveland, LLC

INTRODUCTION

This article was originally written for the *Watchful Eye*, the official publication of the Georgia State Lodge, Fraternal Order of Police and published in 1999. This paper is a condensed version on a police officer's right to privacy within the realm of the internal affairs investigation, the restrictions on management related to the right to privacy, the scope of internal affairs investigations, and the use immunity doctrine granted to officers in internal affairs investigations.

RIGHT TO PRIVACY, USE IMMUNITY, AND SCOPE OF THE INTERNAL AFFAIRS INVESTIGATION

Georgia has long recognized a right to privacy.[1] There are two theories which hold prominence: 1) an individual's interest in avoiding disclosure of personal facts, and 2) the individual's interest in being left alone.[2] As we all know, law enforcement agencies seldom, if ever, recognize such rights and frequently exceed clear and well established constitutional boundaries. Seldom do police officers challenge an investigation exceeding constitutional boundaries.

The test to determine when an officer's right to privacy may be invaded simply balances the officer's interest in privacy versus the employer's interest in disclosure.[3] If information is pertinent to the officer's on the job performance, then the officer may be required to disclose the information, including financial information. However, if there is no link between job performance and the information requested, disclosure most likely will not be mandated. The Court in *Guntharp v. Cobb County* insisted the inquiry must be made as narrowly as possible, may not enter areas unrelated to job performance, and must be specifically, directly, and narrowly related to the performance of official duties.[4] As well, the investigation should be limited to those areas identified as being within the investigation.[5]

In *Guntharp v. Cobb County*, a Cobb County police officer was notified of an internal affairs investigation focusing on whether or not the officer was involved, or had knowledge of, the shooting of his neighbor's dog. Guntharp was ordered to appear for a polygraph examination. Upon arrival he was informed there would be additional questions directed towards shooting into a house and the shooting of horses.

Guntharp, upon being informed of the additional areas of inquiry, asked to call his attorney and declined to proceed further with the polygraph until such time as he consulted with legal counsel. After consultation with legal counsel, he informed his superiors that he would submit to the test. This was approximately two hours after stopping the initial inquiry.

Guntharp's superiors considered he had refused the test and committed an act of insubordination which resulted in his dismissal. The Cobb Civil Service Board upheld his termination and the Cobb Superior Court refused his appeal on writ of certiorari. The Court of Appeals granted his discretionary appeal.

The Appeals Court in reversing the lower court decided that the Cobb Police Department violated General Order 74-6 which required the internal affairs unit to advise the officer of the allegations and the name of the complaining person. In addition, the Court found that the Cobb Police Code of Conduct set the internal affairs unit's procedures which mandated that all procedures carried out under its General Order shall be specifically directed and narrowly related to a particular investigation being conducted by the Department.[6]

As to polygraph examinations, most likely, if the department has a written policy, the employee will be required to submit to the polygraph or face disciplinary action. Polygraph results alone may not support disciplinary action under certain circumstances.[7] The employee may file a declaratory judgment action to challenge the mandatory nature of the department's polygraph examination policy even before he or she exhausts an administrative remedy.[8]

In *Hester v. City of Milledgeville*,[9] city officials were concerned that city fire fighters were involved in illegal drug activity. As a result, the city council passed a resolution requiring fire department employees to undergo polygraph testing. The city council resolution provided for testing specifically directed and narrowly related to a particular internal investigation.[10]

As a result of the city council resolution, all fire fighters were required to elect and sign one of four forms which provided: 1) an agreement that the results could be used in a judicial or administrative proceeding, 2) a waiver of all state and federal constitutional rights in connection with the polygraph examination, 3) a right to preserve all constitutional rights which permitted the

continued on page 17

employee to object to incriminating questions, or 4) a refusal to submit to the polygraph examination. The Court found the process lacking in constitutional protections because employees may have felt compelled to sign the form most favorable to the employer in order to remain employed. In other words, the options provided were inherently coercive[11] to laypersons.

The *Hester* Court, compelled to follow the ruling in Garrity, clearly stated that any information obtained in the administrative investigation would not be available in a criminal case whether or not the employer made an explicit grant of immunity.[12] The Court determined the privilege against self-incrimination automatically attaches to compelled out-of-court incriminating statements as a matter of law.[13] As well, should an police officer assert the privilege against self-incrimination, the employer may not consider the refusal to waive the privilege as a black mark upon an employee's record[14] and may not [threaten] to discipline or discharge the employee if he or she refuses to waive it.[15]

As to the scope of internal affairs investigations, one case stands out as guidance to law enforcement officers, *Eastwood v. Department of Corrections*.[16] In the *Eastwood* case, a female DOC officer was drugged, rendered unconscious, and sexually molested by a fellow employee. The incident was reported and an internal affairs investigation commenced. The internal affairs investigator informed the officer that she would not be retaliated against for revealing all details about the assault.

She was forced to reveal details about her own personal sexual history during the investigation and later threatened with termination unless she signed a statement recanting her allegations. In conjunction with recanting the allegations, the officer was assured the employee involved in the assault would resign. Thereafter, members of the department published degrading drawings of the officer victim and subjected her to insults. The officer victim resigned and filed a civil rights action under a theory of the right to privacy.

The Tenth Circuit found the investigation to have strayed from its inquiry and that it exceeded constitutional boundaries. The Court indicated the investigation had entered the personal life of the officer victim and was a standardless inquiry.[17]

Three other cases dealing with administrative investigations deserve our attention as they relate to use immunity granted in the internal affairs investigation. We must understand the holdings in *Erwin v. Price*, *Benjamin v. City of Montgomery*, and *United States v. Camacho*.[18]

The *Erwin* case involved off duty conduct by an Athens, Georgia police officer. The officer pulled into a store parking lot, at that moment a pedestrian jerked open his car, called him an insulting name, and accused the off duty officer of almost hitting him with the officer's automobile. The officer pulled a handgun from his glove compartment and it was seen by the pedestrian. The officer told the person that if he had a complaint he should call the police department and that he would wait for their arrival.

After this exchange, the pedestrian retreated across the street where he continued to yell insulting remarks at the officer. The officer then pointed his finger at the pedestrian and pretended to shoot at him. The pedestrian immediately departed.

Thereafter, the police chief ordered the officer to provide a truthful and detailed statement to the department representative investigating the incident. The officer was given repeated assurances that his statement would be for administrative purposes only and that none of his statements would be used in a subsequent criminal proceeding, however, he refused to answer questions. The officer was ultimately terminated for refusing to answer.

The officer brought suit against the chief and claimed he was protected by the Fifth Amendment privilege against self-incrimination. The United States District Court upheld the officer's dismissal and the Eleventh Circuit Court of Appeals affirmed that ruling.

The Appeals Court found that since the officer was not coerced into waiving his Fifth Amendment privilege and refused to answer questions specifically, directly, and narrowly relating to performance of his official duties, the privilege would not bar his dismissal.[19] The court further held that under the ruling in Hester any further grant of use immunity would be duplicative. Therefore, the prosecution was bound by the constitutional rulings beginning with Garrity and the clear statement from the department representative was sufficient to be binding on the prosecuting attorney.

In *Benjamin*, two City of Montgomery police officers, both sergeants, filed a civil rights action contesting their dismissal from the force. The case again dealt with the officers' right to invoke their Fifth Amendment right against self-incrimination.

The case began with subpoenas issued to both officers by a defendant in a criminal case. The criminal trial

continued on page 18

Police Officer's Rights cont.

was the result of an assault on two Montgomery police officers in which one was shot. The officers were subpoenaed by defendants with the intention of showing police misconduct.

Upon being placed on the witness stand, both officers refused to answer questions about their investigation of the incident, citing their right against self-incrimination. Following this refusal, the Mayor of Montgomery ordered the officers to report to the district attorney to divulge all information relevant to the case. The District Attorney refused to interview the officers relying on the fact that the officers would obtain immunity against use of the statements apparently because they were being compelled by the Mayor to give the statements.

Sometime later the officers were called a second time to the stand. Again, the officers refused to answer any questions except those from the District Attorney. The trial judge called the Mayor to the witness stand, and while on the stand, the Mayor indicated that he would immediately fire both officers if they did not tell everything they know about this case.

Two days later the officers were called for the third time. On the third occasion, the officers indicated their willingness to testify, but only because the Mayor had ordered them to testify. The trial court refused this offer, called the Mayor back to the stand, and suggested that he fire the officers. According to the case, apparently the trial judge was under the impression the officers would then testify. They again refused.
The federal district court ruled against the officers and held that the state's right to obtain testimony from the officers outweighed the officers' Fifth amendment rights. The appellate court overturned that ruling finding that the district court's ruling was contrary to established Supreme Court precedent which prohibited the government from coercing a police officer's waiver of the constitutional right against self-incrimination.

The last case for this discussion is Camacho which was a federal criminal prosecution of several officers assigned to the street narcotics unit of the Miami police. The prosecution was initiated under the federal civil rights statute. The facts are rather lengthy and have been condensed for our purposes.

This case began with the arrival of the six officers at an intersection about 6:00 p.m. in Miami which ultimately lead to the death of a man named Leonardo Mercado. Immediately subsequent to the officer's notification that Mercado had been seriously injured, two sergeants arrived at the scene. After the sergeants' arrival, they briefly questioned the officers to determine which ones were witnesses and which ones had hands on contact with Mercado. After determining which two had contact, pursuant to standard operating procedure, all officers were ordered to return to police headquarters.

Soon thereafter the department was notified that Mercado had died of injuries received while in police custody. Departmental policy mandated that the Homicide Division conduct an investigation of all in-custody deaths. A shooting team was assembled consisting of homicide personnel, a representative of the State Attorney's Office, and a representative from the Internal Security Division.

All six officers were directed to the homicide office for questioning, directed to remain apart, and told not to speak with each other. All were monitored by homicide personnel.

The officers' attorney explained that they would be giving a statement under penalty of discipline or termination and that the statements could not be used against them in a criminal prosecution.

Upon questioning of the first witness, the State's Attorney attempted to manipulate the questioning by soliciting an agreement from the officer that he was not under subpoena and would be giving the statement voluntarily. The first officer repeatedly stated that his statement was a compelled statement and that he was giving his statement under those conditions. The following three were told substantially the same with the exception that the State Attorney did not continue to inform the officers their statement was voluntary.

Subsequently, all six officers were indicted by the federal government and prosecuted under the federal civil rights laws. All were represented by legal counsel and each filed a motion to suppress all statements made at the scene of the incident as well as those statements compelled at the Homicide Division. The Court determined the statements given at the Homicide Division, as well as some statements made by two officers at their home later, were indeed compelled and suppressed their use at trial. As to the statements at the scene, the Court found them to be admissible due to the absence of compulsion when given. In other words, there was no hint of the threat of discipline or termination when making the "at the scene" statements.

CONCLUSION

The foregoing was not intended to be an exhaustive summary of all cases concerning the right to privacy

continued on page 19

How to Beat the Search Warrant

by: Jeffrey R. Sliz
Sliz/McKinney/Drake Law Firm, LLC

There is currently no issue greater in the field of criminal law than search and seizure. In recent years, "Knock & Talk"; police "Protective Sweeps" of homes and businesses, and Waivers of Fourth Amendment Rights as a condition of probation for persons pleading guilty to drug related charges, have weakened and eroded a Defendants rights to be protected from unlawful searches or seizures. On April 6, 2006, I delivered a speech at the ICLE in Atlanta on "Launching a Successful attack on a Search Warrant". My talk basically consisted of a list of approximately 30 questions to be asked and answered by the defense attorney in assessing the validity of the affidavit and search warrant issued in a drug case.

LAUNCHING A SUCCESSFUL ATTACK ON A SEARCH WARRANT

It's early in the morning...dark outside, you're dead asleep, trying to work off a good drunk and a hell of a buzz...snuggling up to your naked "significant other" ALL of a sudden you hear POLICE...OPEN THE DOOR WE HAVE A SEARCH WARRANT!! LET US IN OR WE'LL KICK THE DOOR DOWN. WHAT SHOULD YOU DO?

HERE ARE YOUR OPTIONS:

OPTION A
Quick turn on the T.V. real loud - Jump into your favorite chair and pretend to be asleep as the door comes crashing in; or

OPTION B
Have your naked girlfriend answer the door, hoping to create a diversion while you hide under the bed, or bolt out the back door; or

OPTION C
Take all the pills and powder you got, inhale and swallow all of it. Start yelling "I'm Dying" "I'm Dying" and hope you have a close hospital and a fast ambulance; or

OPTION D
Do you cooly and calmly wait for the door to crash in; screaming police running in and yelling on the floor Mother @!#* and AMIDST the chaos you say... "Excuse me officer; may I ask you a few questions before I am cursed, threatened and beat down".

IN DRUG CASES - MOST TIMES THE MOTION TO SUPPRESS HEARING IS "YOUR TRIAL" WHERE YOUR GUILT OR INNOCENCE IS DETERMINED

QUESTIONS TO BE ASKED:

QUESTION 1)
PROPER EXECUTION

Was the search warrant which you are serving upon me properly executed by a neutral and detached magistrate as required by law?

In the middle of a hearing, I realized that the issuing Magistrate was also hearing the Motion to determine the validity of the search warrant. No Can Do!

continued on page 20

Police Officer's Rights cont.

and the scope of internal affairs investigations; however, an understanding of the cited cases gives the legal counsel and the police officer ammunition against abusive internal affairs investigations.

[1]*Pavesich v. New England Life Ins. Co.*, 122 Ga. 190 (1905).
[2]*Whalen v. Roe*, 429 U.S. 589 (1977) and *Paul v. Davis*, 424 U.S. 693 (1976); *Plante v. Gonzalez*, 575 F.2d 1132 (5th Cir. 1978), cert denied, 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979).
[3]*Fraternal Order of Police v. Philadelphia*, 812 F.2d 105 (3rd Cir. 1987).
[4]*Garrity v. State of New Jersey*, 385 U.S. 493, 17 L.Ed.2d 562, 87 S.Ct. 616 (1967); *Hester v. Milledgeville*, 777 F.2d 1492 (11th Cir. 1985); *City of Atlanta v. Lambright*, 205 Ga. App. 558, 423 S.E.2d 265 (1992).
[5]*Guntharp v. Cobb County*, 168 Ga. App. 33, 307 S.E.2d 925 (1993).
[6]Id. *Guntharp* 307 S.E.2d at 926.
[7]*Hester v. Milledgeville*, 777 F.2d 1492, 1496 (11th Cir. 1985).
[8]*Moss v. Central State Hospital*, et al, 179 Ga. App. 359, 346 S.E.2d 580 (1986).
[9]*Hester v. Milledgeville*, 777 F.2d 1492 (11th Cir. 1985).
[10]Id. *Hester* 777 F2d at 1494.
[11]Id. *Hester* 777 F.2d at 1495.
[12]*Hester v. Milledgeville*, 777 F.2d 1492, 1496 (11th Cir. 1985) citing *Murphy v. Waterfront Commission*, 378 U.S. 52, 79, 84 S.Ct. 1594, 1609, 12 L.Ed 2d 678 (1964).
[13]Id. *Hester* 777 F.2d at 1496.
[14]Id. *Hester* 777 F.2d at 1495.
[15]Id. *Hester* 777 F.2d at 1495.
[16]*Eastwood v. Department of Corrections*, 846 F.2d 627 (10th Cir. 1988).
[17]Id. *Eastwood* 846 F.2d at 631.
[18]*Erwin v. Price*, 778 F.2d 668 (11th Cir. 1985); *Benjamin v. City of Montgomery*, 785 F.2d 959 (11th Cir. 1986); and *United States v. Camacho*, 739 F.Supp. 1504 (S.D. Fla. 1990).
[19]*Erwin* at 778 F.2d 670.

How to Beat the Search Warrant cont.

As a result of the confusion, and problems with the search warrant, an offer of 10 years to serve went to 10 years probation, due to this foul up in a case in Madison County.

For Further Information (See Daniels § 4-5, 4-6)

QUESTION 2)
DESCRIPTION OR PLACE TO BE SEARCHED

Does the affidavit for the search warrant contain a specific and accurate description of the residence or the structure to be searched?

Often times business parks, driveways, or trailer park streets, in the "exclusive areas" our clients reside or work in have several dwellings or structures on them. The structure to be searched should be adequately and specifically described so that the officer executing the warrant can readily identify the actual structure to be searched.

NOTE: The lack of a proper description also helps attack the credibility and reliability of the officer or confidential informant providing the information for the affidavit.

For Further Information (See Daniels §4-12) Descriptions of places to be searched.

QUESTION 3)
VERACITY & CREDIBILITY OF THE INFORMANT

Does the affidavit for the search warrant contain sufficient information regarding the confidential informant to establish his veracity and credibility in order to enable the issuing Judge to determine that the information provided should be considered accurate and truthful? See Attachment "E", a short summary of relevant case law.

For Further Information (See Daniels § 14-81)

QUESTION 4)
LACK OF CREDIBILITY OF THE INFORMANT

Does the affidavit for the search warrant contain personal information about the affiants lack of credibility known to the police, his criminal history, or terms of the deal made with the police or prosecutors to give this information? The issuing Judge should be properly advised of the negative factors regarding the credibility of the informant in order to effectively weigh the reasonableness of the information provided and to review possible motive for the confidential informant providing the information to the police which might affect its truth and veracity.

QUESTION 5)
INAPPLICABLE GENERAL INFORMATION CONTAINED IN THE AFFIDAVIT

Did the affidavit for the search warrant contain "general information" about drug dealers, drug dealings, paraphernalia, scales, money records which are recited in the affidavit, but do not apply to or is not evidence in this particular case regarding the person or residence sought to be searched? If so, the false or inapplicable information should be stricken, and the affidavit reconsidered without the false or misleading evidence.

QUESTION 6)
DISCLOSURE OF THE IDENTITY OF THE INFORMANT

Was the name of the confidential informant disclosed in the affidavit for the search warrant or given orally to the issuing Judge? The law is entirely different if the confidential informant is identified to the issuing Judge or not identified. If the name is given, the magistrate may use her personal knowledge of his credibility: prior use as a confidential informant, etc., evidence of his truthfulness in the past; standing in the community.

It relates to question of whether or not oral testimony was also provided to the issuing Judge in support of the issuance of the search warrant. In State vs. Michael Wages, the Judge said she could not remember being told the name of the confidential informant, but could not positively dispute the affiants statement that the name was provided to her. The Officer testified he gave the information to the issuing Magistrate and the Court upheld the warrant.

QUESTION 7)
STALENESS OF THE INFORMATION

Was the information contained in the affidavit for the search warrant timely? Always determine if all of the information presented in the affidavit is "dated"- to be able to determine if the information is "stale"- when was he told the information; when did he see the methamphetamine in the house- Timeliness of the information is a KEY ISSUE in validity of search warrants.

QUESTION 8)
ORAL TESTIMONY

Always question the issuing magistrate as soon as possible, as to whether or not there was any "oral testimony" presented in addition to that contained in the written application for the search warrant. Send a letter to the Judge confirming the existence or lack of oral evidence presented at time of issuance. See Attachment "B", the form letter.

QUESTION 9)
CRIME - EVIDENCE TO BE SEARCHED FOR

Does the information or evidence sought in the search warrant "match up" to or relate to the type of

continued on page 21

crime alleged? Does it relate to the information given by the applicant or confidential informant in the affidavit for the search warrant? Often times articles are sought to be searched for which are not related to the crime charged (i.e.: records, packaging materials, phone records, etc.) for a charge of possession of marijuana. Also objects sought must be directly related to affidavit information given to the issuing Judge.

QUESTION 10)
ITEMS IN AFFIDAVIT ITEMS IN SEARCH WARRANT
Does the actual Search Warrant itself allow investigators to search
for evidence other than that sought in the affidavit used in the
vs. application for the search warrant?

EXAMPLE: The affiant is seeking to search for marijuana, baggies, scales, records of drug transactions, phone records, packaging devices, books on manufacturing marijuana, photos of growing marijuana for a simple Possession of Marijuana case. How do most of these items apply to a possession case? A charge of possession is clearly not the same as manufacturing or sales of drugs and if not challenged, a mere "possession" case may become a sale case or a possession with intent to distribute case with a greater sentence possible.

QUESTION 11)
EXECUTION OF THE SEARCH WARRANT

Was the search warrant executed within 10 days of the issuance of the search warrant, or as provided in the search warrant? If not the search is invalid.

For further information (See Daniels §4-16 - §4-23).

QUESTION 12)
INVENTORY

Was a "return" or "inventory" made on the search warrant? The law requires that a verified return be made after the search warrant is executed. A person is entitled to a copy of the search inventory made. Unfortunately the law is very loose on the requirement of the "return" - Not a very good basis for attack.... Examine it very carefully - what was found, where, and what was actually tested by the crime lab. A District Attorney will not be able to establish who had what or what was tested, if each item submitted to the Crime Lab is not specifically described, and information put down as to where, or on whom, it was found.

QUESTION 13)
AREA SEARCHED

Was the area actually searched with the description of the area to be searched? Was the description specific enough for a reasonable person to be able to locate the specific area described in the search warrant. In a Gwinnett County case (State vs. Jason Sidney Green), the description was "the exclusive area of Jason Sidney Green", that means absolutely nothing. This search was set aside because an ordinary person would not be able to determine what area was to be searched pursuant to the description in the search warrant.

QUESTION 14)
ITEMS SEIZED

Were items seized which were not within the items described in the search warrant and authorized to be seized? Obviously the fewer items presented in Court as physical evidence of a crime the better- Four pages of items seized which are necessary to constitute a meth lab will not help your client convince the jury that he was simply making dinner...

Exceeding the Area to be searched often leads to "in plain view" discovery of other items. For example, not only can a person be charged with possession of methamphetamine, now there are lesser offenses for possession of items used in making meth where the finished product is not present at the time of the search, but it appears that meth is being manufactured.

Try to exclude as many items as possible which are not arguably within the description of the items to be seized. The exclusion of evidence often times makes for testimony that appears incomplete from the witness on the stand and difficult for the jury to follow, which may lead to an acquittal.

QUESTION 15)
SCOPE OF SEARCH AREA TO BE SEARCHED vs. AREAS IN WHICH ITEMS ARE FOUND

Did the search itself exceed the scope of the area authorized to be
searched by the terms of the search warrant? Check the inventory sheets to determine exactly what items were found where vs. what areas were authorized to be searched. Items found in areas which were not authorized to be searched, should be excluded, and any other evidence derived therefrom.

QUESTION 16)
PROTECTIVE SWEEP

Was the area of the search expanded under the guise or pretense of conducting a "protective sweep for officers safety"? In a recent case I handled, the Court ruled that searching the house for "officer's safety" was not valid, 3 hours after police arrived, initially searched the residence, saw no one and heard nothing during the period before the protective sweep. (State vs. Jason Sidney Greene).

continued on page 22

How to Beat the Search Warrant cont.

QUESTION 17)
AREAS SEARCHED vs. ITEMS SEARCHED FOR

Were areas searched, which could not contain the items authorized to be searched for in the warrant? What are they searching for? Where were they looking for it? (Re: an elephant is not to be found in the refrigerator).

For further information (See Daniels §4-52, Page 267)

QUESTION 18)
CURTILEGE AND RESIDENCE

Were curtilege, out buildings or vehicles authorized to be searched according to the "black and white" terms of the search warrant?

Read closely - Does it say house or what else is included? What is defined as the "residence" in the description contained in
the affidavit? Was the area to be searched expanded in the search warrant? Example: the affidavit refers exclusively to inside of the house - not adjacent barn, separate garage or vehicles and anything found in other areas should be suppressed.

QUESTION 19)
SEARCH OF INDIVIDUALS

Were any persons or vehicles searched, that appeared or came onto the property during the course of the execution of the search warrant, and were not described in the warrant?

The issue is were the Persons present during the search, named in the Search Warrant or were they Persons that arrived during the search. Police must have independent probable cause to search persons who arrive during the course of the execution of a search warrant; not so for persons who are located at the residence when a search warrant is executed. But persons can be patted down for officers safety or to prevent attack, or to prevent concealment or disposal of contraband described in the warrant if not mentioned in the search warrant.

For further information (See Daniels §4-21)

QUESTION 20)
CONTROLLED BUY

Was the search warrant based on a purported "controlled buy"? If so;

1) On what basis was the controlled buy set up?
2) When was the controlled buy?
3) Who observed the controlled buy?
4) Was the confidential informant adequately searched before and after the controlled buy?
5) Who allegedly made the sale to the confidential informant?
6) Was there marked money use in the controlled buy?
7) Exactly what was seen by the officers during the controlled buy?
8) How long was the confidential informant in the residence to make the buy?
9) Was the amount allegedly spent to purchase the quantity of illicit drugs approximately equal to street value of the contraband?
10) Find out as much as possible about time of buy. Can you find witnesses to testify to the contrary that the Defendant was not there or witnesses that state no sale was made?

QUESTION 21)
CONFIDENTIAL INFORMANT PLANTING EVIDENCE

Has the confidential informant and the alleged seller ever "done
business" before? How often has the confidential informant been
in the house or residence of the alleged seller?

In a case involving the search of a meth lab in Lawrenceville, Georgia, the Defendant acted as a confidential informant and actually took drugs in with him and planted the drugs to create a bust on a competitor to reduce his own sentence. He hid them in the bathroom - told police the transaction took place in the bathroom - police search bathroom, drugs found - VOILA! One cooked goose medium rare!

QUESTION 22)
"NO KNOCK" PROVISION

Was there a NO KNOCK PROVISION in the search warrant based
on persons being armed and dangerous? Door kicked in - but no guns or weapons found. This can be used to revert back to your attack on the credibility and reliability of the confidential informant and other information which was provided to the issuing Judge to bolster the validity of the information in the affidavit, and now used to attack it.

QUESTION 23)
GOOD FAITH EXCEPTION

Are the police contending that a portion of the evidence seized,
although not described in, or authorized by the affidavit for the search warrant or warrant should be allowed as a product of the GOOD FAITH effort of the officer? Georgia does not follow the Federal Rule, set forth in United States vs Leon 468 US 897 (1994). There is no Good Faith exception in Georgia, see (Gary vs. State 262 GA 573 (1992). But ALTHOUGH the "GOOD FAITH" EXCLUSION does not apply, searches of vehicles are not excluded if the wrong transmission (re: existence of bench warrants, suspended license, etc. established the necessary probable cause to search the vehicle.

For further information (See Daniels §2-26).

continued on page 23

How to Beat the Search Warrant cont.

QUESTION 24)
SEARCH WARRANT INFORMATION vs. TESTIMONY AT TRIAL

Does the confidential informants trial testimony match the informants statements given to the police and incorporated into affidavit for search warrant?

In State vs. Michael Wages, Co-Defendant, Phillip Boss' testimony at the time of trial, significantly differed from the events and information he related to the police as a confidential informant at the time of his arrest and which was used in the affidavit for the search warrant.

Argument - The informant was sworn at the time of trial, not sworn when giving information to the police to support the issuance of the search warrant. Presumption is that he told the truth under oath and gave false information in the affidavit. You should move to have the Court reconsider the finding of probable cause for the issuance of the search warrant, based on the inconsistent testimony and possible perjury.

QUESTION 25)
FALSE INFORMATION IN THE AFFIDAVIT

Does the affidavit for the search warrant contain false information upon which the Judge relied in authorizing the search warrant? If
false information is contained in the affidavit for search warrant, the remedy is for the information to be excluded and the validity of the remaining information examined to determine if probable cause still exists. For example, the confidential informant says he witnessed the Defendant have dope, make sales over the last 3 months. Evidence is that the Defendant was in jail during the last 3 months and therefore the information is obviously false.

For further information See (Daniels §14-82).

QUESTION 26)
STANDING

Does the accused have standing to contest the search of his person or property? Be careful what you ask for. Whose purse is it? Do you want it to be yours?

Condemnation, Its your car, you want it back vs. Criminal Charges, presumption of possession and control as owner of the car regarding drugs found in the car.

See State vs. Jason Sidney Green, where the Defendant said he wasn't living there, and the State argued that he had no standing but, that he had control over the "exclusive area" where the drugs were found.

QUESTION 27)
EXPECTATION OF PRIVACY

Does the person seeking to suppress the search have an expectation of privacy in the area to be searched? What about abandoned property? In a pending case I have a Defendant that was riding a motorcycle and he allegedly threw dope into a ditch. The Court held that he had no standing to contest the stop and search of his person and motorcycle. What about Trash Pulls? Check the dates on documents in the trash can to determine "staleness". What evidence is shown as to ownership? The law is simple, you heave it-your rights leave with it!

QUESTION 28)
SECOND SEARCHES

Do police have a right to make a second search of a vehicle or
premises, based on the initial search warrant, after the original search has been concluded? NOT GENERALLY.

EXAMPLE: In State vs Liggett, a "hit and run" case, the driver fled from the car; items recovered from the car and stored at the Police Department evidence room. Later the Detective reads the report, goes to the briefcase and opens it, finds drugs and a gun - held to be improper search without search warrant.

For further information (See Daniels §4-57)

QUESTION 29)
PROBABLE CAUSE

Does the affidavit in support of he search warrant contain sufficient
information to establish probable cause for the issuance of the warrant?

The cases of Spinelli vs. U.S. 393 U.S. 410 (1969) and Aguilar vs. Texas 378 U.S. 108 (1964) are still part of the decision making process regarding reliability of the informer. But now the "TOTALITY OF THE CIRCUMSTANCES" is the test under Illinois vs. Gates 462 U.S. 213 (1983).

QUESTION 31)
SENTENCING

When all else fails and the drugs are not suppressed, what do I say at the time of sentencing.

FACTORS TO BE RAISED IN SENTENCING:
1) Character Witnesses on behalf of the Defendant
2) Lack of a Prior Record
3) Personal history; Work history; Contributions to the community
4) Make a reasonable and plausible request, not something stupid!

IN CONCLUSION - REMEMBER
As to the Search Warrant:
1) Take it apart piece by piece;
2) Assume Nothing;
3) Object to Everything;
4) Defendants will send new clients if you Fight like Hell- whether or not you win or lose; remember that the bigger the case the more pressure on

continued on page 24

Caselaw Update

The past couple of months have been slow for appellate decisions involving traffic; 3 important decisions are:

ARTICULABLE SUSPICION/ARREST
St. v. Dixson A06A0592 7/5/06 Officer cannot stop a car solely because a check of the driver's tag revealed an "unknown status" of insurance.

CHEMICAL TESTING
Stewart v. St. A06A0782 7/10/06 Stewart argued that, among other things, the Intox 5000 results in his case should have been suppressed because: 1. It is not admissible as scientific evidence under Harper, because the machine can be manipulated by the officer, and the DFS does not follow their own rules for inspection of the machine. The court summarily dismissed all arguments and affirmed Stewart's conviction.

IMPLIED CONSENT
Hannah v. St. A06A0759 6/30/06 Hannah was involved in an accident involving serious injuries; he asked trial court to suppress blood test, arguing that the portion of 40-5-55 involving requests for chemical tests in cases involving serious injuries has been ruled unconstitutional. The Court of Appeals, agrees, HOWEVER, under Hough, if the officer has probable cause to believe the driver was DUI, then a request for a chemical test is valid.

ATTENTION GWINNETT LAWYERS!!: Effective August 1, 2006, terms of Gwinnett Judicial Circuit have changed; terms now begin the first Monday in March, June, December, and the 2nd Monday in September; see HB 1423 below:

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.
Code Section 15-6-3 of the Official Code of Georgia Annotated, relating to terms of court for the superior courts, is amended by striking paragraph (20) and inserting in its place a new paragraph (20) to read as follows:
"(20) GWINNETT CIRCUIT: Gwinnett County - First Monday in January, March, May, July, June, and November December and second Monday in September."

SECTION 2.
This Act shall become effective August 1, 2006

One more case where my good friend, Howard Cook was reversed while sitting in Cherokee County: Lyttle v. St. A06A1015 5/12/06 Lyttle was driving out of a dead end road at 1:30 am, a road known for all sorts of illegal activity, when an officer stopped her, asked permission to search, and as a result found some marijuana; Judge Cook ruled the stop valid; The Court of Appeals ruled the officer did not have articulable suspicion to stop.

Editorial Comment: When did the government assume responsibility to obtain "justice" for "victims" of crime?? The law used to be that the District Atty/Solicitor represented the people of the State for crimes against the State; if an individual was a victim of a crime, that person could exercise his remedies against the villainous criminal by seeking a "civil" action for damages; Alas, now the prosecutor not only represents the people, but also the individual victim; based on this years political campaigns, one would think that the solicitor is paid by the taxpayer to collect damages for individuals. Wow, what a country!

Mickey

How to Beat the Search Warrant cont.

the Judge to uphold the search
5) Think outside of the box;
6) In bad cases remind them they will win, but can they stand the "PAIN OF WINNING" several days at trial, endless objections and the appeal which will follow.
7) You can't plead a case, if you can't try a case;
8) Always file a Motion To Suppress in a drug case, sometimes "S**T HAPPENS" for an example: drugs are lost; witnesses unavailable; police officers move and/or leave the department - when no motions are filed "S**T DON'T HAPPEN.

THANK YOU

Use this information to your best knowledge in assessing the validity of a search warrant. For all of the attachments, warrants, affidavits used in the actual presentation and for the other materials on warrantless searches; car searches; recent case law changes, contact ICLE to get a copy of the program materials - Criminal Law - Hot Topics in Search and Seizure, given on April 6, 2006 066302. If you need help or someone to exchange ideas....call me.

Special Thanks to my Paralegal, Janie Deal for helping me complete this information package.

Sincerely yours and good hunting,

Jeffrey R. Sliz
Sliz/McKinney/Drake Law Firm, LLC
280 Constitution Blvd.
Lawrenceville, Georgia 30045
770-963-8607

Summer Conference and Traffic Seminar

June 2006 • Savannah, GA

The Listserv … Is Ready to Serve You!

If you have not joined, do so now. For those of you who are not aware here are a few reasons to join listserv.

Listserv's purpose is to automatically send information out as well as provide interaction between all Traffic Court and Municipal Judge Subscribers.

1) Its an inexpensive way to interact with fellow City Judges and discuss issues concerning your class of court,
2) Great way to seek out advice on unusual cases or cases you may have not experienced before and,
3) It's a quick way to send urgent notices that may other wise require sending postcards, making long distance calls (faxes) and playing phone tag (remember the cost buildup).

The Council encourages you to subscribe to this list. It is convenient, informative, and not to mention, it can be used as a great reference in referring to past events. Subscribing takes one call or e-mail. Once you have subscribed, you will receive a welcome message, providing a pass code and instructions on using the service. If you have any questions about this service, please contact AOC Webmaster Brian Collins at (404) 463-3804 or collinsb@gaaoc.us To subscribe to the Traffic Court Listserv, please contact LaShawn Murphy, AOC, at (404) 651-6325 or via email at murphyla@gaaoc.us

Welcome aboard to all new subscribers!

Council of Municipal Court Judges
Administrative Office of the Courts
244 Washington Street, SW • Suite 300
Atlanta, Georgia 30334

Margaret Gettle Washburn
Chief Judge, Sugar Hill & Buford
Editor

David L. Ratley
Director

Marla Moore
Associate Director for Court Services

Ashley G. Stollar
Graphic Design