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“Evidence for Dummies”

Presented by:
Judge Gary Mikell
Bulloch County State Court

December 6, 2004 (2:00 - 3:00 pm)
State Court Judges 2004 New Judge Orientation
ICJE, Dean Rusk Hall
Athens, GA

Foundations/Outlines

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Brady Motion

Batson Basics

Domestic Violence Supplement

- a. Confidential Communications Privilege
- b. Marital Privilege
- c. Hearsay Exceptions:
 1. Necessity; 2. Res Gestae

DUI Supplement

1. Alcosensor
2. Intoxilzyer/Gidey
3. Field Sobriety Tests
4. GCIC
5. Refusal Recission
6. Roadblock
7. Reasonableness/Independent Test
8. Field Sobriety Tests
9. Three Tiers of Police Contact
10. Probable Cause Test

Driving with Suspended License

- a. Elements
- b. Driving Record/GCIC

Relevance

Speeding

1. Accident Report-Civil (40-9-41)

–accident report (filed w DPS/findings/action) not admissible at damages trial

2. Admissions

- A. In Judicio–pleadings/formal court statements (of fact)–conclusive against declarant.
 - relating to case at hand/not other cases
 - contrary to trial contentions
- B. Out-of-Court Statements–against party’s interest at trial (right of declarant to have whole statement admitted)
 - acquiescence or silence where circumstances require answer–may amount to admission
 - subsequent remedial measures inadmissible (unless door opened to rebut)
 - offers to compromise inadmissible/offer to settle admissible
 - agents pursuant to agency and res gestae of business transaction–admissible

3. Audio/Video Recording Authentication (24-4-48(c))

- if operator unavailable or not under individual control:
 - competent evidence tend to show reliably fact/facts offered for
 - contains date and time showing contemporaneous w/events depicted
- if operator testifies:
 - someone present when made testify fair and accurate representation of event

4. Authentication of Private Document

Preliminaries:

- marked for identification
- shown to opposing counsel
- witness asked to identify document
- witnessed asked knowledge of document to establish can identify

Rule: authenticated in any manner that directly or circumstantially identifies the source of the document

Methods of Authentication include:

- stipulation of parties
- business records foundation
- medical records statute: certification by custodian
- requests for admission
- by witness
 - if signed, by signing party
 - if not signed, by witness of preparation or execution
- solid circumstantial proof (ex.: handwriting/signature samples)

5. Authentication of Public Document

- a. State and county records, including court records
 - certificate or attestation of public official
 - no seal required
 - certification identify name, office, title
 - certification attest true and accurate copy
 - bear's certifier's signature.
 - b. Municipal and other records, and ordinances
 - certificate or attestation of public official
 - certification identify name, office, title
 - certification attest true and accurate copy
 - bear's certifier's signature
 - bears seal of person charged with official custody
- Note: Statute only for authentication, not hearsay exception

6. Best Evidence Rule

- Party may not testify to contents of writing without having the writing.
[Can testify to facts, without referring to writing(which would be bolstering testimony)]
Copies--Must produce original, except:
- carbon copy/computer printout made from same source and process as original
 - copies produced in response to discovery
 - ordinary business records (made in course of biz for purpose of preserving)
 - certified copies of original documents
 - satisfy court original is inaccessible, despite due diligence (or original outofstate)
 - proof that original lost or destroyed (with diligence) offered to court
 - in criminal case, original in possession of accused = inaccessible exception

7. Business Record

- qualifying witness:
1. testifies record of type routinely made in regular course of business
 2. has knowledge of business' routine practices with respect to this type of record
- recording of an act, transaction, occurrence or event
 - act, transaction or event the business routinely records
 - recorded by someone acting according to that routine (made in regular course of biz)
 - reduced to tangible form
 - at or near the time of the act, transaction, occurrence or event described.
- (NO OPINIONS/CONCLUSIONS, JUST THE ACTS AND FACTS)

8. Chain of Custody

- establishment of routine procedures for handling item in question
- procedures reasonably assure identity and integrity of item will be presented.

9. Character Evidence in Civil Cases = Irrelevant (unless matter involves character)

- carelessness or propensity to act negligently = inadmissible character evidence
- reputation/past acts inadmissible to show propensity

Def.: Person's propensity to act one way rather than another in certain situations

Exceptions (admissible):

- impeachment with bad character evidence
- defendant sued for conduct that is criminal or immoral
(good character evidence okay to rebut)
- wrongful death--for assessing damages
- punitive damages-- if bifurcated from liability stage
- part of res gestae (ex. consuming drugs/drinking before/during act)
- party opens door by offering testimony that can be contradicted

Similar transactions inadmissible to show character/propensity, but admissible for:

- notice or knowledge (like of dangerous condition)
- plan or scheme
- routine practice
- design to process failure/success
- pre-existing or superceding cause of injuries (evidence that unrelated accident may have caused plaintiff's injuries is admissible)
- motive or bad faith

Note: Court still balances probative value v. undue prejudice/confuse/time waste

Note: General character of biz/org. to do things certain way inadmiss. for neg.

- but routine practices/SOP of biz are admissible (specific procedure OK)

10. Character Evidence in Criminal Cases

A. Defendant = Inadmissible, but for exceptions.

Exceptions:

- Good character by Def. (2 methods only: 1. Reputation evidence by witnesses;
[but State can cross/delve into source/extent of knowledge]
2. Defendant's testimony, including specific instances of conduct)

State's permissible response:

1. Cross of Def. regarding prior conduct;
 2. Cross of Def. character witnesses of Def's prior conduct;
 3. Certified copies prior moral turp. convictions.; or
 4. Witnesses on Def's bad reputation in community.
- part of res gestae (ex. consume alcohol/drugs before/during act)
 - Defendant opens the door (but not de minimis reference)
 - Similar transactions inadmissible to show character/propensity, but admissible for:
 - notice or knowledge (like of dangerous condition)
 - plan or scheme
 - routine practice
 - motive/intent or bad faith
 - identity
 - opportunity
 - absence of mistake/accident

Note: Court still balances probative value v. undue confuse/prejudice/time waste

B. Victim character = generally inadmissible; exceptions:

- res gestate
- impeachment
- credibility issues: bias, prejudice, diminished capacity
- state of mind (ex. self defense)
- prior difficulties

11. Closing Arguments

May:

- draw inferences from evidence, no matter how illogical
- discuss the instructions or charges the judge will give (refer to not read)
- refer to well established historical facts
- argue from facts as to why a particular witness should not be believed
- comment upon what opponent has not proved
- comment on witnesses not called (other than asserting privilege)

May Not:

- misrepresent the facts in evidence
- engage in pure speculation
- argue or debate the court's instructions
- refer to facts never admitted into evidence
- assert counsel's own belief as to the credibility of witnesses or merits of case
- express personal believe as to guilt or innocence
- comment on accused's pre-trial silence or failure to testify at trial
- attempt to arouse the emotions of jury by appeal to prejudices irrelevant and inconsistent with legal justice
- read the law or cases to the jury (but may refer to law court is going to charge)
- attempt to inform the jury about certain legal implications of their actions
- argue party's ability/inability to pay judgment
- argue jury should use verdict to punish party (unless punitives sought)
- argue golden rule (juror put in party's place)
- argue accused if convicted might get parole, pardon, reduction of sentence
- prosecutor may not argue Defendant poses future danger

12. Computer Graphics

a. Illustrations of ordinary scenes:

- admissible if accompanied by testimony of witness w/first hand knowledge of thing being illustrated

b. Illustrations of normally unobservable phenomena, like beating heart:

- require foundation testimony of qualified expert that illustration is true and accurate representation of real thing.

C. Simulations (visual representation of what expert believes happened):

- should only be adjunct to testimony of fully qualified expert
- must be product of testifying expert's analysis of facts and issues
- expert must be prepared to reveal and defendant every step in the analysis

13. Confidential Informant

Motion to Suppress Context :

- test is if information offered by CI 'meets test for probable cause'
- no need to reveal identity of informer's identity
 - cross examination not allowed on identity

- probable cause to search may be provided by information from reliable CI
 - determined by totality of circumstances surrounding:
 1. Basis of informant's knowledge, and
 2. Informant's veracity or reliability
 - note: verification of CI info with personal observation of officers = good PC

14. Continuing Witness Rule

- Test: a. Is writing/video little more than reduction/substitute for oral statements
b. Does it depend on credibility of maker for value
c. Is it uncontrolled so that jury can view/read again and again

Writings that do NOT go out with jury:

- confessions
- depositions and interrogatory answers; affidavits
- transcripts of former testimony
- writings admitted as past recollections recorded
- witness' written notes/data made or collected for purpose of facilitating the witness's testimony
- audio or video records (including statements)
 - may be played for jury in open court (controlled) if jury requests

Note: Video true depiction of event can go with jury

15. Day in the Life Film

- must be supported by testimony that scenes accurately portray plaintiff's experiences
- witness with first hand knowledge must testify that scene recorded is in fact typical
- fair and accurate depiction of routine or typical activity of plaintiff
- can be staged, if fair and accurate of routine or typical activity

NOTE: a. Re-enactments of past events generally not allowed

- b. Care needed for hearsay or opinion by participants
- probative value lies in what can only be insufficiently spoken
 - may need little or no verbal content
- c. If commentary needed, commentary should be provided by witness at trial subject to cross examine.

ULTIMATE DECISION FOR COURT: Probative value outweighs negative effects.

Consider: -is film accurate/fair portrayal of Plaintiff's condition

- does it exaggerate pain/difficulties
- was film shot/edited for disproportionate focus on pain/struggles
- does film add to jury's understanding of injuries/damages
- length of film (truly not cumulative and repetitive)
- adequately support by testimony of accuracy subject to cross examine

16. Demonstration Evidence/Diagram

- witness with personal knowledge of the real evidence
 - witness testifies demonstrative evidence is fair and accurate representation of that real evidence in all material respects.
(substantially similar and fairly supporting inferences okay)
 - demonstration evidence sufficiently probative to be helpful and outweigh confuse/mislead
- Note: Demonstration evidence not go out with jury in deliberations
Note: Diagram with testimony okay if contains material only from testimony and not otherwise erroneous or prejudicial.

17. Depositions

Objections preserved (NOT waived) by taking deposition without written objection:

- competency of witness or
- competency, relevancy or materiality of testimony
(unless ground of objection may have been obviated/removed if presented at time)

Objections WAIVED by not making seasonable objection at deposition taking:

- errors or irregularities in manner of taking
 - form of the questions or answers
 - responsiveness of witness
 - in oath or affirmation
 - in conduct of parties
 - errors of any kind which could have been obviated or cured
 - for instance, objection of insufficient foundation laid for expert witness
 - must be made at time to give opportunity to cure
- (all other objections are reserved for trial)

18. Direct Examination

Leading Questions on direct exam allowed in court discretion when:

1. Witness physical/mental/age condition causes trouble communicating;
2. Boilerplate foundation;
3. Jog witness memory when obvious having difficulty remembering;
4. Witness deemed hostile.

(Leading Question: one that suggests its own answer)

19. Expert Witness

Requirements:

- expert testimony needed to explain some fact or draw inferences beyond jury ken (not bolster theory of case)
- opinions based on principles, methods, techniques of proven reliability
- expert’s background shows experience or training in matters claimed as expertise
- expert’s opinions based on facts personally known to him or facts admitted at trial
- must be based on good science (scientific stage of verifiable certainty) (but bad application goes to weight not admissibility)
- expert cannot be mere conduit for hearsay opinions of other experts

General Rule: Expert may testify to opinions based on facts within his personal knowledge or facts otherwise admitted at trial and presented to witness in form of a hypothetical question.

Re Hearsay:

- expert can base opinion in part on hearsay (but not mere conduit for opinions of other experts not available on cross);
- but most needs to be on admitted evidence (and can’t say what hearsay was)
 - (if expert based pretty much on hearsay, reject opinion)
 - (if hearsay, may not allow to disclose hearsay basis is jury)
- (emerging approach—some tolerance of hearsay when underlying hearsay involves facts, not opinions, and is of kind of basic information that such experts gather and use in reaching conclusions; but not hearsay evidence of specific facts expert learned in course of investigation)

Re Qualification:

- direct examination/disclosure to background and qualifications
- three options then: 1. **no objection**; 2. **argument on sufficiency**;
3. voir dire on qualification
- may charge on expert upon qualification

Re Hypothetical Questions:

- not used when expert is basing opinions on personal knowledge (personal knowledge includes general sources and knowledge in his field and data the expert has collected)
- are used to present facts to expert that are beyond his personal knowledge but which are admissible at trial.
- may be based on reasonable inferences from admissible evidence (not speculation)
- never required in a deposition
- rarely useful/frequently detrimental to clear and cogent presentation of expert opinion testimony

Re Prior Cases: won-lost record inadmissible; prior contrary opinions okay

20. Financial Status in Tort

–financial status, liability insurance, collateral benefits—ordinarily inadmissible/prejudicial

–but liability insurance relevant to prove witness ownership/agency/control/motives/bias

21. Habit and Routine Practice

–witness who can describe the routine from personal knowledge

–witness can affirm routine was in place at time in question and

–witness can affirm that matter in question would have been subject to routine.

General rule: witnesses may testify about their habits, not habits of others

–witnesses beyond that testify to what they observed other do

22. Hearsay:

Defined: Statements whose value depends on credibility, competency and veracity of someone not in Court. There is an inaccessibility to the credibility of the declarant.

Test I: Does statement and proponent's use essentially ask jury to assume the out-of-court declarant was not lying or mistaken when statement made?

Test II: After stripping witness of all credibility, is it still relevant?

(if yes, it is not based on credibility and admissible)

Note: Georgia hearsay based on confrontation/ability to cross examine credibility

Relevant purposes that do not depend on credibility of hearsay declarant:

–explaining conduct

–statement had effect on person explaining subsequent conduct

–must be truly relevant to some issue in case

(police—is officer's motive, intent, state of mind at issue?—usually not; inadmissible at trial, but admissible at suppression motion hearing when Defendant challenges why police did something)

–effect on hearer/reader

–verbal acts

–state of mind

–offered for effect on state of mind of listener

–reveals something about state of mind of declarant (when this at issue)

–knowledge

–motive

–intent

–feelings and emotions

–self defense

NOTE: Limiting jury instruction may be in order if hearsay has dual purpose.

Other hearsay exceptions:

–statements for medical diagnosis treatment (not just to doctor)

–must be reasonably pertinent to diagnosis or treatment

23. Impeachment

Contradiction: No foundation necessary.

Prior Inconsistent Statement:

- Call to witness mind time, place, person, circumstances of prior statement
- if in writing, show to witness, ask if recognize and recall
- deposition: refer to deposition and ask to confirm if made earlier statement
- Note: If witnesses admits making statement, impeachment is complete and statement may not be shown by extrinsic evidence, whether oral or written.

Bias or Ill Feelings:

- ask witness on cross-examination as to bias/ill feelings for party.
- if admits-ends inquiry (no extrinsic evidence)
- if denies, extrinsic evidence similar to reputation testimony may be shown
- but not shown by particular acts or transactions.

Character of Witness:

- ask impeaching witness of knowledge of general character/reputation of witness in community where he lives/works
- ask impeaching witness what that character is.
- ask impeaching witness if from that character he would believe him on his oath
- Note: no inquiry into particular transactions except on cross in seeing the extent and foundation of witness' knowledge.

Conviction of Crime by Witness (Moral Turpitude):

- no foundation necessary, even improper.
- crime of moral turpitude (generally felonies)

24. Lay Witness Opinion Testimony

Admissible:

1. if question under examination is opinion, not existence of fact
 2. opinion based on witnesses personal knowledge, not hearsay
 - witnesses discloses factual basis for opinion
 - opinion not violate ultimate issue rule
 3. opinion logically flows from observations
- like speed of auto, simple cause of wreck, own or person's mental state

25. Medical Bills

- patient or family member or other responsible for bill identifies as expenses incurred in treatment connected to subject of litigation
- reasonableness/necessity of charges not part of foundation, but can be subject of cross

26. Medical Records (24-7-8(b))

- a. If preparer of medical record does not testify:
 - business record with proper foundation, but diagnosis/opinions not admissible
 - foundation must be laid for every hearsay source with multiple hearsay
- b. If preparer of record does testify:
 - preparer’s/witness’s statements, diagnosis, opinions not hearsay
 - preparer may read from, once foundation laid as past recollection recorded or business record

27. Mistrial

1. Whether improper evidence, without curative instructions, so prejudicial that its consideration by jury could tip the verdict
2. If so, will curative instruction effectively remove the danger

28. Necessity Exception to Hearsay

1. unavailability of declarant in court
 - deceased or unlikely available
 - beyond subpoena power/not voluntarily appear
 - cannot be located despite due diligence
 - witness asserts valid privilege not to testify
2. no comparable evidence available
3. statement shows circumstantial guarantees of trustworthiness

29. Offers to Settle/Compromise (24-3-37)

- offer to comprise (w/view to compromise) inadmissible
- offer to settle (liability conceded; offer to pay appropriate damages) admissible
 - exception: offer to pay expense not appear as liability admission but expression of sympathy/benevolence/concern for injured party

30. Opening Statements

- confined to matters lawyer expects to prove
 - confined to matters admissible in evidence
 - demonstration/illustrations okay
 - if based on evidence party intends to produce at trial
- Common relevant objections:
- addressing jurors by name
 - argument of the law (but brief reference to applicable law)
 - arguing credibility of expected witnesses
 - arguing facts, and drawing inferences and conclusions from the argued facts
 - emotional appeals
 - inflammatory rhetoric
 - racial or ethnic appeals

31. Photographs/videos/tapes

Photos: --witness actually saw scene depicted

--scene in photo fairly/accurately depicts scene

Tapes/Videos: --someone present when made testify fair and accurate representation

--no one present--testify to routine and reliable practices assure accuracy of date, time and location of events recorded

Criminal:

--not admissible if prepared with view toward prosecution

--may be admissible as Biz Record if contains simple, mundane matter that could not be influenced by prospect of prosecution

32. Police Reports-Criminal

--admissible as business record for observations of officer recorded soon after observation

--narrative portion not admissible under biz exception

--opinions and hearsay in the report are inadmissible

Note: on civil, accident reports above

33. Prior Consistent Statement

Admissible, if:

1. Veracity of witness trial testimony placed in issue

--affirmative charges of recent fabrication, improper influence, or improper motive raised during cross exam

2. Witness present at trial

3. Witness available for cross examination

34. Recollection

A. REFRESHING RECOLLECTION (OCGA 24-9-69)

--establish witness is having trouble recalling some relevant fact

--ask court for permission to refresh witness recollection

--hand witness item and ask to review silently and see if refreshes recollection

--retrieve item from witness ask if memory refreshed; then testify from refreshed memory

Note: a. anything may be used, regardless of whether witness prepared or not

b. item to refresh witness' recollection not admitted evidence, unless otherwise admitted

c. no need to tell jury or let know what refreshing document is.

d. opposing counsel has right to see item and cross examine upon it

B. PAST RECOLLECTIONS RECORDED

--witness states or exhibits inability to fully or accurately recall certain relevant facts

--witness identifies writing as prepared (or verified) by him at time when memory fresh

--or prepared by another, reviewed and confirmed when memory fresh

--witness testifies the writing is true and accurate to the best of his knowledge

Note: Past Recollection recorded may be read to jury (but not go out if substitute for oral testimony--continuing witness rule; dividing line if writing is little more than reduction of substitute for oral testimony, read only)

35. Replica

- real evidence inaccessible
- witness familiar with original states fair and accurate representation
- aids presentation of testimony or argument to jury
- existence or nature of original not in controversy

Note: if requested, charge jury item is only a replica

36. Res Gestae

- declarations which accompany an act.
- declarations so nearly connected to act in time--free of suspicion of device/afterthought

Notes: 1. Talking to others before statement cuts against admission

2. Time: Did declarant have time to deliberate what going to say?

3. Motive: Did declarant have motive to deliberate what going to say?

4. Opportunity: Did declarant have opportunity to deliberate what to say?

37. Silence/Acquiescence (OCGA 24-3-36)

Criminal: Not allowed

Civil: Factors to determine admissibility--

1. Party must have heard and understood statement
2. Subject matter of statement within party's knowledge
3. No physical/psychological impediments to responding
4. Statement of type that party expected to respond to

38. Spoliation of Evidence

destruction/meaningful alteration of evidence

- 3 remedies:
1. Charge jury--spoliation creates rebuttable presumption evidence would have been harmful to spoliator;
 2. Dismiss case;
 3. Exclude testimony about evidence

5 factors to consider remedy: 1. Was defendant prejudiced;

2. Can prejudice be cured;
3. Practical importance of the evidence;
4. Whether spoliator acted in good or bad faith
5. Potential for abuse if expert testimony about evidence not excluded

39. Statement Against Interest (O.C.G.A. 24-3-8)

- made by deceased person (not a party) against his interest
- made with view to pending litigation

40. Summary of Voluminous Documents

- underlying records made available for inspection by all parties and the court
- underlying records would be admissible
- person who examined the records and prepared summary available for cross

41. Treatises

- on direct exam, expert may refer to name and general nature of published source on which based opinions, but may not disclose the contents of source
- on cross, expert may be impeached with published source if there already exists expert evidence that source is accepted as reliable and authoritative in the field or witness on cross admits as much

42. Ultimate Issue Rule

- if question under examination is one of opinion, any witness may swear to opinion or belief and give reasons for it
- if issue of existence of facts, opinions of witnesses generally inadmissible

Notes:

- witnesses generally refrain from drawing conclusions/inferences if jury able to draw on their own
- mundane, descriptive opinions of witness not prohibited
- witness who perceives facts first hand in better position than jury to draw simple inferences that logically flow from his observations okay
- witness NOT allowed to testify legal terms/conclusions:
 - as to contractual obligations of parties
 - that person acted in self defense
 - that a death was a homicide
 - that a shooting was accidental
 - that death was suicide
 - that person was negligent
 - that child was abused
 - that person was raped

43. Voice

- voice identified by witness familiar with voice and can recognize it
- familiarity based on face to face contacts or subsequent contacts, even if contact made for purpose of gaining familiarity in order to testify

Brady Motion Supplement

- State states no exculpatory/impeaching information
- Defense moves court for in camera inspection of prosecutor's file
- defense must ask record be preserved by trial court by sealed copy for possible appellate review
- Appellant must prove:
 1. State possessed true Brady material
 2. Defense did not have the evidence or could not obtain with reasonable diligence
 3. Prosecution suppressed favorable evidence
 4. Defense denied access to such evidence at trial
 5. Disclosure would have benefitted defense
 6. Denial deprived of fair trial (reasonable probability of different outcome.)

Batson Basics:

1. Party challenging strike has burden of making prima facie showing of discrimination;
2. Proponent of strike must then produce race-neutral/nondiscriminatory explanation;
3. Burden shifts back to challenging party to show strike merely pre-textual (motivated by discriminatory intent).

DOMESTIC VIOLENCE SUPPLEMENT

A. Confidential Communications Privilege (O.C.G.A. section 24-9-21)

(concerns admissibility of evidence)

Basic: Communications between husband and wife excluded on grounds of public policy.

- communication must be confidential (based on husband-wife relationship and confidence)
- communications meant to be confidential (impersonal statement not rely on relationship okay)
- belongs to the communicator
- either spouse may assert the privilege but only the spouse who confidential statements are sought (communicator) may waive the privilege
- permanent: survives end of relationship or death
- must be assertive communication (can be other than speech)
- not apply when made in presence of third party
- not apply when communication is actionable by one spouse against another
- not apply in crime against minor child (24-9-27)

B. Marital Privilege (O.C.G.A. section 24-9-23)

(Concerns compellability of one spouse to become a witness for or against another spouse).

- husband and wife competent but not compellable to testify
- not apply to proceeding where husband or wife charged with crime against minor child—but compellable only as to evidence on specific act charged
- privilege of refusing to testify belongs to witness and not the accused
- privilege, unlike confidential communications privilege, ends with death or divorce

Summary: Witness/Spouse can refuse to testify under the marital privilege, but accused/defendant cannot block or object to testimony under the marital privilege. However, the accused/defendant can object to any communication that was confidential under confidential communications privilege if the communication was confidential and based on husband-wife relationship of confidence.

C. Marital Hearsay Exceptions:

- formerly based on 1. **Necessity (24-3-1)**
 - need/necessity for hearsay
 - statement relevant to a material fact
 - more probative on the material fact than other evidence that may be procured
 - circumstantial guarantee of trustworthiness
 - witness dead or unavailable
- 2. **Res Gestae (24-3-3)**
 - accompany act or
 - so nearly connected in time to be free of suspicion of device/afterthought
 - Note: unavailability of witness not required

Crawford v. Washington: Confrontation clause overcomes necessity/trustworthiness

New Focus: 1. What is understanding of declarant about use of statement

2. Role of government agent in receive the statement

DUI Supplement

1. Alcosensor

- state must prove device approved by Director of DFS/GBI
- officer testimony of approval w/o contradiction sufficient
 - inability to name model/model number goes to credibility, not admissibility

2. Intoxilyzer/Gidey Foundation

Intoxilyzer must testify:

- trained and certified to operate Intox. at test time
- operator's permit must be introduced into evidence
- testing methods approved by GBI/DFS
- test conducted using Intox. previously and subsequently used by operator
- machine function properly/no parts missing
- machine appear in good working order
- machine conducted diagnostic tests on itself before-revealed no problems
- no requirement that operator know about the internal machinery

3. Field Sobriety Tests

a. General:

- Expert testimony indicating officer failed to administer test in according with training = credibility/weight question for jury. (Pasterini v. State)
- field sobriety test, including HGN, may be admitted without expert testimony-verifiable test
- lay witness on observations (not pass/fail) on leg lift and walk and turn-NHTSA cross irrelevant

b. HGN:

- shows symptom indicative, not determinative, of presence of alcohol
- if NHTSA not part of training, allowing officer to cross examine on not relevant
 - appears to say need expert versed in method of training to cross on improper apply
- foundation been recognized as state of verifiable certainty in scientific community
 - challenge to the method of administration not a challenge of foundation
- challenge to method by which admissible test administered draw objection at trial
 - subsequent analysis of case by case basis.
 - burden of party raising objection to admissibility to show error
 - if argue guidelines not followed, need guidelines in record.

Note: HGN/Level Opinion: Kirkland v. State-Court allowed officer who had training on HGN to testify that when six of six clues are available, blood alcohol level is generally above .10

DUI Supplement (continued)

4. Intoxilyzer/Gidey Foundation

Intoxilyzer must testify:

–trained and certified to operate Intox. at test time

5. Recission of Refusal:

To be effect, consent to chemical test:

1. Must be within very short and reasonable time after first refusal.
2. Must be when test administered would still be accurate.
3. Testing equipment is still readily available.
4. Honoring request results in no substantial inconvenience or expense to police.
5. When individual requesting been in custody of arresting officer and under observation

6. Roadblocks

–decision to implement made by supervisory personnel rather than officer in field

–(and) supervisors had a legitimate primary purpose

–all vehicles stopped as opposed to random vehicle stops

–delay to motorists in minimal

–roadblock operation is well identified as a police checkpoint

–screening officer’s training and experience is sufficient to qualify him to make an initial determination as to which motorists should be given field sobriety tests

Note: Christopher case–

–despite criteria in Lafontaine, not an absolute criteria to be legitimate

–look at totality of circumstances surrounding roadblock/decide if factors satisfied

–totality must show roadblock not being used as pretext to detain citizens in order to search cars

Note: GSP field officers can follow GSP policy on roadblocks even if supervisory

personnel not approve particular roadblock if complies w/supervisory personnel policy

7. Reasonableness/Alternative Test Arrangements:

FACTORS TO BE CONSIDERED:

1. Availability or access to funds or resources to pay for requested test;
2. Protracted delay in giving of test if officer complies with accused’s request;
3. Availability of police time and other resources;
4. Location of requested facilities (hospital to which accused wants to be taken is nearby but in different jurisdiction okay)
5. Opportunity and ability of accused to make arrangements personally for testing.

CRUX OF TEST: Was it reasonable; cannot deprive of meaningful opportunity to choose alternative.

8. Three Tiers of Police Contact

1. Verbal communications involving no coercion or detention;
2. Brief stops/seizures w/reasonable suspicion of criminal activity;
3. Arrests supported by probable cause.

9. DUI Probable Cause

- a. PC Test = officer w/knowledge or reasonably trustworthy information that suspect was in physical control of moving vehicle while under influence to degree rendering him incapable of driving safely.
- B. Presence of alcohol only not = PC

Driving with Suspended License

- a. Elements:
 1. Driving
 2. License was suspended
 3. Accused received actual or legal notice of suspension
 - a. Note: Individual convicted of DUI deemed to have notice by operation of law (Hale v. State, 188 Ga. 524 (1))
 - B. Note: Officer must verify and place on citation service date if:
 - failure to appear/respond under 40-5-56, or
 - insurance cancellation
- b. Driving Record/GCIC_(24-3-17(b))
 - obtained from lawfully connected GCIC terminal
 - no need for certification

Relevance Supplement:

Relevance must have 3 elements:

1. Probative force–strength of connection between evidence and what it's offered to prove.
2. Materiality–requirement that evidence related to a matter in issue at trial.
3. Balancing–collateral cost of balancing probative value of evidence against the negative potential to create unfair prejudice, undue surprise, confusion, misleading or waste of court time.

Speeding Supplement:

A. County, City, College Officers

- device approved by DPS (40-14-1)
- sheriff or governing authority or president applies for DPS permit (40-14-2)
- operators must be certified (40-14-2)
- must name roads for use to DPS application (40-14-3)
- need FCC license (40-14-4)
- device certified by DPS technician before putting in service and annually (40-14-4)
- officer must test device for accuracy/record/maintain results at beginning/end of duty (40-14-5)
 - test made in accordance with manufacturer's recommended procedure (40-14-5)
- officer must notify Defendant of right to request accuracy before citation issued (40-14-5)
- radar warning signs on state highways at limits/boundary (30' by 30') (40-14-6)
 - no device used within 500 feet of warning sign (40-14-6)
- stationary radar not operated where obstructed view of vehicle, at least 500 feet (40-14-7)
- speed must exceed posted limits by 10 mph (40-14-8)
 - but marked school zones/historic zones/residential zones (34 mph or less)(40-14-8)
- No use w/in 300 feet of city speed reduction/600 feet county speed reduction or 30 day change (40-14-9)
- No use on highway portion with grade in excess of 7 percent (40-14-9)

B. Georgia State Patrol

- need FCC license (40-14-4)
- device certified by DPS technician before putting in service (40-14-4)
- officer must test device for accuracy/record/maintain results at beginning/end of duty (40-14-5)
 - test made in accordance with manufacturer's recommended procedure (40-14-5)
- stationary radar not operated where obstructed view of vehicle, at least 500 feet (40-14-7)

2004 New Judges Orientation

Final Schedule

December 6 - 10, 2004, ICJE, Dean Rusk Hall, Athens, GA (706-542-5150)

Lodging at Athens' Holiday Inn, Lumpkin & Broad ("NJO" @ 706-549-4433 or 1-800-HOLIDAY)

Monday, 12-6-04

- 12:00 to 12:30 **Welcome / Intro to Council** Ed Carriere
- 12:30 to 2:00 **Ethics** Rich Reaves
- 2:00 to 3:00 **"Evidence for Dummies"** Gary Mikell
- 3:00 to 4:00 **Court Technology Applications** Joe Iannazzone
- 4:00 to 5:00 **Communicating Judiciously in Court** Jeanette Little
- 5:00 to until Role Play Tapings (Opening Court, Taking a Guilty Plea, Admonitions to Self Representing Litigants)
- 6:30 to 7:00 Group Dinner, on Site
- 7:00 **"A Jury of Her Peers"** Jack McLaughlin

Tuesday, 12-7-04

- 9:00 to 12:00 **Criminal Law & Procedure, Nuts and Bolts** John Carbo
- 12:00 to 1:00 Group Luncheon, on Site
- 1:00 to 2:00 **Probation (& Intro to DUI-Drug Court)** Kent Lawrence
- 2:00 to 5:00 **D.U.I, The Seminal Cases in GA** Joe L'Oiselle
- 5:00 to 6:00 **"What to Do When It's Only You . . ."** Bill Bass, for part time judges only, or (continued) Role Play Tapings, for full timers
- 6:30 Group Dinner, out at a local Restaurant

Wednesday, 12-8-04

9:00 to 10:00 **Sentencing** Fletcher Sams
10:00 to 11:00 **“Nuts & Bolts”** Fletcher Sams & Linda Cowen
11:00 to 12:00 **Life Changes** Linda Cowen
12:30 to 1:00 Group Luncheon, on Site
1:00 to 2:30 **Running Your Court Efficiently & Getting Re-Elected Too** Matt Robins
2:30 to 5:00 **Domestic Violence** Jeanette Little & John Salter
5:00 to 6:00 (continued) Role Play Tapings
6:30 Group Dinner, out at local restaurant

Thursday, 12-9-04

9:00 to 10:30 **Jury Innovations & Effective Trial Management** John Salter
10:30 to 12:00 **Caseflow / Workload Management** Howard Cook
12:00 to 1:00 Group Luncheon, on Site
1:00 to 2:30 **“Civil Drivel” or Nuts and Bolts of Civil Practice** Janis Gordon
2:30 to 4:00 **DMVS Practices & Corresponding Court Procedures** Bridgette Campbell
4:00 to 5:00 **Handling Discovery & High Profile Cases** Gino Brogden
6:30 Group Dinner, out at local restaurant

Friday, 12-10-04

9:00 until ??? **Critique of Role Play Tapings**, Prof. Jennifer Monahan