Council of Superior Court Judges of Georgia

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To All Recipients of *Suggested Pattern Jury Instructions*:

The Council of Superior Court Judges of Georgia is pleased to present the July 2009 updates to the *Suggested Pattern Jury Instructions,* Vol. II: Criminal Cases, 4th ed. (2007). The sections provided contain the changes; please replace the original sections in their entirety.

We encourage attorneys to submit pattern jury instructions to judges and to do so either by reproducing specific charges contained herein or by citing pages in these volumes.

The Council welcomes suggestions for revising or adding to the pattern instructions with regard to content, language, or format to promote the goal of providing pattern instructions that are accurate, understandable, and convenient. Please submit any suggestions to the Pattern Jury Instructions Committee of the Council at the above address.

CONTENTS

Preface xv

Acknowledgments xvii

Preliminary Jury Instructions 0.01.00

Indictment/Accusation

Indictment/Accusation 1.10.10
Issue and Plea of Not Guilty 1.10.20

Presumption; Burden; Sufficiency

Presumption of Innocence; Burden of Proof; Reasonable Doubt 1.20.10
Bare Suspicion 1.20.20
Jury; Judges of Law and Facts 1.20.30

Evidence

Evidence; Generally 1.30.10
Direct and Circumstantial Evidence 1.30.20
Two Theories; Guilt and Innocence 1.30.30
Credibility of Witnesses 1.31.10
  Polygraph 1.31.11
Conflicts in Testimony 1.31.20
Expert Witness 1.31.30
Witness, Impeached by 1.31.40
Impeachment (Witness) 1.31.50
Prior Consistent Statement; Substantive Evidence 1.31.60
Prior Inconsistent Statement; Substantive Evidence 1.31.70
Immunity or Leniency Granted Witness 1.31.80
Accomplice; Corroboration 1.31.90
Defendant's Failure to Testify 1.32.10
Statement of Defendant 1.32.20
  Constitutional Rights 1.32.21
  After Exercising Miranda Rights; Defendant Then Initiating Further Conversations 1.32.22
Voluntariness 1.32.30
  Voluntariness Defined 1.32.31
  Illegal Detention, etc. 1.32.32
Burden of Proof as to Voluntariness 1.32.40
Conditions Precedent to Consideration of Statement 1.32.50
Credibility of Statement 1.32.60
Corroboration; Defendant's Statement 1.32.70
Confession by One Defendant at Joint Trial 1.33.10
Related Acts (Similar Transactions) 1.34.10
Prior Difficulties between Parties 1.34.20
Prior Convictions; Limited Purpose 1.34.30
Identification; Reliability 1.35.10

Identification; Burden of Proof 1.35.11
Fingerprints 1.35.20
DNA 1.35.30
Alibi 1.35.40
Flight 1.36.10
Dying Declaration 1.36.20
Good Character of Defendant 1.36.30

Definition of Crime

Definition of Crime 1.40.10
Intent 1.41.10
No Presumption of Criminal Intent 1.41.11
Presumptions and Inferences 1.41.12
Intoxication 1.41.13
Intent; Transferred 1.41.20
Accident 1.41.30
Criminal Negligence 1.41.40
Mistake of Fact 1.41.50
Parties to Crime 1.42.10
Principal, Failure to Prosecute; Other Involved Persons 1.42.11
Knowledge 1.43.10
Conspiracy; Culpability 1.43.20
Mere Presence; Guilt by 1.43.30
Mere Association; Guilt by 1.43.31

Jurisdictional Issues

Statute of Limitations 1.50.10
Statute of Limitations; Tolling 1.50.11
Statute of Limitations; Burden of Proof 1.50.12
Venue; Generally 1.51.10
Venue; Theft 1.51.11
Venue; Extortion 1.51.12
Venue; Computer-Related Offenses 1.51.13
Venue; R.I.C.O. 1.51.14
Venue; Conspiracy to Commit a Crime (Separate Offense) 1.51.15
Venue; Crime Committed by Mail or Telephone 1.51.16
Venue; Securities Violation 1.51.17
Venue; Abandonment 1.51.18
Venue; Specialized Land Transactions 1.51.19
Venue; Special Circumstances 1.51.20

Jury—Duty, Deliberations, and Verdict

Verdict; Generally 1.60.10
Lesser Offense 1.60.11
Multiple Defendants 1.60.12
Sentencing; Aggravation 1.62.00
Court Has No Interest in Case 1.70.10

Sentencing; Responsibility for 1.70.20
Deliberations 1.70.30
Unanimous Verdict 1.70.40
Alternate Jurors 1.70.50
Retire to Jury Room 1.70.60
Jury (Hung) 1.70.70

Specific Offenses

Attempt; Statutory Definition 2.01.10
    Attempt; Commission of Crime as Affecting 2.01.11
    Attempt; Crime Includes 2.01.12
Attempt; Abandonment of; Generally 2.01.20
    Attempt; Impossibility Not a Defense 2.01.21
Conspiracy; Offense of; Definition 2.02.10
Conspiracy (Additional Instructions) (Culpability) 2.02.20
Conduct and Presence of Parties 2.02.30
    Mere Presence; Guilt by 2.02.31
    Mere Association; Guilt by 2.02.32
Admission of Coconspirator 2.02.40
Renunciation and Abandonment of Criminal Enterprise 2.02.50
Solicitation, Criminal; Statutory Definition 2.02.60
    Solicitation; Findings Necessary for Guilty Verdict 2.02.61

Homicide

Malice Murder; Defined 2.10.10
    Premeditation; Defined 2.10.11
    Motive 2.10.12
    Adultery 2.10.13
    Weapon; Inference Drawn from Use 2.10.14
Felony Murder; Defined 2.10.20
Murder; Felony, during Commission of 2.10.30
Lesser Offense 2.10.40
    Voluntary Manslaughter; Statutory Definition 2.10.41
    Provocation by Words Alone 2.10.42
    Murder; Mutual Combat 2.10.43
    Involuntary Manslaughter; Statutory Definition 2.10.44
Homicide by Vehicle 2.10.50
Homicide; Contributing to Death 2.10.60
Concealing Death; Statutory Definition 2.10.70
Justification; Defense of Habitation; Force, Use of;
    Statutory Provisions and Exceptions 2.10.80

Death Penalty

Death Penalty Charge 2.15.10
Death Penalty; Two-Stage Trial 2.15.20
Death Penalty; Determination of Punishment 2.15.30
Death Penalty; Victim Impact Evidence 2.15.40

Death Penalty; May Fix Penalty at Life Imprisonment for Any Reason 2.15.50
Death Penalty; Forms of Verdict 2.15.60
Death Penalty; Life Imprisonment 2.15.61
Death Penalty; Life Imprisonment without Parole 2.15.62
Death Penalty; Death 2.15.63
Death Penalty; Expression of Opinion by Court 2.15.70
Death Penalty; Retire and Make Up Verdict 2.15.80
Death Penalty; Verdict Form, Sentencing 2.15.90

Bodily Injury and Related Offenses

Assault, Simple; Generally 2.20.10
Assault, Simple; Reasonable Fear 2.20.11
Assault, Simple; Detailed Instruction 2.20.12
Assault, Aggravated (Intent); Statutory; Extended Definition 2.20.20
Assault, Aggravated (Weapon); Statutory; Extended Definition 2.20.21
Aggravated Assault; Deadly Weapon; Firearm 2.20.22
Aggravated Assault; Deadly Weapon; Other Weapons 2.20.23
Aggravated Assault; Deadly Weapon; Proof of Capability 2.20.24
Aggravated Assault; Peace Officer 2.20.25
Battery, Simple; Statutory Definition 2.22.10
Battery 2.22.11
Battery, Sexual 2.22.20
Battery, Aggravated 2.22.30
Battery, Aggravated; Malice 2.22.31
Terroristic Threats and Acts 2.24.10
Cross Burning and Related Acts 2.24.11
Shooting or Throwing at Conveyance 2.24.12
Stalking; Statutory Provision 2.24.50
Stalking, Aggravated; Statutory Provision 2.24.55
False Imprisonment 2.26.10
False Imprisonment under Color of Legal Process 2.26.11
Malicious Confinement of Sane Person 2.26.20
Kidnapping; Statutory Provision 2.26.30
Kidnapping; Kidnapping with Bodily Injury 2.26.31
Hijacking a Motor Vehicle; Statutory Provision 2.26.40
Custody; Interference with Court Order; Children, Insane or Incompetent Persons, and Other Dependent Persons 2.28.10
Cruelty to Children; Deprivation 2.28.20
Cruelty to Children in the First Degree 2.28.21
Cruelty to Children in the Second Degree 2.28.22
Cruelty to Children in the Third Degree 2.28.23
Justifiable; Parental Discipline 2.28.24
Manufacturing Methamphetamine with Children Present 2.28.25
Abandonment; Statutory Definition 2.28.50
Abandonment; Form of Verdict 2.28.55

Sexual Offenses

Rape; Generally 2.30.10
Rape; Victim under the Age of 10 .... 2.30.11
Rape; Victim 10 Years of Age or Older but under the Age of 16 .... 2.30.12
Rape; Victim 16 Years of Age or Older 2.30.13
Rape; Serious Bodily Injury, Fear of 2.30.14
Rape; Incapacity to Consent 2.30.15
Sodomy, Aggravated; Generally 2.32.10
Sodomy, Aggravated; Victim under the Age of 10 .... 2.32.11
Sodomy, Aggravated; Victim 10 Years of Age or Older but under the Age of 16 .... 2.32.12
Sodomy, Aggravated; Victim 16 Years of Age or Older 2.32.13
Sodomy (Committed in Public or in Commercial Transaction) 2.32.20
Child Molestation; after 7/1/95 .... 2.34.10
Child Molestation; before 7/1/95 .... 2.34.20
Child Molestation, Aggravated 2.34.30
Enticing a Child for Indecent Purposes; Statutory Definition 2.34.40
Statutory Rape; Definition 2.36.10
Statutory Rape; after 7/1/95 .... 2.36.11
Statutory Rape; before 7/1/95 .... 2.36.12
Statutory Rape; Corroboration of Victim 2.36.13
Bestiality; Statutory Definition 2.38.10
Incest; Statutory Definition 2.38.20
Bigamy; Statutory Definition 2.38.30
Marrying a Bigamist; Statutory Definition 2.38.31
Indecency, Public; Generally; Statutory Definition 2.38.40
Pandering by Compulsion; Statutory Definition 2.38.50
Prostitution; Offenses of Pimping and Pandering of a Minor 2.38.55
Obscene Material; Distribution, Possession for Purpose of; Statutory Definition 2.38.60
Battery, Sexual 2.38.70

Dangerous Instrumentalities and Practices

Firearm; Pointing at Another 2.40.10
Firearm, Archery Tackle; Misuse while Hunting; Misdemeanor 2.40.20
Firearm, Archery Tackle; Misuse while Hunting; Felony 2.40.25
Firearm during Commission of Crime; Possession of 2.40.30
Knife during Commission of Crime; Possession of 2.40.40
Possession of a Firearm by a Convicted Felon 2.42.00
Obstruction of Officer; Felony 2.44.10
Obstruction of Officer; Misdemeanor 2.44.20
Obstruction of Officer; Additional Charge 2.44.30
Obstruction of Officer; Intent 2.44.40
Escape 2.44.60
Bribery; Statutory Definition 2.48.10
Perjury; Statutory Definition 2.48.20
False Swearing 2.48.25

Disorderly Conduct; False Public Alarm; Statutory Definition 2.48.50

Robbery

Robbery; Statutory Definition 2.60.10
Force; Defined 2.60.20
Robbery, Armed 2.60.30
  Offensive Weapon; Defined 2.60.31
  Robbery by Intimidation; Lesser Included Offense 2.60.32
Robbery by Intimidation 2.60.40
Robbery; Recent Possession of Stolen Property 2.60.50
Ownership 2.60.60

Burglary and Related Offenses

Burglary with Intent to Commit Theft 2.62.10
Burglary with Intent to Commit a Felony 2.62.20
Recent Possession of Stolen Goods (Burglary, Theft, Robbery) 2.62.30
Tools Used in Commission of Crime; Possession 2.62.40

Theft

Theft; Definitions of Terms 2.64.10
  Theft; Deprive 2.64.11
  Theft; Financial Institution 2.64.12
  Theft; Property of Another 2.64.13
  Theft; Owner 2.64.14
  Theft; Asportation or Removal of Property 2.64.15
Theft by Taking; Statutory Definition 2.64.20
Theft by Shoplifting 2.64.30
  Theft; Recent Possession of Stolen Property 2.64.31
Theft by Taking 2.64.40
  Theft by Taking; Value over $500 .... 2.64.41
  Theft by Taking; Value of $500 or Less 2.64.42
  Theft by Taking; Value Defined 2.64.43
Theft; Generally; Punishment 2.64.50
Theft by Deception; Statutory Definition 2.64.60
Theft by Extortion; Defined 2.64.70
  Theft by Extortion; Venue 2.64.71
  Theft by Extortion; Affirmative Defense 2.64.72
Theft by Receiving Stolen Property; Knowledge 2.64.80
Theft by Conversion; Statutory Definition 2.64.90
  Theft by Conversion; Inference; Government or Financial Agent 2.64.91
  Theft by Conversion; Inference; Leased or Rental Property 2.64.92
  Theft by Conversion (Formerly Embezzlement or Larceny after Trust);
    Distinguished from Other Theft 2.64.93
Theft; Defense; Claim of Right 2.65.10

Deceptive Business Practices; Forgery; Check and Credit Card Offenses

Statutory Definition of First Degree Forgery 2.66.10

Statutory Definition of Second Degree Forgery 2.66.11
Forgery; Authority 2.66.12
Forgery; "Writing"; Definition of 2.66.13
Forgery; Knowledge 2.66.14
Forgery; Intent to Defraud; Necessity of; Proof of 2.66.15
Forgery; Delivery (First Degree Forgery) 2.66.16
Forgery; Intent to Defraud; Passing Forged Instrument 2.66.17
Deposit Account Fraud (Bad Checks; Writing, Delivering, etc.) 2.66.20
Financial Transaction Card; Statutory Definition 2.66.30
Financial Transaction Card Fraud; Statutory Definition 2.66.32
Deceptive Business Practice, Engaging in; Statutory Definition 2.66.50
Fraud in Obtaining Public Assistance 2.66.70

Natural Products, Failure to Pay for

Natural Products, Failure to Pay for; Statutory Definition 2.66.80
Natural Products, Failure to Pay for; Cash Sale 2.66.81
Natural Products, Failure to Pay for;
Check Not Payment until Honored 2.66.82

Crimes against Property

Arson, First Degree 2.68.10
Arson, Second Degree 2.68.12
Arson, Third Degree 2.68.14
Arson; Presumption of Accidental Cause 2.68.16
Criminal Damage to Property in the First Degree 2.68.20
Criminal Damage to Property in the Second Degree 2.68.22
Criminal Damage to Property; Value 2.68.24
Interference with Government Property 2.68.26
Criminal Trespass; Damage; Interference 2.68.30
Criminal Trespass; Entering or Remaining 2.68.32
Criminal Trespass; Failure or Refusal to Leave 2.68.34
Ownership 2.68.40

Drugs

Drug Possession; Sale, Manufacture, with Intent to Distribute, etc. 2.70.10
Possession, Legal 2.70.11
Selling or Dispensing 2.72.10
Trafficking 2.74.00
Trafficking Marijuana 2.74.10
Trafficking Cocaine (mixture not alleged or not proved) 2.74.20
Weight/Mixture Caveat (for judge only) 2.74.23
Trafficking Cocaine Mixture 2.74.25
Cocaine; Purity 2.74.27
Trafficking Heroin (Morphine or Opium) 2.74.30
Trafficking Methaqualone 2.74.40
Trafficking Methamphetamine 2.74.50
Trafficking Methamphetamine; Manufacturing 2.74.53

Trafficking 3,4-Methylenedyoxyamphetamine or
3,4-Methylenedyoxymethamphetamine 2.74.60
Weight 2.74.70
Possession of Drugs, Narcotics, etc.; Joint, Several, Actual,
and Constructive 2.76.10
Equal Access 2.76.20
Premises; Inference of Possession 2.76.30

Traffic and Vehicular Offenses

Habitual Violator 2.80.10
Homicide by Vehicle in the First Degree 2.82.10
Homicide by Vehicle in the Second Degree; Misdemeanor 2.82.20
Homicide; Contributing to Death 2.82.30
Driving under the Influence; Alcohol; Less Safe; General Charge 2.84.10
Driving under the Influence; Chemical Analysis; Inferences 2.84.11
Driving under the Influence; Per Se Violation; 0.08 Grams Alcohol 2.84.12
Driving under the Influence; Per Se Violation; Persons under
21 Years of Age 2.84.13
Driving under the Influence; Per Se Violation; Commercial Vehicles 2.84.14
Driving under the Influence; Refusal; Implied Consent 2.84.20
Driving under the Influence; Drugs; General Charge 2.84.30
Driving under the Influence; Legal Use of Drugs 2.84.31
Driving under the Influence; Per Se Violations; Drugs 2.84.32
Driving under the Influence; Other Substances 2.84.40
Driving under the Influence; Combination 2.84.50
Driving under the Influence; Chemical Analysis; Alcohol; Inference 2.84.51
Driving under the Influence; Less Safe; Drugs
(Marijuana and Prescription Drugs) 2.84.52
Driving under the Influence; Intent 2.84.60
Reckless Driving 2.86.10
Leaving the Scene; Hit and Run 2.86.20
Leaving the Scene; Hit and Run; Felony 2.86.22
Leaving the Scene; Unattended Vehicle 2.86.24
Speeding 2.86.70
Driving without License 2.88.15
Operating Vehicle without Tag 2.88.17
Stop Sign 2.88.19
Failure to Report a Collision 2.88.20
Insurance; Operating Vehicle without Proof of; Proof Required 2.88.30
Insurance on Vehicle Registered in State 2.88.31
Littering 2.88.40

Affirmative Defenses

Affirmative Defense; Definition; Burden of Proof 3.00.00
Justification; Generally 3.01.10
Justification; Use of Force in Defense of Self or Others 3.10.10
Forcible Felony; Definition of 3.10.11

Reasonable Beliefs; Doctrine of 3.10.12
Retreat (No Duty to Retreat to Be Justified) 3.10.13
Battered Person Syndrome 3.10.14
Justification; Use of Force in Defense of Habitation (Motor Vehicle) 3.12.10
Justification; Use of Force in Defense of Property 3.14.10
Justification; Threats, Menaces Causing Reasonable Beliefs of Danger 3.16.10
Excessive Force 3.16.20
Revenge for Prior Wrong 3.16.30
Arrest; Right to Resist Unlawful Force in Making Legal Arrest 3.16.40
Illegal Arrest; Right to Use Force to Prevent 3.16.41
Justification; Parental Discipline 3.16.50
Entrapment 3.20.10
Entrapment; Burden of Proof 3.20.20
Coercion 3.22.10
Theft; Defense; Claim of Right 3.26.10

Evidentiary Defenses

Alibi 3.30.10
Character of Defendant; Good 3.35.10
Equal Access 3.38.10

Intent-Related Defenses

Mistake of Fact 3.40.10
Accident 3.50.10
Intoxication, Voluntary; No Excuse for Crime 3.60.10
Intoxication, Involuntary; Defense of 3.60.20
Intoxication; Alcoholism; No Defense for Crime 3.60.30
Intoxication, Voluntary; Insanity Resulting from Excessive, Continued Use of Alcohol 3.60.40
Insanity at Time of Commission of Offense 3.80.10
Insanity at Time of Act (Right and Wrong) 3.80.20
Insanity, Delusional 3.80.30
Insanity; Mentally Ill at Time of Alleged Act 3.80.40
Insanity; Mentally Retarded 3.80.50
Insanity; Consider Evidence as a Whole 3.80.60

Mental Incompetence at Time of Trial

Insanity; Special Plea Trial Contentions of Movant (Give Movant's Contentions) 3.90.10
Insanity; Mental Condition of Defendant 3.90.20
Insanity; Findings and Form of Verdict 3.90.30

EVIDENCE

1.30.10 **Evidence; Generally**

Evidence is the means by which any fact that is put in issue is established or disproved. Evidence includes all of the testimony of the witnesses and the exhibits admitted during the trial. (It also includes any stipulations, which are facts agreed to by the lawyers.) It does not include the indictment, the plea of not guilty, opening statements or closing arguments by the lawyers, or the questions asked by the lawyers.

1.30.20 **Direct and Circumstantial Evidence**

(Give the following charge in all cases in which there is circumstantial evidence. Although there may be exceptions, the Pattern Jury Instructions Committee feels it is a safer practice to give the circumstantial evidence charge in every case. Note: Cross reference to 1.30.30.)

Evidence may be either direct or circumstantial or both. Direct evidence is evidence that points immediately to the question at issue.

O.C.G.A. §24-1-1(3)

Evidence that may be used to prove a fact by inference is referred to as circumstantial evidence. Circumstantial evidence is the proof of facts or circumstances, by direct evidence, from which you may infer other related or connected facts that are reasonable and justified in light of your experience.

O.C.G.A. §§24-1-1(3), 24-1-1(4)

To warrant a conviction on circumstantial evidence, the proven facts must not only be consistent with the theory of guilt but also exclude every other reasonable theory other than the guilt of the accused.

O.C.G.A. §24-4-6
Carpenter v. State, 167 Ga. App. 634, 641–42(8) (1983)

The comparative weight of circumstantial evidence and direct evidence on any given issue is a question of fact for the jury to decide.

Steen v. State, 130 Ga. App. 632, 634 (1974) (*Relative weight of direct and circumstantial evidence is determined by the jury when there are inconsistencies.*)

Mims v. State, 264 Ga. 271 (1994) (*When the State introduces circumstantial evidence, a charge on the law of circumstantial evidence must be given.*)

1.30.30 Two Theories; Guilt and Innocence

(*This former charge was removed as a result of* Langston v. State, *208 Ga. App. 175 (1985).* ***However, a circumstantial evidence charge must be given as applicable. See 1.30.20.***)

1.31.10 Credibility of Witnesses

You must determine the credibility or believability of the witnesses. It is for you to determine which witness or witnesses you believe or do not believe, if there are some whom you do not believe.

In deciding credibility, you may consider all of the facts and circumstances of the case, the manner in which the witnesses testify, [their interest or lack of interest in the case,*] their means and opportunity for knowing the facts about which they testify, the nature of the facts about which they testify, the probability or improbability of their testimony, and the occurrences about which they testify. You may also consider their personal credibility insofar as it may have been shown in your presence and by the evidence.

* (*Note: In a criminal case, use caution in giving if the defendant testifies.* McKenzie v. State, *293 Ga. App. 350 (2008).*)

1.31.11 Polygraph

(*The following charge must be given on request if polygraph evidence is admitted.* Johnson v. State, *208 Ga. App. 87(1) (1993).*)

There has been certain evidence admitted during the trial concerning a polygraph test and the polygraph examiner's opinions and conclusions as to its results. Polygraph evidence is considered opinion evidence and is governed by the law concerning opinion evidence as has been/will be given to you.

A polygraph examiner's opinion can only be used to indicate whether, at the time of the polygraph examination, the defendant/witness believed that he/she was telling the whole

truth. You are not bound by the polygraph examiner's conclusions, and the examiner's testimony is not controlling on the issues and may be entirely disregarded by you. It is for you to decide what weight, if any, should be given to the evidence concerning the polygraph test, its results, and the examiner's opinions and conclusions.

State v. Chambers, 240 Ga. 76, 80 (1977)

1.31.20 **Conflicts in Testimony**

(*Caution: If the defendant offers no evidence, see* Noggle v. State, *256 Ga. 383, 385–86(4) (1986).*)

When you consider the evidence in this case, if you find a conflict, you should settle this conflict, if you can, without believing that any witness made a false statement. If you cannot do so, then you should believe that witness or those witnesses whom you think are best entitled to belief.

You must determine what testimony you will believe and what testimony you will not believe.

O.C.G.A. §§24-4-4, 24-9-80

1.31.30 **Expert Witness**

(*Use only if applicable.*)

Testimony has been given by certain witnesses who, in law, are termed experts. The law permits persons who are expert in certain areas to give their opinions derived from their knowledge of that area. The weight that is given to the testimony of expert witnesses is a question to be determined by the jury. The testimony of an expert, like that of any other witness, is to be received by you and given only such weight as you think it is properly entitled to receive. You are not required to accept the opinion testimony of any witness, expert or otherwise.

O.C.G.A. §24-9-67

McNorton v. State, 159 Ga. App. 604, 606(2) (1981)

1.31.40 **Witness, Impeached by**

To impeach a witness is to prove that the witness is unworthy of belief. A witness may be impeached by (*charge only those that apply*)

a) disproving the facts to which the witness testified (O.C.G.A. §24-9-82);

b) proof of reputation for untruthfulness (O.C.G.A. §24-9-84(3)) (*for criminal defendant ONLY after defendant testifies and offers evidence of truthful character*);

c) proof that the (witness) (defendant) has been convicted of the offense of _______________ (*Admit and charge only those offenses punishable by one year or more of imprisonment and only where the judge finds the probative value of conviction outweighs prejudicial effect (*to the person testifying*).*) (O.C.G.A. § 24-9-84.1(a)(1 & 2)) (*See 1.34.30 for a limiting instruction on the use of prior conviction to impeach a witness or defendant.*);

d) proof that the witness has been convicted of a crime involving dishonesty or making a false statement (O.C.G.A. § 24-9-84.1(a)(3)) (*Note:* Probable *10-year limit on conviction (O.C.G.A. § 24-9-84.1(b)). Pardoned offenses inadmissible, juvenile offenses* probably *inadmissible, and cases on appeal admissible (O.C.G.A. § 24-9-84.1(c, d, e)).*);

Powell v. State, 122 Ga. 571 (1905), 234 Ga. 80 (*first offender*)
Adams v. State, 284 Ga. App. 534 (2007)

e) proof of contradictory statements previously made by the witness about matters relevant to the witness's testimony and to the case (O.C.G.A. §24-9-83).

(*Only if it is sought to impeach a witness by "b," "c," "d," or "e" above may a reputation for truthfulness of the witness be shown. The effect of the evidence is to be determined by the jury. O.C.G.A. § 24-9-84(2)*)

If any attempt has been made in this case to impeach any witness by proof of contradictory statements previously made, you must determine from the evidence

1) whether any such statements were made,
2) whether such statements were contradictory to any statements the witness made on the witness stand, and
3) whether such statements were relevant to the witness's testimony and to the case.

If you find that a witness has been successfully impeached by proof of previous contradictory statements, you may disregard that testimony unless it is supported by other credible testimony. The credit to be given to the balance of the witness's testimony would be for you to determine.

(*Note: Only if it is sought to impeach a witness by "e" above may proof of the general good character of the witness be shown. The effect of the evidence is to be determined by the jury.*)

1.31.50 **Impeachment (Witness)**

It is for you to determine whether or not a witness has been impeached and to determine the credibility of such witness and the weight the witness's testimony shall receive in the consideration of the case.

Noggle v. State, 256 Ga. 383(4) (*Presumption of truthfulness is dangerous.*)

1.31.60 **Prior Consistent Statement; Substantive Evidence**

(***Cautionary note: Before using this charge, please see*** **Boyt v. State, 286 Ga. App. 460 (2007).)**

(*Note: Do not give this charge unless witness credibility is attacked at trial.*)

Should you find that any witness has made a statement prior to trial of this case that is consistent with that witness's testimony from the witness stand and such prior consistent statement is material to the case and the witness's testimony, then you are authorized to consider the other statement as substantive evidence.

Cuzzort v. State, 254 Ga. 745 (1985)

Woodard v. State, 269 Ga. 317 (1998)

1.31.70 **Prior Inconsistent Statement; Substantive Evidence**

Should you find that any witness has made any other statement inconsistent with that witness's testimony from the stand in this case and that such prior inconsistent statement is material to the case and the witness's testimony, then you are authorized to consider that

other statement not only for purposes of impeachment, but also as substantive evidence in the case.

Gibbons v. State, 248 Ga. 858, 862 (1982)

1.31.80 **Immunity or Leniency Granted Witness**

In assessing the credibility of a witness, you may consider any possible motive in testifying, if shown. In that regard you are authorized to consider any possible pending prosecutions, negotiated pleas, grants of immunity or leniency, or similar matters. You alone shall decide the believability of the witnesses.

1.31.90 **Accomplice; Corroboration**

(*The following charge is not applicable to misdemeanors.*)

The testimony of a single witness, if believed, is generally sufficient to establish a fact. An exception to this rule is made in the case of (*specify felony charge*), where the witness is an accomplice. The testimony of the accomplice alone is not sufficient to warrant a conviction. The accomplice's testimony must be supported by other evidence of some type, and that evidence must be such as would lead to the inference of the guilt of the accused independent of the testimony of the accomplice.

It is not required that supporting evidence be sufficient to warrant a conviction or that the testimony of the accomplice be supported in every material particular.

The supporting evidence must be more than that a crime was actually committed by someone. It must be sufficient to connect the accused with the criminal act and must be more than sufficient to merely cast upon the accused a grave suspicion of guilt.

Slight evidence from another source that connects the accused with the commission of the alleged crime and tends to show participation in it may be sufficient supporting evidence of the testimony of an accomplice. In order to convict, that evidence, when considered with all of the other evidence in the case, must be sufficient to satisfy you beyond a reasonable doubt that the accused is guilty.

Whether or not any witness in this case was an accomplice is a question for you to determine from the evidence in this case.

(The testimony of one accomplice may be supported by the testimony of another accomplice. Whether or not the testimony of one accomplice does, in fact, support the testimony of another accomplice is a matter for you to determine.)

The sufficiency of the supporting evidence of an accomplice is a matter solely for you to determine.

O.C.G.A. §24-4-8
Berry v. State, 124 Ga. App. 31 (1971)
Geiger v. State, 129 Ga. App. 488, 495 (1973)
Brown v. State, 232 Ga. 838, 840 (1974)
Smith v. State, 236 Ga. 5 (1976)
Price v. State, 141 Ga. App. 335 (1977)
Terrell v. State, 271 Ga. 783(4) (1999)

1.32.10 **Defendant's Failure to Testify**

(*Not required unless requested.*)

The defendant in a criminal case is under no duty to present any evidence tending to prove innocence and is not required to take the stand and testify in the case. If the defendant elects not to testify, no inference hurtful, harmful, or adverse to the defendant shall be drawn by the jury, nor shall such fact be held against the defendant in any way.

Lakeside v. Oregon, 55 L. Ed.2d 319 (1978)
Rowe v. State, 162 Ga. App. 742 (1982)

1.32.20 **Statement of Defendant**

(*The court makes a preliminary finding about these issues and should enter a WRITTEN order in the format suggested in* Berry v. State*, 254 Ga. 101, 104–105 (1985). The issue must still be submitted to the jury for decision unless expressly waived. If the court determines the defendant is in custody, the court should give voluntariness and Miranda charges. If the court determines the defendant is not in custody, the court should give the voluntariness charges only. Additionally, the court does not have to give the voluntariness charges if the defendant stipulates the statement is admissible.*)

A statement that the defendant allegedly made (after arrest) has been offered for your consideration. Before you may consider this as evidence for any purpose, you must answer the following (*continue to 1.32.21*).

1.32.21 **Constitutional Rights**

First, was the defendant warned of his/her constitutional rights, and did the defendant understand and knowingly give up such rights?

Those constitutional rights that must be explained and that must be understood and given up by the defendant before any statement is taken by the police are as follows:

1) The defendant had a right to remain silent.
2) If the defendant chose not to remain silent, anything he/she (said) (wrote) (signed) could be used as evidence against the defendant in court.
3) The defendant had a right to consult a lawyer before any questioning and to have the lawyer present with him/her at all times during any questions.
4) If the defendant did not have money for a lawyer, a lawyer would have been provided for him/her to represent him/her before any questioning and to be present with him/her during any questioning.

The burden of proof is upon the State to establish that the warnings of all rights mentioned were given and that they were understood and knowingly given up by the defendant.

(*Note: Charge the following, if requested, only if the defendant is a juvenile.*)

In considering whether a statement by a juvenile defendant was made with a knowing and intelligent waiver of his/her constitutional rights, you are to consider the totality of the circumstances. Factors you may consider to determine whether the defendant has made a knowing and intelligent waiver include but are not limited to:

1) the age of the defendant,
2) the education of the defendant,
3) the knowledge of the defendant as to the substance of the charge and nature of his/her rights to consult an attorney,
4) whether the defendant was allowed to consult with relatives or an attorney,

5) whether the defendant was interrogated before or after formal charges had been filed,
6) methods used in questioning,
7) length of questioning,
8) whether the defendant refused to voluntarily give statements on prior occasions, and
9) whether the defendant withdrew or denied making the statement at a later date.

Henry v. State, 264 Ga. 861 (1995)
McKoon v. State, 266 Ga. 149 (1996)

1.32.22 After Exercising Miranda Rights; Defendant Then Initiating Further Conversations

If the defendant exercises any of these rights, such as requesting an attorney, the police cannot question the defendant any further without an attorney being present.

If the police initiate (or continue conversation with the defendant after the defendant exercises such right), then any statement made to the police by the defendant after he/she exercises such right would not be voluntary, and you must disregard it entirely and completely in reaching your verdict in this case.

Edwards v. Arizona, 69 L. Ed.2d 984 (1981)

(In the event the defendant testifies, however, any voluntary statement may be used for purposes of impeachment.)

Harris v. New York, 401 U.S. 222 (1971)
Beckwith v. State, 183 Ga. 871(4) (1936)

(However, if the defendant, solely on his/her own initiative after exercising such rights, freely and voluntarily requests and initiates further conversation with the police without an attorney and without any request, instigation, coercion, duress, fear, or hope of benefit or reward or other action on the part of the police, then you would be authorized to consider it, provided you find from the evidence and the court's instructions that any such conversation or statement was otherwise freely and voluntarily given by the defendant.)

Edwards v. Arizona, 69 L. Ed.2d 984 (1981)

1.32.30 **Voluntariness**

The (other) issue you must address is whether the defendant's statement was voluntary, that is, freely and willingly given.

1.32.31 **Voluntariness Defined**

To be voluntary, a statement must be freely and willingly given and without coercion, duress, threats, use of violence, fear of injury, or any suggestions or promises of leniency or reward. A statement induced by the slightest hope of benefit or the remotest fear of injury is not voluntary. To be voluntary, a statement must be the product of a free will and not under compulsion or any necessity imposed by others.

1.32.32 **Illegal Detention, etc.**

You may consider the legality, duration, and conditions of detention as factors relevant to the question of whether or not a statement was freely and voluntarily made. However, under the law, in order for a statement to be excluded because of illegal detention, it must be shown that the statement was, in fact, induced by such illegal detention.

Wilson v. State, 229 Ga. 395 (1972)
Parham v. State, 135 Ga. App. 315 (1975)

1.32.40 **Burden of Proof as to Voluntariness**

The burden of proof is upon the State to establish that the statement was voluntary and was freely and willingly made.

1.32.50 **Conditions Precedent to Consideration of Statement**

If you find that (all of the warnings as to the defendant's constitutional rights were given, that the defendant did understand the meaning of what was said and knowingly gave up such rights, and) that the statement was voluntary, then you may consider it as evidence. If so, then you must apply the general rules for testing the believability of witnesses and decide what weight, if any, you will give to all or any part of such evidence. If you fail to find any

one of the conditions that I have just described, you must disregard the statement entirely and give it no consideration in reaching your verdict (except for purposes of impeachment).

Harris v. New York, 401 U.S. 222 (1971)

Beckwith v. State, 183 Ga. 871(4) (1936)

1.32.60 **Credibility of Statement**

(*Note: As a result of* McKenzie v. State*, 293 Ga. App. 350 (2008), this charge was omitted because it is adequately covered by the previous charges.*)

1.32.70 **Corroboration; Defendant's Statement**

(*Note: There is no necessity to give a charge on the subject without specific request.* Welch v. State*, 235 Ga. 243, 246 (1975).*)

A defendant's statement unsupported by any other evidence is not sufficient to justify a conviction.

Proof beyond a reasonable doubt that the crime alleged has been committed may, but does not necessarily, constitute supporting evidence of a defendant's statement, if any. The law does not fix the amount of supporting evidence necessary. You must determine whether or not other evidence sufficiently supports a defendant's statement so as to justify a conviction. If you find that there was a statement made by the defendant that was supported by other evidence, the degree of proof necessary to convict is that you be satisfied of the guilt of the defendant beyond any reasonable doubt.

(*Note: Standard of proof before the trial court in* Jackson v. Denno *hearing is a preponderance of the evidence.* Lawrence v. State*, 235 Ga. 216, 219 (1975).*)

1.33.10 **Confession by One Defendant at Joint Trial**

Any out-of-court statement made by one of the defendants on trial in this case after the alleged criminal act has ended may be considered only against the person who made the statement and only if you find that such statement was freely and voluntarily made.

If you find that an out-of-court statement was made to the police freely and voluntarily by a defendant on trial in this case, then you are to consider the statement only as against the particular defendant who made it.

(*Note: See 2.02.40, Admission of Coconspirator.*)

O.C.G.A. §24-3-52

1.34.10 **Related Acts (Similar Transactions)**

(*Note: "[A]lthough a trial judge is not required in the absence of a request to give a limiting instruction when . . . evidence [or related acts] is admitted, it would be better for the trial judge to do so."* State v. Belt, *269 Ga. 763 (1998). Charge should be given prior to admission of such evidence and repeated in final charge.* Chisholm v. State, *231 Ga. App. 835 (1998).*)

Sometimes evidence is admitted for a limited purpose. Such evidence may be considered by the jury for the sole issue, or purpose, for which the evidence is limited and not for any other purpose.

The law provides that evidence of other acts or occurrences of this defendant that are sufficiently similar or connected, and therefore purportedly related, to the offense(s) for which the defendant is on trial may be considered for the limited purpose of showing, if it does, the ____________________* (identity of the perpetrator) (state of mind, e.g., knowledge or intent of the defendant) in the crime(s) charged in the case now on trial. Such evidence, if any, may not be considered by you for any other purpose.

* (*Note: In instructing the jury, name only the specific issue to which the evidence of related acts pertains and is limited in the case on trial, not the entire "laundry list" of all reasons that might be appropriate in other case(s).* Watson v. State, *230 Ga. App. 79, 82(5) (1998);* Hall v. State, *230 Ga. App. 741, 742 (1998).*)

The defendant is on trial for the offense(s) charged in this bill of indictment only and not for any other acts or occurrences (even though such acts or occurrences may incidentally be criminal [and may have resulted in conviction]).

Before you may consider any other acts or occurrences for the limited purpose(s) stated, you must first determine whether the accused committed the other acts or occurrences. If so, you must then determine whether the act or occurrence was sufficiently

(similar) (connected), and therefore purportedly related, to the crime(s) charged in the indictment such that proof of the other acts or occurrences tends to prove the crime charged in the indictment. Remember to keep in mind the limited use and consideration of other acts or occurrences of the defendant.

By giving this instruction, the Court in no way suggests to you that the defendant has or has not committed any other acts, nor whether such acts, if committed, prove anything; this is solely a matter for your determination.

U.S.C.R. 31.3. Notice of Prosecution's Intent to Present Evidence of Similar Transactions

Campbell v. State, 234 Ga. 130, 131–32 (1975) (*admissible despite lapse of seven years; balancing test*)

French v. State, 237 Ga. 621(3) (1976) (*requiring evidence establishing that the defendant committed the independent crime*)

Clemson v. State, 239 Ga. 357, 361(3) (1977) (*requiring evidence establishing sufficient similarity or connection to the offense charged*)

Johnson v. State, 242 Ga. 649, 653(3) (1978) (*Exception has been most liberally extended in the area of sexual offenses.*)

State v. Johnson, 246 Ga. 654, 655(1) (1980) (*admissible to prove identity*)

Dowling v. United States, 493 U.S. 342, 350, 354, 110 S. Ct. 688, 107 L. Ed.2d 708 (1990) (*Double jeopardy clause does not preclude the evidentiary use of a prior crime, even when the defendant has been acquitted.*)

Gilstrap v. State, 261 Ga. 798, 799 (1991) (*child molestation case; may be admissible after 11 or 19 years; 31-year lapse makes independent crime too remote*)

Stephens v. State, 261 Ga. 467, 468–69(6) (1991) (*drug sale; proof required* at trial *of similarity; certified copy of conviction normally insufficient*)

Williams v. State, 261 Ga. 640, 641–42(2) (1991) (*drug case; procedure under U.S.C.R. 31.3(B); three-part test: (1) purpose, (2) identification, and (3) proof of the former tends to prove the latter*)

Smith v. State, 206 Ga. App. 557, 558(1) (1992) (*bent of mind, motive, or intent; less similarity than when identity is sought to be proved*)

Sheppard v. State, 205 Ga. App. 373, 374(2) (1992) (*predisposition; rebut defense of entrapment*)

Bradford v. State, 261 Ga. 512, 513 (1992) (*corroboration of accomplice testimony*)

Bradford v. State, 261 Ga. 833, 834 (1992) (*corroboration of accomplice testimony connecting party to crime*)

Rash v. State, 207 Ga. App. 585, 586–87(3) (1993) (*corroboration of victim testimony in sex crime*)

Adams v. State, 208 Ga. App. 29, 32–36(2) (1993) (*child molestation case; evidence of any sexual abuse of young children is sufficient to establish similarity requirement; must present trier of fact with evidence that accused committed the independent offense; balancing probative value against prejudicial impact*)

Freeman v. State, 268 Ga. 185, 187(4) (1997) (*Standard of proof is a preponderance of the evidence.*)

1.34.20 **Prior Difficulties between Parties**

Evidence of prior difficulties between the defendant and the alleged victim has been admitted for the sole purpose of illustrating, if it does so illustrate, the state of feeling between the defendant and the alleged victim and the bent of mind and course of conduct on the part of the defendant.

Whether this evidence illustrates such matters is a matter solely for you, the jury, to determine, but you are not to consider such evidence for any other purpose.

White v. State, 242 Ga. 21(4) (1978)

Wall v. State, 269 Ga. 506, 509(2) (1998) (*U.S.C.R. 31.1 and 31.3 not applicable*)

01.34.30 **Prior Convictions; Limited Purpose**

Sometimes evidence is admitted for a particular limited purpose. Such evidence may be considered by the jury for the sole issue, or purpose, for which the evidence is admitted and not for any other purpose.

In that connection, you have received in evidence exhibits (which purport to be copies) of (a) prior conviction(s) of the defendant (of a witness). You may consider this evidence only insofar as it may relate to (the issue of impeachment) (the required element of "conviction of a felony" for the offense in count ________) and not for any other purpose (or count).

Holsey v. State, 281 Ga. 177 (2006)

Head v. State, 253 Ga. 429 (1984)

1.35.10 **Identification; Reliability**

Identity is a question of fact for you to determine. Your determination of identity is dependent upon the credibility of the witness or witnesses offered for this purpose. You should consider all of the factors previously charged you regarding credibility of witnesses.

Some, but not all, of the factors you may consider in assessing reliability of identification are

1) the opportunity of the witness to view the alleged perpetrator at the time of the alleged incident,
2) the witness's degree of attention toward the alleged perpetrator at the time of the alleged incident,
3) the possibility of mistaken identity,
4) whether the witness's identification may have been influenced by factors other than the view that the witness claimed to have, and
5) whether the witness on any prior occasion did not identify the defendant in this case as the alleged perpetrator.

Neil v. Biggers, 409 U.S. 188, 198, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)

Brodes v. State, 279 Ga. 435 (2005)

1.35.11 **Identification; Burden of Proof**

It is for you to say whether, under the evidence in this case, the testimony of the witnesses and the facts and circumstances of the case sufficiently identify this defendant beyond a reasonable doubt as the perpetrator of the alleged crime (or that the defendant was a party to it). It is not necessary that the defendant show that another person committed the alleged offense.

If you do not believe that the defendant has been sufficiently identified as the person who committed the alleged crime (or was a party to it), or if you have any reasonable doubt about such, then it would be your duty to acquit the defendant.

The burden of proof rests upon the State to prove, beyond a reasonable doubt, the identity of this defendant as the person who committed the crime alleged in this bill of indictment.

Strickland v. M. & Council, City of Athens, 111 Ga. App. 280, 281(2) (1965) and citations (*identification of a witness,* viz., *corroboration*)

Hightower v. State, 225 Ga. 681, 682–83(2) (1969); *Shepard v. State*, 234 Ga. 75, 77 (1975) (*identification of defendant*)

Berry v. State, 10 Ga. 511–29 (1851) (*Identification by a witness of a person or thing is necessarily a matter of opinion, and when accompanied with the facts on which it is founded, it is always admissible.*)

U.S. v. Wade, 18 L. Ed.2d 1149 (1967)

Baier v. State, 124 Ga. App. 334 (1971)

1.35.20 **Fingerprints**

Certain evidence of fingerprint comparison has been admitted by the court for your possible consideration.

Identification by fingerprint comparison is opinion evidence and is dependent upon the credibility (or believability) and accuracy of the expert witness(es) called for that purpose as well as the following factors:

1) the validity of the theory of identification by fingerprint comparison,
2) the credibility of the witness who performs other necessary functions in making the comparison such as inked finger impressions and latent lifts, and
3) the accuracy of procedures in identifying, preserving, recording, and maintaining integrity of the physical evidence, all of which are questions for the jury.

Fingerprint evidence is also governed by the rules on circumstantial evidence.

If you believe that fingerprints corresponding to those of the accused were found and identified, their evidentiary value, if any, would be diminished to the extent that they could reasonably have been left (at the scene) (on the article(s) alleged) at a time or under circumstances that would be consistent with innocence.

A verdict of guilty may not rest upon fingerprint identification alone, unless you are satisfied beyond a reasonable doubt that fingerprints left by the accused were in fact found and that they could only have been impressed by the accused (at the scene of the crime) (on the weapon, etc.) at the time of the commission of the crime and that such identification under all of the facts and circumstances of the case is sufficient to satisfy your mind of the guilt of the accused to the exclusion of any other reasonable theory and beyond a reasonable doubt.

1.35.30 **DNA**

Evidence relating to DNA comparison has been admitted for your consideration.

Identification by DNA comparison is considered opinion evidence and is governed by the law concerning opinion testimony as has been given to you.

As opinion testimony, evidence relating to DNA comparison is dependent upon many factors. Among the factors are the credibility (or believability) and accuracy of the witnesses who were involved with the process of obtaining, identifying, preserving, recording, and maintaining the physical evidence and upon the accuracy and validity of the testing procedures themselves that were used to form such opinions. All of these issues are matters for you to consider and determine.

It is for you to determine what weight, if any, you will give to the evidence relating to DNA comparison in your decision in this case.

Caldwell v. State, 260 Ga. 278 (1990)

1.35.40 **Alibi**

(*See 3.30.10, Alibi.*)

1.36.10 **Flight**

(*Note: After January 10, 1991, it is reversible error to charge the jury on flight.* Renner v. State, *260 Ga. 515 (1990).*)

1.36.20 Dying Declaration

If a person is dying and is aware that he/she is dying, and if under those conditions that person makes a statement as to the cause of death (and the person who killed him/her), such statement, even though hearsay, would be admissible.

Whether or not such a statement was made, and if made, whether it was truthful and accurate, as well as whether such a statement was correctly recorded or repeated are all questions of fact for you, the jury, to decide under all of the facts and circumstances of the case.

Before you would be authorized to consider any such statements, however, you must first be satisfied that the statement, if any, was made while the person making the statement was dying and while the person was aware that he/she was dying.

If you find both of these conditions to be true, the statement would qualify as a "dying declaration" and would be testimony to be considered along with all other testimony in the case under the instructions given you.

O.C.G.A. §24-3-6
Owens v. State, 11 Ga. App. 419 (1912)
Gibbons v. State, 137 Ga. 786 (1912)
Knight v. State, 12 Ga. App. 111 (1913)
Cooper v. State, 182 Ga. 42 (1936)
Williams v. State, 256 Ga. 460 (1986)

1.36.30 Good Character of Defendant

(*See 3.35.10, Character of Defendant; Good*)

HOMICIDE

(*Charge only the appropriate language; adapt parentheticals to the indictment and evidence.*)

2.10.10 **Malice Murder; Defined**

A person commits murder when that person unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of another human being, which is shown by external circumstances capable of proof. Malice may, but need not, be implied when no considerable provocation appears and when all of the circumstances of the killing show an abandoned and malignant heart. It is for the jury to decide whether or not the facts and circumstances of this case show malice.

O.C.G.A. §16-5-1(a)(b)

To constitute murder, the homicide must have been committed with malice. Legal malice is not necessarily ill will or hatred, but it is the unlawful intention to kill without justification, excuse, or mitigation.

If a killing is done with malice, no matter how short a time the malicious intent may have existed, such killing constitutes murder.

Roberts v. State, 3 Ga. 310, 325 (1847)
Brown v. State, 190 Ga. 169 (1940)
Walker v. State, 240 Ga. 608 (1978)

Georgia law does not require premeditation, and no particular length of time is required for malice to be generated in the mind of a person. It may be formed in a moment, and instantly a mortal wound may be inflicted. Yet, if malice is in the mind of the accused at the time of the doing of the act or killing and moves the accused to do it, such is sufficient to constitute the homicide as murder.

Wright v. State, 255 Ga. 109, 113 (1985)
Stephens v. State, 259 Ga. 820 (1990)
Carswell v. State, 268 Ga. 531 (1997)

2.10.11 **Premeditation; Defined**

(*This charge should be given only if a definition of premeditation is requested by the jury.*)

Premeditation, as the term is usually used, means a prior determination or plan to commit an act. Premeditation is not an element of the offense of murder and therefore need not be proven by the State to establish malice aforethought. However, any evidence of premeditation, or lack of it, may be considered by you insofar as it relates to the existence, or nonexistence, of malice at the time of the alleged killing.

Parks v. State, 254 Ga. 403 (1985)
Hubbert v. State, 254 Ga. 429 (1985)

2.10.12 **Motive**

Proof of particular motive is not essential to constitute the crime of murder. Evidence of motive, if any, is admitted for your determination as to whether or not it establishes the state of the defendant's mind at the time of the alleged homicide.

Johnson v. State, 130 Ga. 22 (1908)
Hunter v. State, 188 Ga. 215, 218(2) (1939)
Cone v. State, 193 Ga. 420(4) (1942)
Pulliam v. State, 199 Ga. 709, 713 (1945)
Spencer v. State, 231 Ga. 705, 708 (1974)
Johnson v. State, 260 Ga. 457 (1990)
Earnest v. State, 262 Ga. 495 (1992)

2.10.13 **Adultery**

(*Do not give the phrase in parentheses unless justification is a defense.*)

(Adultery is not a forcible felony, therefore) To kill either a spouse or the spouse's lover for past acts of adultery or to prevent the apparent commission or the completion of an act of adultery in progress between them is not justified.

You may consider whether adultery amounts to provocation, which would mitigate the killing. If the evidence shows that the defendant killed the alleged victim(s) without malice and not in a spirit of revenge but under a violent, sudden impulse of passion created

in the defendant's mind by ongoing adultery or the recent discovery of past adultery on the part of the victim(s), you would be authorized to consider whether or not the defendant is guilty of voluntary manslaughter as I will define it.

(*Define voluntary manslaughter; see 2.10.41.*)

What circumstances will present a situation so as to excite such passion is a matter for the jury to decide. As always, the State has the burden of proving guilt beyond a reasonable doubt. As between murder and voluntary manslaughter, the State has that same burden of proving that the killing is not mitigated to voluntary manslaughter.

Burger v. State, 238 Ga. 171 (1977)

See *Shields v. State*, 285 Ga. 372 (2009) (see controversy)

2.10.14 **Weapon; Inference Drawn from Use**

(*Note: Ruled improper in* Harris v. State, *273 Ga. 608 (2001).*)

2.10.20 **Felony Murder; Defined**

A person (also) commits the crime of murder when, in the commission of a felony, that person causes the death of another human being (with or without malice.)* Under the laws of Georgia, (*name offense*) is a felony and is defined as follows:

(*Give the statutory definition of that felony.*)

* (*Note: In cases not involving malice murder, omit the words in parentheses;* Lee v. State, *265 Ga. 112, 454 S.E.2d. 761 (1995).*)

O.C.G.A. §16-5-1(c)

(*Note: Felony murder should not be charged when the indictment alleges only malice murder, unless the indictment also alleges facts showing how the murder was committed sufficient to put the defendant on notice of the underlying felony.* McCrary v. State, *252 Ga. 521 (1984).*)

(*Note: If both malice murder and felony murder are charged in one count, you must instruct the jury to make its verdict clear as to whether they are finding the defendant "guilty of malice murder" or "guilty of felony murder." See* Walker v. State, *254 Ga. 149, at 161 (1985).*)

(The following is a suggested charge to be used after charging both malice murder and felony murder.)

If you find and believe beyond a reasonable doubt, under all of the evidence and the court's instructions, that the defendant is guilty of the offense of murder with malice aforethought, then you must specify such in your verdict, and the form of your verdict in that event would be, "We, the jury, find the defendant guilty of malice murder."

If you find and believe beyond a reasonable doubt, under all of the evidence and the court's instructions, that the defendant is guilty of the offense of felony murder, then you must specify such in your verdict, and the form of your verdict in that event would be, "We, the jury, find the defendant guilty of felony murder."

2.10.30 **Murder; Felony, during Commission of**

(The alleged felony in which the defendant was engaged must be charged.)

If you find and believe beyond a reasonable doubt that the defendant committed the homicide alleged in this bill of indictment at the time the defendant was engaged in the commission of the felony of (*name offense*),* then you would be authorized to find the defendant guilty of murder, whether the homicide was intended or not. A person commits (*specific felony*) when (*define specific felony*). In order for a homicide to have been done in the commission of this particular felony, there must be some connection between the felony and the homicide. The homicide must have been done in carrying out the unlawful act and not collateral to it. It is not enough that the homicide occurred soon or presently after the felony was attempted or committed. (There must be such a legal relationship between the homicide and the felony so as to cause you to find that the homicide occurred before the felony was at an end or before any attempt to avoid conviction or arrest for the felony.) The felony must have a legal relationship to the homicide, be at least concurrent with it in part, and be a part of it in an actual and material sense. A homicide is committed in the carrying out of a felony when it is committed by the accused while engaged in the performance of any act required for the full execution of the felony.

40 C.J.S. 21, 870

* (*Caution: See* Ford v. State, *262 Ga. 602, not applicable to "nondangerous felonies" unless "attendant circumstances create a foreseeable risk of death";* Hulme v. State, *273 Ga. 676 (2001);* Mosely v. State, *272 Ga. 881 (2000).*)

Baker v. State, 236 Ga. 754 (1976)
Llewellyn v. State, 241 Ga. 192, 196 (1978)
Edge v. State, 261 Ga. 865 (1992)
Gore v. State, 246 Ga. 575 (1980)
Smith v. State, 272 Ga. 874 (2000)

2.10.40 **Lesser Offense**

(*The following charge may not be required in malice murder cases.*)

McGill v. State, 263 Ga. 81 (1993)
Terry v. State, 263 Ga. 294 (1993)

After consideration of all of the evidence, before you would be authorized to return a verdict of guilty of (malice murder) (felony murder), you must first determine whether mitigating circumstances, if any, would cause the offense to be reduced to voluntary manslaughter.

Edge v. State, 261 Ga. 865 (1992)

2.10.41 **Voluntary Manslaughter; Statutory Definition**

A person commits voluntary manslaughter when that person causes the death of another human being under circumstances that would otherwise be murder if that person acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person. (If there should have been an interval between the provocation and the killing sufficient for the voice of reason and humanity to be heard, which the jury in all cases shall decide, the killing may be attributed to revenge and be punished as for murder.)

In that connection, I charge you that the burden of proof is upon the State to prove beyond a reasonable doubt that the offense is not so mitigated.

O.C.G.A. §16-5-2

2.10.42 **Provocation by Words Alone**

Provocation by words alone will, in no case, justify such excitement of passion sufficient to free the accused from the crime of murder or to reduce the offense to manslaughter when the killing is done solely in resentment of such provoking words.

Words accompanied by menaces, though the menaces do not amount to an actual assault, may in some instances be sufficient provocation to excite a sudden, violent, and irresistible passion in a reasonable person, and if a person acts from such passion (and not from malice)* or any spirit of revenge, then such would constitute voluntary manslaughter. In all cases, the motive is for determination by the jury.

Moore v. State, 228 Ga. 662 (1972)
Brooks v. State, 249 Ga. 583 (1982)
Aguilar v. State, 240 Ga. 830, 833 (1978)
Mack v. State, 272 Ga. 415 (2000)
Todd v. State, 274 Ga. 98 (2001)

* (*Note: In cases not involving malice murder, omit the words in parentheses;* Lee v. State, *265 Ga. 112, 454 S.E.2d. 761 (1995).*)

2.10.43 **Murder; Mutual Combat**

If you find from the evidence that there was between the defendant and the deceased a mutual combat (that is, a mutual intent or mutual agreement to fight), then you will consider the rules of law concerning mutual combat and apply them to the evidence. But if you find from the evidence that there was no mutual combat, you will not consider this law.

Mutual combat occurs when there is combat between two persons as a result of a sudden quarrel or such circumstances as indicate a purpose, willingness, and intent on the part of both to engage mutually in a fight. (It is not essential to constitute mutual combat that blows be struck or shots be fired.) There must be a mutual intent to fight or engage in combat. The existence of intent to engage in mutual combat may be established by proof of acts and conduct, as well as by proof of an express agreement.

If you find that there was a mutual intention on the part of both the deceased and the defendant to enter into a fight or mutual combat and that under these circumstances the defendant killed the deceased, then ordinarily such killing would be voluntary manslaughter, regardless of which party (struck the first blow) (fired the first shot).

Under some circumstances, such killing may be murder, or it may be justifiable.

If you find that the killing was done with malice, express or implied, and with a felonious intent to take the life of the person killed, and the killing was accomplished as a result of mutual combat, such killing would be murder.

The killing as a result of mutual combat may be justifiable, and you may find it to be so if it appears that the defendant reasonably believed at the time of the killing that the force the defendant used was necessary to prevent death or great bodily injury to the defendant (or a third person) or to prevent the commission of a forcible felony, and if it further appears that the deceased was the aggressor. If it appears that the deceased was not the aggressor but that the defendant was the aggressor, then in order for the killing to be justified, if such killing was the result of mutual combat, it must further appear that the defendant withdrew from the encounter and effectively communicated to the deceased the intent to do so, and the deceased, notwithstanding, continued or threatened to continue the use of unlawful force.

If you should believe from all of the evidence in this case that there was no mutual intent to fight or mutual combat between the defendant and the deceased, then you may determine whether or not the deceased used words, threats, menaces, or contemptuous gestures toward and against the defendant and, if so, whether or not they were sufficient to cause the defendant to reasonably believe that the force the defendant used, if any, was necessary to prevent death or great bodily injury to the defendant (or a third person) or to prevent the commission of a forcible felony. Such words, threats, menaces, or contemptuous gestures may or may not be sufficient to cause such reasonable belief on the part of the defendant, it being solely a question for you, the jury, to determine from a consideration of the evidence in this case.

Freeman v. State, 130 Ga. App. 718, 720 (1974)
Strickland v. State, 137 Ga. App. 419 (1976)
McCord v. State, 176 Ga. App. 505 (1985)
Forley v. State, 265 Ga. 622 (1995)

Carreker v. State, 273 Ga. 371 (2001)

Smith v. State, 267 Ga. 372, at 375 (1996)

2.10.44 Involuntary Manslaughter; Statutory Definition

A person commits involuntary manslaughter when that person causes the death of another human being without any intention to do so by the commission of the offense of (*specify offense, which must be a misdemeanor*). In that connection, I charge you that the offense of (*specify offense, which must be a misdemeanor*) is defined as follows: (*define the misdemeanor*).

O.C.G.A. §16-5-3(a)

Johnson v. State, 261 Ga. 236 (1991)

2.10.50 Homicide by Vehicle

(*See 2.82.10, Homicide by Vehicle in the First Degree and 2.82.20, Homicide by Vehicle in the Second Degree; Misdemeanor*)

2.10.60 Homicide; Contributing to Death

Where one inflicts an unlawful injury upon the person of another, such injury may be found to be the cause of the death of the person injured whenever it shall be made to appear that the injury

a) itself constituted the cause of death or

b) directly and materially contributed to the happening of a secondary or consequential cause of death or

c) materially sped up the death, although the death would have eventually occurred anyway.

The burden of proof rests upon the State to prove beyond a reasonable doubt that the injury inflicted by the defendant, if any, upon the deceased was the cause of death, as I have previously instructed you. If the State has failed to prove such beyond a reasonable doubt, then you should acquit the defendant.

Cook v. State, 134 Ga. App. 357, 359 (1975)

Ward v. State, 238 Ga. 367, 369 (1977)

Larkin v. State, 247 Ga. 586 (1981)

Durden v. State, 250 Ga. 325 (1982)

James v. State, 250 Ga. 655, 656 (1983)

Green v. State, 266 Ga. 758 (1996)

2.10.70 **Concealing Death; Statutory Definition**

(*See O.C.G.A. §16-10-31*)

2.10.80 **Justification; Defense of Habitation; Force, Use of; Statutory Provisions and Exceptions**

(*See 3.01.10* et seq., *Defenses; Justification*)

BODILY INJURY AND RELATED OFFENSES

(*Charge only the appropriate language; adapt parentheticals to the indictment and evidence.*)

2.20.10 **Assault, Simple; Generally**

A person commits simple assault when that person (attempts to commit a violent injury to the person of another) (commits an act that places another in reasonable apprehension of immediately receiving violent injury).

(*Note: Misdemeanor punishment.*)

O.C.G.A. §16-5-20

Henderson v. State, 136 Ga. App. 490 (1975)

2.20.11 **Assault, Simple; Reasonable Fear**

(*Give in the second type of assault only.*)

Such an assault is an act that places another in reasonable apprehension or fear of immediately receiving a violent injury. If there is a demonstration of violence with an apparent ability to inflict injury so as to cause the person against whom it is directed to reasonably fear the injury, then the assault is complete, even though the assailant may never have been within actual striking distance.

Reeves v. State, 128 Ga. App. 750 (1973)

2.20.12 **Assault, Simple; Detailed Instruction**

To prove (either type of) assault, there need not be an actual, present ability to commit a violent injury. It is not necessary to show an actual injury or even physical contact with the alleged victim.

Tuggle v. State, 145 Ga. App. 603

(*Note: The assault series of charges have been particularly troublesome over the years. The charge MUST be "tailor made" to the indictment AND the evidence. One of the problems involves the two types of assault. If the indictment charges one type, and the judge charges the jury on the other, there likely will be a reversal. Likewise, if the evidence shows*

one type, and the judge charges on the other, a reversal is likely. There are many possibilities in the various combinations.

Some extended charges had become too broad or too vague and needed to be focused only on their respective assault type. The committee has tried to "compartmentalize" the various extended charges with their respective types of assault. We have done likewise with the various factors that aggravate an assault to a felony. While trying to minimize duplication, we have also tried to make it less likely that a judge will cross over to another section and pick up a charge that applies only to another type of assault or aggravating factor. In short, be careful.

For additional special aggravating circumstances—e.g., assault on the elderly, a correctional officer, student or teacher, past or present spouse, or in a public transit vehicle—address with special charge only if so indicted. Apprendi v. New Jersey, *530 U.S. 466 (2000).*)

2.20.20 **Assault, Aggravated (Intent); Statutory; Extended Definition**

A person commits the offense of aggravated assault when that person assaults another person with intent to (murder) (rape) (rob).

O.C.G.A. §16-5-21(a)

To constitute such an assault, actual injury to the alleged victim need not be shown. It is only necessary that the evidence show, beyond a reasonable doubt that the defendant (attempted to cause a violent injury to the alleged victim) (intentionally committed an act that placed the alleged victim in reasonable fear of immediately receiving a violent injury).

The intent to (murder) (rape) (rob) is a material element of aggravated assault as charged in this case. In deciding the question of intent, you may consider all of the facts and circumstances of the case (as well as the character of the weapon used and the manner in which it was used, if you find that a weapon was used).

(Define (murder) (rape) (rob) as appropriate. See 2.10.10 et seq., *Murder; 2.30.10, Rape; and 2.60.10, Robbery.*)

2.20.21 **Assault, Aggravated (Weapon); Statutory; Extended Definition**

A person commits the offense of aggravated assault when that person assaults another person (with a deadly weapon) (with any object, device, or instrument that, when used offensively against a person, is likely to or actually does result in serious bodily injury).

To constitute such an assault, actual injury to the alleged victim need not be shown. It is only necessary that the evidence show beyond a reasonable doubt that the defendant (attempted to cause a violent injury to the alleged victim) (intentionally committed an act that placed the alleged victim in reasonable fear of immediately receiving a violent injury).

The State must also prove as a material element of aggravated assault, as alleged in this case, that the assault was made with (a deadly weapon) (an object, device, or instrument that, when used offensively against a person, is likely to or actually does result in serious bodily injury).

O.C.G.A. §16-5-21(b)

2.20.22 **Aggravated Assault; Deadly Weapon; Firearm**

A firearm, when used as such, is a deadly weapon as a matter of law.

Willis v. State, 258 Ga. 477(1)

2.20.23 **Aggravated Assault; Deadly Weapon; Other Weapons**

(*Name implement*), if and when used in making an assault upon another person, is not a deadly weapon per se but may or may not be a deadly weapon depending upon the manner in which it is used and the circumstances of the case.

You may or may not infer the (lethal) (serious injury–producing) character of the instrument in question from the nature and extent of the injury, if any, inflicted upon the person allegedly attacked.

Whether or not, under all of the facts and circumstances of this case, the (*name implement*), alleged in this bill of indictment to have been used in making an assault upon the alleged victim did, in fact, constitute a (deadly) weapon (likely to cause serious bodily injury) is a matter to be decided by the jury from the evidence in this case.

O.C.G.A. §16-5-21

Wells v. State, 125 Ga. App. 579(4) (1972)

Hannah v. State, 125 Ga. App. 596 (1972)

Williams v. State, 127 Ga. App. 386 (1972)

Chafin v. State, 154 Ga. App. 122(5) (1980)

(*Note: For use of fists or other "questionable" weapons, see* Quarles v. State, *130 Ga. App. 756 (1974) and* Williams v. State, *127 Ga. App. 386 (1972).*)

2.20.24 Aggravated Assault; Deadly Weapon; Proof of Capability

In deciding whether the alleged instrument was a weapon capable of causing (death) (serious bodily injury), you may consider direct proof of the character of the weapon, any exhibition of it to the jury, evidence of the nature of any wound or absence of wound, or other evidence of the capabilities of the instrument.

Jackson v. State, 56 Ga. App. 374 (1937)

Tanner v. State, 86 Ga. App. 767 (1952)

Wells v. State, 125 Ga. App. 579 (1972)

Hannah v. State, 125 Ga. App. 596 (1972)

2.20.25 Aggravated Assault; Peace Officer

A person commits the offense of aggravated assault upon a peace officer when that person knowingly commits aggravated assault (as I have previously defined it) upon an officer while that officer is engaged in, or on account of the performance of, official duties.

An essential element of the offense of aggravated assault on a peace officer is that the accused knew that the alleged victim was a peace officer. This may be shown by evidence of circumstances that would cause a reasonable person to know that the alleged victim was a police officer.

(*See 2.44.10, Obstruction of Officer; Felony*)

O.C.G.A. §16-5-21

Bundren v. State, 247 Ga. 180 (1981)

Chandler v. State, 204 Ga. App. 816, 820 (1992)

Tate v. State, 198 Ga. App. 276(4) (*"on duty" defined*)

2.22.10 Battery, Simple; Statutory Definition

A person commits simple battery when that person either

a) intentionally makes physical contact of an insulting or provoking nature with the person of another or
b) intentionally causes physical harm to another.

O.C.G.A. §16-5-23

2.22.11 Battery

A person commits the offense of battery when that person intentionally causes substantial physical harm or visible bodily harm to another. The term "visible bodily harm" means bodily harm capable of being perceived by a person other than the alleged victim and may include, but is not limited to, substantially blackened eyes, substantially swollen lips or other facial or body parts, or substantial bruises to facial or body parts.

O.C.G.A. §16-5-23.1

Carroll v. State, 293 Ga. App. 721 (2008)

2.22.20 Battery, Sexual

(*See 2.38.70, Battery, Sexual*)

2.22.30 Battery, Aggravated

A person commits the offense of aggravated battery when he or she maliciously causes bodily harm to another by depriving him or her of a member of his or her body, by rendering a member of his or her body useless, or by seriously disfiguring his or her body or a member thereof.

O.C.G.A. §16.5.24(a)

2.22.31 **Battery, Aggravated; Malice Defined**

(*Caution: Use of this charge is best limited to circumstances in which the jury has asked for a definition.*)

Malice is not ill will or hatred. For the purpose of this code section, malice means an actual intent to cause the particular harm produced (that is, bodily harm) without justification or excuse. Malice is also the wanton and willful doing of an act with an awareness of a plain and strong likelihood that such particular harm may result. Intention may be shown by the circumstances connected with the offense.

Brewton v. State, 266 Ga. 160(1) (1996)

Hightower v. State, 256 Ga. App. 793 (2002)

2.24.10 **Terroristic Threats and Acts**

A person commits terroristic threats when that person threatens to (commit any crime of violence) (burn/damage property) with the purpose of

a) (terrorizing another) (in reckless disregard of the risk of causing terror) or
b) (causing evacuation of a building, place of assembly, facility of public transportation) or
c) (causing serious public inconvenience) (in reckless disregard of the risk of causing serious public inconvenience).

No person shall be convicted of terroristic threats on the unsupported testimony of the party to whom the threat is made.

O.C.G.A. §16-11-37

2.24.11 **Cross Burning and Related Acts**

O.C.G.A. §16-11-37(b)(1)

2.24.12 **Shooting or Throwing at Conveyance**

O.C.G.A. §16-11-37(b)(2)

2.24.50 Stalking; Statutory Provision

A person commits the offense of stalking when that person (follows) (places under surveillance) (contacts) another person at any place other than the defendant's residence without such other person's consent and for the purpose of harassing and intimidating such other person.

"Contact" means any communication and shall be deemed to have occurred where any such communication was received.

"Harassing and intimidating" means a knowing and willful course of conduct directed at a specific person that causes emotional distress by placing such person in reasonable fear for such person's safety or for the safety of a member of such person's immediate family by establishing a pattern of harassing and intimidating behavior and that serves no legitimate purpose. There is no requirement that an overt threat of death or bodily injury has been made.

O.C.G.A. §16-5-90

2.24.55 Stalking, Aggravated; Statutory Provision

A person commits the offense of aggravated stalking when that person, in violation of a(n) (*specify type of order or restraint*) (follows) (places under surveillance) (contacts) another person at any place other than the defendant's residence without such other person's consent and for the purpose of harassing and intimidating such other person.

O.C.G.A. §16-5-91

2.26.10 False Imprisonment

O.C.G.A. §16-5-41

2.26.11 False Imprisonment under Color of Legal Process

O.C.G.A. §16-5-42

2.26.20 Malicious Confinement of Sane Person

O.C.G.A. §16-5-43

2.26.30 **Kidnapping; Statutory Provision**

A person commits kidnapping when that person abducts or steals away any person without lawful authority or warrant and holds such person against such person's will.

O.C.G.A. §16-5-40

To prove abduction or stealing away, the State must prove that the victim was moved. The movement of the victim must be more than a mere change of position, and such movement must be more than that which is incidental to or necessary to the completion of another crime.

Garza v. State, 284 Ga. 696 (2008)

Rayshad v. State, 295 Ga. App. 29, 33(1)(b) (2008)

(*Note: This charge was modified in response to* Garza. *The above applies to all cases arising before July 1, 2009, when the General Assembly's amendment to the kidnapping statute takes effect.* ***There will be further revisions to this charge based upon the new amendment. Judges should check sidebaronline.org for further updates before giving this charge.***)

2.26.31 **Kidnapping; Kidnapping with Bodily Injury**

When, during a kidnapping, the person abducted receives any bodily injury, however slight, then that constitutes kidnapping with bodily injury. It is not necessary that the State show that the defendant directly committed, caused, nor even intended the injury to the alleged victim nor that the act of kidnapping directly produced the injury. However, the evidence must show beyond a reasonable doubt that any such injury was caused during a period of and in some way connected to the alleged abduction.

Carter v. State, 268 Ga. App. 688 (2004)
Bailey v. State, 269 Ga. App. 262 (2004)
Green v. State, 193 Ga. App. 894 (1989)

2.26.40 **Hijacking a Motor Vehicle; Statutory Provision**

O.C.G.A. §16-5-44.1

2.28.10 Custody; Interference with Court Order; Children, Insane or Incompetent Persons, and Other Dependent Persons

A person commits the offense of interference with custody when, without lawful authority to do so, that person

a) knowingly or recklessly takes or entices any child or committed person away from the individual who has lawful custody of such child or committed person when he/she is not privileged to do so or
b) knowingly harbors any child or committed person who has absconded.

A person commits the offense of interstate interference with custody when without lawful authority to do so that person knowingly or recklessly takes or entices any child or committed person away from the individual who has lawful custody of the child or committed person and in so doing brings the child or committed person into this state or removes the child or committed person from this state.

As used herein

1) "Committed person" means any child or other person whose custody is entrusted to another individual by authority of law.
2) "Child" means any individual who is under the age of 17 or any individual who is under the age of 18 who is alleged to be a deprived child.
3) "Deprived child" (O.C.G.A. §15-11-2) means a child who
    a) is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for the child's physical, mental, or emotional health or morals;
    b) has been placed for care or adoption in violation of the law;
    c) has been abandoned by his/her parents or other legal custodian; or
    d) is without a parent, guardian, or custodian.
4) "Lawful custody" means that custody inherent in the natural parents, pursuant to the Juvenile Proceedings Code of Georgia (O.C.G.A. §15-11-17), or awarded to a parent, guardian, or other person by a court of competent jurisdiction.

O.C.G.A. §16-5-45

2.28.20 **Cruelty to Children; Deprivation**

A parent, guardian, or other person (supervising the welfare of) (having immediate charge or custody of) a child under the age of 18 commits the offense of cruelty to children when that person willfully deprives the child of necessary food to the extent that the child's health or well-being is jeopardized.

2.28.21 **Cruelty to Children in the First Degree**

Any person commits the offense of cruelty to children when that person maliciously causes a child under the age of 18 cruel or excessive physical or mental pain.

O.C.G.A. §16-5-70

Malice is not ill will or hatred. For the purpose of this code section, "malice" means an actual intent to cause the particular harm produced (that is, physical pain) (that is, mental pain) without justification or excuse. Malice is also the wanton and willful doing of an act with an awareness of a plain and strong likelihood that such particular harm may result. Intention may be shown by the circumstances connected with the offense.

Brewton v. State, 266 Ga. 160(1) (1996)
Hightower v. State, 256 Ga. App. 793 (2002)

2.28.22 **Cruelty to Children in the Second Degree**

Any person commits the offense of cruelty to children in the second degree when such person with criminal negligence (*define*) causes a child under the age of 18 cruel or excessive physical or mental pain.

O.C.G.A. §16-5-70(c)

(*See definition of criminal negligence, 1.41.40.*)

2.28.23 **Cruelty to Children in the Third Degree**

Any person commits the offense of cruelty to children in the third degree when

a) such person, who is the primary aggressor, intentionally allows a child under the age of 18 to witness the commission of a forcible felony, battery, or family violence battery or

b) such person, who is the primary aggressor, having knowledge that a child under the age of 18 is present and sees or hears the act, commits a forcible felony, battery, or family violence battery.

O.C.G.A. §16-5-70(d)

2.28.24 **Justifiable; Parental Discipline**

A parent is justified in using corporal or physical punishment in order to discipline a minor child, so long as the corporal punishment is reasonable. A parent is not justified in using corporal punishment to discipline a minor child if the corporal punishment maliciously causes the child cruel or excessive physical pain, harm, or injury. If you find from the evidence that the defendant did inflict corporal punishment upon the child in this case, and you further find that it was reasonable and did not cause the child to suffer cruel or excessive physical pain, harm, or injury, then the defendant would be justified, and it would be your duty to acquit the defendant.

When the issue of justification (in the exercise of parental discipline) is raised by the evidence, the burden is on the State to disprove that the defendant was justified.

O.C.G.A. §16-3-20(3)

(*See also item "c" in 3.01.10, Justification; Generally.*)

2.28.25 **Manufacturing Methamphetamine with Children Present**

Any person who intentionally causes or permits a child under the age of 18 to be present where any person is manufacturing methamphetamine or possessing a chemical substance with the intent to manufacture methamphetamine shall be guilty of the offense of manufacturing methamphetamine with children present.

O.C.G.A. §16-5-73(b) (*See subsection (b)(1) for when child receives serious injury.*)

2.28.50 **Abandonment; Statutory Definition**

If any parent willfully and voluntarily abandons minor children, leaving the children in a dependent condition, the parent shall be guilty of abandonment.

If a parent commits the offense of abandonment as I have defined it and leaves this state, the parent shall be guilty of abandonment, a felony.

A minor child is a child under the age of 18.

A child is considered to be in a dependent condition when the parent charged with abandonment does not furnish sufficient food, clothing, or shelter for the needs of the child.

The fact that the custodial parent (grandparent, welfare, etc.) furnished the sufficient food, clothing, and shelter to meet the needs of the child(ren) is no defense to the charge of abandonment against the parent charged.

O.C.G.A. §19-10-1

2.28.55 **Abandonment; Form of Verdict**

If you believe beyond a reasonable doubt that the defendant in this case is the parent of the child or children (named in this bill of indictment) and you further believe beyond a reasonable doubt that the parent did, in ___________ County, Georgia, on about the _____ day of ________________, 20_____, unlawfully (*read from accusation*), then you would be authorized to convict the defendant. In that event, the form of your verdict would be, "We, the jury, find the defendant guilty."

After considering the evidence and the law as given you by the court, if you do not believe the defendant is guilty or if you have any reasonable doubt about the defendant's guilt, then you should acquit the defendant.

Whatever your verdict is, it must be agreed upon by all of you; it must be in writing, entered on the back of the accusation, which the court will send out with you, dated, signed by one of your members as foreperson, and returned and read into open court.

Members of the jury, you may retire to your jury room to make up your verdict.

O.C.G.A. §19-10-1

(*Note: Two paragraphs have been deleted from this charge due to* Whitman v. State, *212 Ga. App. 523 (1994).*)

EVIDENTIARY DEFENSES

3.30.10 **Alibi**

The defendant contends that he/she was not present at the scene of the alleged offense at the time of its commission. Alibi, as a defense, involves the impossibility of the defendant's presence at the scene of the alleged offense at the time of its commission. Presence of the defendant at the scene of the crime alleged (or the defendant's involvement as a coconspirator or as a party to the crime) is an essential element of the crime set forth in this indictment, and the burden of proof rests upon the State to prove such beyond a reasonable doubt.

Any evidence in the nature of alibi should be considered by you in connection with all of the other evidence in the case. If, in doing so, you should entertain a reasonable doubt as to the guilt of the accused, it would be your duty to acquit the defendant.

On the other hand, if you believe from the entire evidence that the defendant is guilty beyond a reasonable doubt, you may convict.

O.C.G.A. §16-3-40

Allen v. State, 137 Ga. App. 302, 304 (1976)

Patterson v. State, 233 Ga. 724 (1975)

(*See* Parham v. State, *120 Ga. App. 723 (1969);* Young v. State, *225 Ga. 255 (1969).*)

3.35.10 **Character of Defendant; Good**

When evidence of the good character of the defendant is offered, the jury has the duty to consider that testimony, along with all of the other evidence in the case, in determining the guilt or innocence of the defendant. Good character is a positive, substantive fact and may be sufficient to produce in the minds of a jury a reasonable doubt about the guilt of the defendant. You have the duty to consider any evidence of general good character along with all of the other evidence in the case, and, if in doing so, you should entertain a reasonable doubt about the guilt of the defendant, it would be your duty to acquit. However, if you should believe that the defendant is guilty beyond a reasonable doubt, you would be authorized to convict, despite the evidence about general good character.

Nunnally v. State, 235 Ga. 693, 704(8) (1975)

David v. State, 143 Ga. App. 500 (1977)

Crass v. State, 150 Ga. App. 374 (1979)

Morrow v. State, 166 Ga. App. 883(3) (1983)

3.38.10 **Equal Access**

If you determine from the evidence that persons other than the defendant had equal opportunity to possess or to place the articles of contraband upon the described premises, then you should acquit the defendant. However, if you are convinced beyond a reasonable doubt that the defendant knowingly possessed the contraband or shared possession or control with another person and helped or procured the other person in possessing and having control of the contraband, you would be authorized to convict.

Gee v. State, 130 Ga. App. 634, 636 (1974)

(*Note: Refer to "equal access" as it pertains to drugs; see 2.76.20, Equal Access.*)