

**Municipal Court Judges of Georgia
New Judge Orientation Course**

**Sentencing:
Philosophy, Norms, & Alternative Practices**

Judge Fletcher Sams
Fayette County State Court

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I. **Introduction**

II. **Sentencing Philosophy**

A. **Purpose of Punishment**

1. Rehabilitation
2. Deterrence
3. Isolation
4. Retribution

B. **Options**

1. Jail
2. Supervised Probation
3. Unsupervised Probation
4. County Diversion Center / Work Release
5. Community Service
 - a. Bathroom Pointers
 - b. Squirrel Patrol
6. Home Arrest
7. Electronic Monitoring
8. Drug Screening
9. Drug Testing
10. Counseling
11. Victim Impact Panels
12. No Violence (chicken speech)

13. Drug/DUI Court
14. Cognitive Development Programs
15. Pre-Trial Intervention Programs

C. **The best indicator of future criminal behavior is past criminal behavior.**

D. **Individualize Sentences**

"[T]he belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender ... [I]t is necessary to individualize each case, to give that careful, humane, and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion ... [F]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." Williams v. New York, 337 U.S. 241 (1949).

E. **Appropriate Aggravating Factors**

1. The defendant's conduct caused or threatened serious harm
2. The defendant received compensation for committing the offense
3. The defendant has a history of prior delinquency or criminal activity
4. The defendant, by his office or position, was obliged to prevent the offense or bring the offenders committing it to justice
5. The defendant held public office and the offense related to the conduct of that office
6. The defendant utilized his reputation or position to commit the offense
7. The sentence is necessary to deter others from committing the same crime
8. The defendant committed the offense against a person 60 years of age or who is physically handicapped

9. The defendant committed the offense by reason of the person's actual or perceived race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin
10. The offense took place in or on the grounds of a place of worship
11. The defendant was convicted of a felony committed while he was on pre-trial release or while on probation
12. The defendant committed perjury
13. The defendant held a position of trust or supervision
14. The defendant committed an offense related to the activities of an organized gang
15. The defendant committed an offense in school

F. Inappropriate Sentencing Factors

1. Race, sex, religion
2. Election to go to trial
3. Election to appeal
4. Pending criminal cases
5. Vindictiveness
6. Pro Se representation

G. Mitigating Factors

1. The defendant's criminal conduct did not cause or threaten serious physical harm to another
2. The defendant did not contemplate that his criminal conduct would cause or threaten serious physical harm to another
3. The defendant acted under a strong provocation

4. There were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense
5. The defendant's criminal conduct was induced or facilitated by someone other than the defendant
6. The defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he or she sustained
7. The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime
8. The defendant's criminal conduct was the result of circumstances unlikely to recur
9. The character and attitude of the defendant indicate that he or she is unlikely to commit another crime
10. The defendant is particularly likely to comply with the terms of a period of probation
11. The imprisonment of the defendant would entail excessive hardship to his or her dependants
12. The imprisonment of the defendant would endanger his or her medical condition
13. The defendant was mentally retarded
14. The defendant has shown remorse and repentance
15. The defendant has cooperated with law enforcement authorities

H. **Shame Punishment: Must be a reasonable relationship to rehabilitation or to public protection.**

1. Pink Bracelet. Ballenger v. State, 210 Ga. App. 627 (1993).
2. Short Haircut. Inman v. State, 124 Ga. App. 190 (1971).

3. Placard. Williams v. State, 234 Ga. App. 37 (1998).
4. The Trouble with 'Scarlet Letter' Punishment, Douglas Litowitz, 81 Judicature 52 (1997).
5. What is Wrong with Inflicting Shame Sanctions?, James Q. Whitman, 107 Yale L.J. 1055 (1998).
6. Three Worlds Collide: A Novel Approach to the Law, Literature, and the Philosophy of Shame, Deni Smith Garcia, 6 Tex. Wesleyan L. Rev. 105 (1999).
7. Green Bumper Sticker

**IN CASE OF
MOVING VIOLATION
CONTACT
STATE COURT OF
FAYETTE COUNTY
(770) 716-4260**

I. The Ten Commandments of Effective Communication in Sentencing

1. Maintain eye contact with the defendant
2. Use layperson's language
3. Explain aggravating and mitigating factors

4. Deliver a carrot — “rehabilitative language”
5. Deliver the whip — “reprimand”
6. Keep your temper and maintain your poise
7. Allocution – allow the defendant to be heard (sometimes make the defendant be heard)
8. Stop the defendant from being heard
9. Be flexible with demeanor
10. Just say “No.”

III. Sentencing Basics

- A. **Fine and Confinement Generally:** Upon a verdict or plea of guilty, and after a pre-sentencing hearing, the judge fixing the sentence shall prescribe a determinate sentence for a specific number of months or years which shall be in conformity with any mandatory minimum sentences required by law or shall be within the minimum or maximum prescribed by law as the punishment for the crime. O.C.G.A. § 17-10-1. Effective January 1, 2001 (see annotations to O.C.G.A. § 17-10-3 for crimes committed prior to effective date), unless otherwise provided by law, misdemeanors shall be punished as follows:

(1) By a fine not to exceed \$1,000.00 or by confinement in the county or other jail for a total term not to exceed 12 months, or both;

(2) By confinement under the jurisdiction of the Board of Corrections in a state probation detention center or diversion center pursuant to Code Sections 42-8-35.4 and 42-8-35.5, for a determinate term of months which shall not exceed a total term of 12 months; or

(3) If the crime was committed by an inmate within the confines of a state correctional institution, by confinement under the jurisdiction of the Board of Corrections in a state correctional institution or such other institution as the Department of Corrections may direct for a term which shall not exceed 12 months.

Either the punishment provided in paragraph (1) or (2), but not both, may be imposed in the discretion of the sentencing judge. Punishment imposed under either paragraph may be subject to suspension or probation. The sentencing courts shall retain jurisdiction to amend, modify, alter, suspend, or probate sentences under paragraph (1) at any time, but in no instance shall any sentence under the paragraph

be modified in a manner to place a county inmate under the jurisdiction of the Board of Corrections, except as provided in paragraph (2). O.C.G.A. § 17-10-3.

1. **Weekend Service:** if a six-month sentence or less is imposed, it is within the authority and discretion of the sentencing judge to allow the sentence to be served on weekends by weekend confinement or during the nonworking hours of the defendant. A weekend shall commence and shall end in the discretion of the sentencing judge, and the nonworking hours of the defendant shall be determined in the discretion of the sentencing judge; provided, however, that the judge shall retain plenary control of the defendant at all times during the sentence period. A weekend term shall be counted as serving two days of the full sentence. Confinement during the nonworking hours of a defendant during any day may be counted as serving a full day of the sentence. O.C.G.A. § 17-10-3©.

2. **Improper Sentences:**

Example: Imposition of the maximum misdemeanor punishment upon conviction for criminal trespass exceeded constitutional bounds against cruel and unusual punishment where the trespass involved defendant's trimming of her neighbor's hedge. Haygood v. State, 225 Ga. App. 81 (1997).

Example: Sentence of 10 days in jail followed by 12 months probation for driving under the influence held not proper as violating O.C.G.A. § 17-10-3, *cited supra*, (total term greater than 12 months not allowed). Kovacs v. State, 227 Ga. App. 870 (1997).

3. **Credit for Time in Confinement:** Each person convicted of a crime in this state shall be given full credit for each day spent in confinement awaiting trial and for each day spent in confinement, in connection with and resulting from a court order entered in the criminal proceedings for which sentence was imposed, in any institution or facility for treatment or examination of a physical or mental disability. The credit or credits shall be applied toward the convicted person's sentence. O.C.G.A. § 17-10-11(a).

4. **Corporate Defendants:** A court may sentence a corporation to serve a term of years (even though such sentence is incapable of enforcement) and may suspend that sentence and impose a fine. State v. Shepherd Constr. Co., 248 Ga. 1, *cert. denied*, 454 U.S. 1055, *appeal dismissed*, 454 U.S. 1074 (1981).

B. **Costs of Prosecution:** The costs of prosecution shall not be demanded of a defendant until after trial and conviction. Ga. Const. 1983, Art. I, Sec. I, Par. XXIV; O.C.G.A. § 17-11-1. If convicted, judgment may be entered against the defendant

for all costs accruing in the committing and trial courts and by any officer pending the prosecution. The judgment shall be a lien from the date of his arrest on all the property of the defendant. *Id.* See the annotations to O.C.G.A. § 17-11-1 for cases dealing with which costs are chargeable and which are not (i.e. costs of bailiffs and jurors are not taxable to criminal defendants, Walden v. State, 258 Ga. App. 503 (1988); Cf. payment of hotel and airline ticket costs for witnesses are permissible. Smith v. State, 236 Ga. App. 548 (1999)). See also O.C.G.A. § 17-11-2.

C. **Restitution:** The judge shall order that an adult offender make full restitution as a condition of any relief ordered by the court to the victims of his crimes. O.C.G.A. § 17-14-3. The factors to be considered in determining the nature and amount of the restitution include:

- (1) The present financial condition of the offender and his dependents;
- (2) The probable future earning capacity of the offender and his dependents;
- (3) The amount of damages;
- (4) The goal of restitution to the victim and the goal of rehabilitation of the offender;
- (5) Any restitution previously made;
- (6) The period of time during which the restitution order will be in effect; and
- (7) Other appropriate factors which the judge deems to be appropriate.

O.C.G.A. § 17-14-10.

D. **Community Service:** Where a defendant has been punished in whole or in part by a fine, the sentencing judge shall be authorized to allow the defendant to satisfy such fine through community service as defined in paragraph (2) of Code Section 42-8-70. One hour of community service shall equal the dollar amount of one hour of paid labor at the minimum wage under the federal Fair Labor Standards Act of 1938, as now or hereafter amended, unless otherwise specified by the sentencing judge. Prior to or subsequent to sentencing, a defendant may request the court that all or any portion of a fine may be satisfied through community service. O.C.G.A. § 17-10-1(d).

E. **Consideration of Plea in Final Disposition:** It is proper for the judge to grant charge and sentence leniency to defendants who enter pleas of guilty or nolo contendere when the interests of the public in the effective administration of criminal justice are

thereby served. Among the considerations which are appropriate in determining this question are:

- (1) that the defendant by entering a plea has aided in ensuring the prompt and certain application of correctional measures;
- (2) that the defendant has acknowledged guilt and shown a willingness to assume responsibility for conduct;
- (3) that the leniency will make possible alternative correctional measures which are better adapted to achieving rehabilitative, protective, deterrent or other purposes of correctional treatment, or will prevent undue harm to the defendant from the form of conviction;
- (4) that the defendant has made public trial unnecessary when there are good reasons for not having the case dealt with in a public trial;
- (5) that the defendant has given or offered cooperation when such cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct;
- (6) that the defendant by entering a plea has aided in avoiding delay (including delay due to crowded dockets) in the disposition of other cases and thereby has increased the probability of prompt and certain application of correctional measures to other offenders.

Although the judge may consider the entering of a "not guilty" plea by defendant as evidence of that defendant's lack of remorse, Bradwell v. State, A03A1349 (8/5/03); Sparks v. State, 176 Ga. App. 8 (1985), the judge should not impose upon a defendant any sentence in excess of that which would be justified by any of the rehabilitative, protective, deterrent or other purposes of the criminal law merely because the defendant has chosen to require the prosecution to prove the defendant's guilt at trial rather than to enter a plea of guilty or nolo contendere. U.S.C.R. 33.6. The trial judge is authorized, however, to impose a greater sentence upon a defendant after hearing evidence than he might have imposed in conjunction with a guilty plea. Arnold v. State, 163 Ga. App. 94 (1982).

1. **Consideration of Plea Agreements:** The trial judge should give the agreement due consideration, but notwithstanding its existence, must reach an independent decision on whether to grant charge or sentence leniency under U.S.C.R. 33.6, *supra*. U.S.C.R. 33.5(b).

- F. **Victim Impact Evidence:** In misdemeanor cases, if the defendant allegedly caused serious physical injury or death to the victim, a prosecuting attorney bringing charges

against a defendant shall notify, where practical, the alleged victim or, when the victim is no longer living, a member of the victim's family of his or her right under certain circumstances to submit a victim impact statement. A victim impact statement submitted by a victim shall be attached to the case file and may be used by the prosecuting attorney or the judge during any stage of the proceedings against the defendant involving predisposition, plea bargaining, sentencing, or determination of restitution. A victim impact statement shall:

- (1) Identify the victim of the offense and the perpetrator;
- (2) Itemize any economic loss suffered by the victim as a result of the offense;
- (3) Identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence;
- (4) Describe any change in the victim's personal welfare or familial relationships as a result of the offense;
- (5) Identify any request for psychological services initiated by the victim or the victim's family as a result of the offense; and
- (6) Contain any other information related to the impact of the offense upon the victim that the court requires.

The victim impact statement is to be submitted to the prosecuting attorney. If the victim is unable to do so because of such victim's mental, emotional, or physical incapacity, or because of such victim's age, the victim's attorney or a family member may complete the victim impact statement form on behalf of the victim. The prosecuting attorney shall file the statement with the court. The court shall, in the manner prescribed by rule of court, provide the defendant with a copy of the victim impact statement within a reasonable time prior to any hearing at which it is to be considered and allow the defendant to have the opportunity to rebut the victim's written statements.

O.C.G.A. § 17-10-1.1.

1. **Oral Victim Impact Statements:** In misdemeanor cases, prior to fixing of the sentence as provided for in Code Section 17-10-1, and before rendering the appropriate sentence, including any order of restitution, the court, within its discretion, may allow evidence from the victim, the family of the victim, or such other witness having personal knowledge of the impact of the crime on the victim, the family of the victim, or community. Such evidence shall

be given in the presence of the defendant and shall be subject to cross-examination. See O.C.G.A. § 17-10-1.2 for additional information regarding how such evidence shall be presented.

IV. **High and Aggravated Misdemeanors, Enhanced Penalties, and Selected Offenses**

- A. **High and Aggravated Misdemeanors:** A person who is convicted of a misdemeanor of a high and aggravated nature shall be punished by a fine not to exceed \$5,000.00 or by confinement in jail for a term not to exceed 12 months, or both. In all cases of a conviction of a misdemeanor of a high and aggravated nature, the sentencing court shall retain jurisdiction to amend, modify, alter, suspend, or probate sentences imposed under this Code section at any time; but in no instance shall a sentence imposed under this Code section be modified in such a manner as to increase the amount of fine or the term of confinement.

Notwithstanding any laws to the contrary, a person sentenced for a misdemeanor of a high and aggravated nature may earn no more than four days per month earned time allowance. From the Georgia Code index, a partial list of misdemeanors of a "high and aggravated nature":

Abandoned cemeteries and burial ground violations, § 36-72-16.

Aggressive driving, § 40-6-397.

Alcoholic beverage violations, § 3-3-46.

Furnishing beverages to and purchase and possession of beverages by person under 21 years of age, § 3-3-23.1.

Assault.

Simple assault, § 16-5-20.

Bad checks, § 16-9-20.

Battery, § 16-5-23.1.

Sexual battery, § 16-6-22.1.

Simple battery, § 16-5-23.

Bear hunting, § 27-3-26.

Illegal use of bear bait, § 27-3-27.

Bingo violations, § 16-12-62.

Body parts.

Removal from scene of death or dismemberment, § 16-12-161.

Bovine disease violations, § 4-4-95.1.

Business opportunities sales violations, § 10-1-417.

Chain letter clubs, pyramid clubs and like groups as lotteries, § 16-12-38.

Controlled substances.

Imitation controlled substances.

Unlawful manufacture, distribution or possession, § 16-13-30.2.

Dangerous dog violations, § 4-8-28.

Deposit account fraud, § 16-9-20.

Driving under the influence, § 40-6-391.
 Serious injury by vehicle, § 40-6-394.
Driving while license suspended or revoked, § 40-5-121.
Electronically furnishing obscene material to minors, § 16-12-100.1.
Fishing.
 Commercial fishing boats used for fishing with power-drawn nets,
 §§ 27-4-134, 27-4-138.
 Shellfish violations, § 27-4-201.
Fleeing or attempting to elude police while using motor vehicle, § 40-6-395.
Gambling.
 Advertising commercial gambling, § 16-12-26.
 Antique slot machine possession, § 16-12-24.
 Bingo violations, § 16-12-62.
 Chain letter clubs, pyramid clubs and like groups as lotteries, § 16-12-38.
 Keeping gambling place, § 16-12-23.
 Possession, manufacture or transfer of device or parts, § 16-12-24.
General assembly sessions or meetings prevented or disrupted, § 16-11-34.1.
Hazing, § 16-5-61.
Highway work zones.
 Speeding in highway work zones, § 40-6-188.
Hunting.
 Bears, § 27-3-26.
 Unlawful use of bear bait, § 27-3-27.
 Engaging in hunting while privileges suspended, § 27-2-25.1.
 Unlawful killing at night, § 27-3-48.
Marijuana and controlled substance excise tax.
 Confidentiality of information violations, § 48-15-10.
Motor vehicle racetrack operators.
 Violations of chapter, § 43-25-10.
Motor vehicle subleasing violations, § 10-1-40.
Motor vehicle theft or conversion.
 False report, § 44-3-92.
Obscene materials.
 Distributing, § 16-12-80.
 Sale and distribution of harmful materials to minors, § 16-12-105.
Pandering, § 16-6-13.
Pest control operators.
 Violations of provisions, § 43-45-25.
Pimping, § 16-6-13.
Prior violations.
 Effect of repeal or amendment of criminal law in prosecution, § 16-1-11.
Prostitution, § 16-6-13.
 Punishment for generally, § 17-10-4.
Sale or distribution of harmful materials to minors, § 16-12-105.

School campus or facility.

Failure to leave when directed, § 16-11-35.

Security interest.

Destruction, removal, concealment, etc., of property subject to, § 16-9-51.

State capitol or capitol square buildings.

Unlawful activities within, § 16-11-34.1.

University campus or facility.

Failure to leave when directed, § 16-11-35.

Weapons.

Furnishing metal knuckles or knife to person under the age of 18, § 16-11-101.

- B. **Enhanced Penalties for Crimes Involving Bias or Prejudice:** Subject to the notice requirement provided in Code Section 17-10-18 and in enhancement of the penalty imposed, if the trier of fact determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property of the victim as the object of the offense because of bias or prejudice, the judge imposing sentence shall, if the offense for which the defendant was convicted is a misdemeanor or a misdemeanor of a high and aggravated nature, increase the sentence and the fine normally imposed by the court through court policy or voluntary sentencing guidelines by 50 percent up to the maximum authorized by law. When the enhanced sentence is imposed, the judge shall state the amount of the increase of the sentence due to bias or prejudice. O.C.G.A. § 17-10-17. **Now ruled unconstitutional by Botts v. State, 278 Ga. 438 (2004).**
- C. **Traffic Offenses Generally:** In addition to or instead of any other penalty provided for the punishment of a misdemeanor involving a traffic offense, or punishment of a municipal ordinance involving a traffic offense, with the exception of habitual offenders sentenced under Code Section 17-10-7, a judge may impose any one or more of the following sentences:
- (1) Reexamination by the Department of Public Safety when the judge has good cause to believe that the convicted licensed driver is incompetent or otherwise not qualified to be licensed.
 - (2) Attendance at, and satisfactory completion of, a driver improvement course meeting standards approved by the court;
 - (3) Within the limits of the authority of the charter powers of a municipality or the punishment prescribed by law in other courts, imprisonment at times specified by the court or release from imprisonment upon such conditions and at such times as may be specified; or

(4) Probation or suspension of all or any part of a penalty upon such terms and conditions as may be prescribed by the judge. The conditions may include driving with no further motor vehicle violations during a specified time unless the driving privileges have been or will be otherwise suspended or revoked by law; reporting periodically to the court or a specified agency; and performing, or refraining from performing, such acts as may be ordered by the judge.

O.C.G.A. § 17-10-3(d).

D. **Speeding Fines:** Unless a different maximum fine or greater minimum fine is specifically provided in O.C.G.A. Title 40, Chapter 6 (Uniform Rules of the Road) for a particular violation, the maximum fine which may be imposed as punishment for a first offense of violating any lawful speed limit established by or pursuant to the provisions of Title 40, Chapter 6, Article 9 by exceeding a maximum lawful speed limit:

- (1) By five miles per hour or less shall be no dollars;
- (2) By more than five but not more than ten miles per hour shall not exceed \$25.00;
- (3) By more than ten but not more than 14 miles per hour shall not exceed \$100.00;
- (4) By more than 14 but less than 19 miles per hour shall not exceed \$125.00;
- (5) By 19 or more but less than 24 miles per hour shall not exceed \$150.00; or
- (6) By 24 or more but less than 34 miles per hour shall not exceed \$500.00.

E. **Traffic Violations Bureaus:** See O.C.G.A. § 40-13-50 through § 40-13-64.

Assorted Cases

Pierce v. State, 278 Ga. App. 162 (2006). Home arrest cannot be substituted for the 72 hour confinement required in second DUI cases.

Ivey v. State, 2006 Ga. App. (A06A0514). An oral declaration as to what the sentence shall be is not the sentence of the court; the sentence signed by the Judge is. However, the oral declaration of the sentence may not be increased after the defendant has begun to serve it.

Stinson v. State, 219 Ga. App. 107 (2006). A defendant is not entitled to credit against his sentence for time spent in a Drug Court rehabilitation program.

Register v. State, 270 Ga. App. 61 (2006). Amount of restitution may be governed by the nature of the charge. Defendant's felony charge of criminal damage to property was reduced to a misdemeanor through plea bargaining even though the damage was over \$1,600.00. Restitution was capped at \$500, being the maximum allowed on the misdemeanor.

Putman v. State, 270 Ga. App. 45, 606 S.E.2d. 50 (2006). Defendant was convicted of his sixth speeding offense. The State recommended twelve months probation, \$1,000 for driving school, and five days of community service because of the inconvenience of the jury trial. The Court responded, "I don't know that that is any reason to punish the defendant," at which time the recommendation was imposed. The Court had rejected using the jury trial as an aggravating factor. There is a strong presumption that courts ignore illegal evidence and consider only legal evidence in imposing sentencing.

Wilford v. State, 265 Ga. App. 153 (2004). Court sentenced Defendant to twelve months detention and ten years probation under the First Offender Act. When Court discovered Defendant had lied about his eligibility for First Offender, the Court resentenced Defendant to ten years in prison followed by 25 years probation. Resentencing to correct an illegal sentence does not implicate double jeopardy rights, even if the Defendant has already served a part of his term.

Maness v. State, 265 Ga. App. 239 (2004). After conviction, as condition of probation, Judge ordered a waiver of Defendant's Fourth Amendment rights for future searches. Request to modify condition was premature because no warrantless arrest had taken place. Fourth Amendment waivers should not be imposed absent a negotiated plea or valid waiver of said right.

Costin v. State, 269 Ga. App. 632, 605 S.E.2d 73 (2004). The Defendant plead guilty to DUI, less safe (refusal) and requested less than 24 hours in jail. Court misinterpreted O.C.G.A. § 40-6-391(c)(1) to require 24 hours in jail. Since there was no intox result, the case was remanded for the Court to use discretion as to whether to impose 24 hours of jail time.

Wilkerson v. State, 269 Ga. App. 190 (2004). Defendant was convicted of trafficking cocaine, driving with an expired tag, and driving with a suspended license. Court gave the Defendant twelve

years to serve on the felony conviction but failed to sentence on the two misdemeanors. Outside of the Defendant's presence, the Court later sentenced Defendant to twelve months to serve on each misdemeanor to run concurrent with the felony sentence. Normally, the Defendant has a right to be present unless he/she flees or excuses himself/herself. Here, no violation of due process was found because the Defendant was present for the felony sentencing hearing and had the opportunity to be heard.

Botts v. State, 278 Ga. 538 604 S.E.2d 512 (2004). Georgia's hate crime penalty statute, O.C.G.A. § 17-10-17, was found unconstitutional. The phrase "bias or prejudice" is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.

Partridge v. State, 266 Ga. App. 305 (2004). Defendant was convicted of per se DUI and DUI less safe and Court sentenced Defendant on both. Less safe DUI was reversed and case was remanded for resentencing on DUI less safe. Charges were alternative and should have been merged.

Gibson v. State, 257 Ga. App. 134 (2002). Court has no duty to raise issue of 1st Offender consideration.

Cook v. State, 256 Ga. App. 353 (2002). A trial court's use of a mechanical sentencing formula or policy as to any portion of a sentence amounts to a refusal to exercise its discretion and therefore is an abdication of judicial responsibility. Jury trial, alone, is not enough to deny 1st Offender status. Cannot prohibit all violence, only inappropriate violence.

Humphrey v. State, 257 Ga. App. 312 (2002). Cannot consider impermissible hearsay in denying 1st Offender status.

Burns v. State, 251 Ga. App. 889 (2001). The Court erred in sentencing Defendant to reimburse costs of indigent defense without making a factual determination on the record that Defendant was able to do so. The factual determination should include "the amount of [defendant's] assets, expenses, income or outstanding obligations.

Walton v. State, 247 Ga. App. 717 (2001). Judge, "... I have no choice but to sentence you to twenty years ..." Sentence Affirmed. Judge did consider options and evidence.

Patel v. State, 247 Ga. App. 815 (2001). Even after term of Court, Judge retains right to downwardly modify misdemeanor sentences imposed under O.C.G.A. § 7-10-3

Alvarado v. State, 248 Ga. App. 810 (2001). Resentencing after partial reversal. Sentence not improperly enhanced by changing counts from concurrent to consecutive.

Stephens v. State, 247 Ga. App. 719 (2001). It is appropriate condition of probation (cruelty to animals case) to forbid possession of dogs.

Carthon v. State, 248 Ga. App. 738 (2001). Court correctly sentenced defendant for both DUI (alcohol) and DUI (drugs) since charges not predicated on same conduct.

Threlkeld v. State, 250 Ga. App. 44 (2001). Defendant appealed his conviction for public indecency, contending that he was entitled to first offender treatment and not sentenced as a first offender because of his status as an attorney. Whether to sentence a Defendant as a first offender lies entirely within the discretion of the trial court. Here, Defendant pled guilty to fondling the crotch area of a male juvenile at a youth detention center. In considering Defendant's request for first offender treatment, the trial court observed that Defendant was a 50-year-old attorney who had special access to the victim who was only 17 years old. The trial court did not abuse its discretion here, and the ruling was based not only on his status as an attorney, but on the relative ages of those involved and the fact that the victim was not free to leave the room.

Burchell v. State, 419 So.2d 358 (Fla. App. 1982). Struck down condition of probation disallowing the defendant from fathering any children during the term of probation.

Commonwealth v. Koren, 646 A.2d 1205 (Pa. Super. Ct. 1994). Upheld condition of probation that the defendant have no contact with her boyfriend during period of probation in a case in which the defendant had been charged with aiding boyfriend's escape from custody.

Delacruz v. State, 687 So.2d 415 (Fla. App. 1990). Struck down condition of probation requiring the defendant to maintain full-time employment and remanded case to trial court to modify condition requiring the defendant to "maintain or actively seek" full-time employment.

Edmunds v. State, 559 So.2d 415 (Fla. App. 1990). Struck down condition of probation that prohibited the defendant, convicted of cocaine charges, from visiting bars, restaurants, and other establishments where alcohol was served without written permission from probation officer after consent from judge.

Goldschmitt v. State, 490 So. 2d 918 (Fla. App. 1986). Allowed as condition of probation for the defendant who was convicted of driving under the influence of alcohol the requirements that the defendant affix a bumper sticker reading "CONVICTED DUI-RESTRICTED LICENSE" to his car so long as the bumper sticker has some reasonable rehabilitative purpose.

In re Babak, 22 Cal. Rptr.2d 893 (Cal. App. 1993). Struck down a condition of probation that a juvenile defendant move to Iran to live with his parents for two years.

Markey v. State, 507 So.2d 1043 (Ala.. Crim. App. 1987). Upheld condition of probation disallowing the defendant-priest from participating in anti-abortion picketing as a result of his conviction for burglary and criminal mischief arising out of anti-abortion protests.

People v. Bauer, 260 Cal. Rptr. 62 (Cal. App. 1989). Upheld conditions of probation requiring the defendant to submit to warrantless searches and seizures at any time.

People v. Bennor, 643 N.Y.S.2d 739 (N.Y. App. Div. 1996). Upheld condition of probation that required the defendant to enroll in and successfully complete a G.E.D. program.

People v. Hackler, 16 Cal. Rptr.2d 681 (Cal. App. 1993). Struck down condition of probation requiring the defendant, a convicted shoplifter, to wear a t-shirt bearing a printed statement of his status as a felony-theft probationer whenever he was outside his residence.

People v. Johnson, 528 N.E.2d 1360 (Ill. App. 1988). Struck down condition of probation requiring the defendant, a convicted drunk driver, to publish an apology and picture of herself taken during booking in the local newspaper.

People v. Zaring, 10 Cal. Rptr.2d 263 (Cal. App. 1992). Upheld condition of probation prohibiting the defendant who was a heroin addict from becoming pregnant during the term of her probation.

Priest v. State, 636 So.2d 1005 (Fla. App. 1993). Struck down a condition of probation requiring the defendant, convicted for receiving a stolen property, to obtain his G.E.D.

State v. Brown, 326 S.E.2d 410 (S.C. 1985). Struck down a condition of probation requiring castration as violative of the eighth amendment.

State v. Burdin, 923 S.W.2d 82 (Tenn. 1996). Struck down a condition of probation requiring the defendant to post a sign in his front yard stating "Warning, all children [defendant] is an admitted and convicted child molester. Parents beware."

State v. Graham, 636 A.2d 852 (Conn. App. 1994). Struck down conditions of probation regarding the cleanliness of the defendant's home and children as they did not serve to rehabilitate or reform the defendant whose convictions were for larceny and drug offenses.

State v. Jones 550 N.E. 2d 469 (Ohio 1990). Upheld a condition of probation that the defendant, who was convicted of contributing to the delinquency of a minor, have no contact with persons under eighteen years of age.

State v. McSweeney, 860 P.2d 305 (Or. App. 1993). Upheld a condition of probation that the defendant did not reside with spouse if spouse returned to drug use.

State v. Miller, 499 N.W.2d 215 (Wis. App. 1993). Upheld a condition of probation that the defendant not call any woman not a member of his family without permission from probation officer.

State v. Mosberg, 768 P.2d 313 (Kan. App. 1989). Struck down a condition of probation that prohibited the defendant from getting pregnant during probation.

Wiggins v. State, 386 So.2d 46 (Fla. App. 1980). Struck down a condition of probation prohibiting the defendant from having intercourse with individuals other than lawful spouse since the condition could not be said to be reasonably related to rehabilitation.

Wilkinson v. State, 388 So.2d 1322 (Fla. App. 1980). Struck down a condition of probation prohibiting the defendant from living with family to whom he was not married or related since the condition had no reasonable relationship to the charge for which the defendant was convicted.

Keyton v State, 257 Ga. App. 380 (2002). Defendant pled guilty to driving with an expired tag and was found not guilty of prowling. Defendant was sentenced to twelve months in jail for the expired tag. The court stated at sentencing, "Mr. Keaton [sic], it is very rare that someone goes to jail for an expired tag violation. I know that is a very minor offense. But, sir, I find that you committed the relatively minor offense of driving with an expired tag while in the commission of prowling, even though it was at a different location as alleged in the accusation. For that reason, I sentence you to 12 months in the county jail." Trial court was correct in considering the circumstances surrounding the defendant's driving with an expired tag.