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## EVIDENCE Particular Matters of Proof: Permit Authentication of Photographs, Motion Pictures, Videotapes, and Audio Recordings for Admissibility as Evidence When Witness is Unavailable and Device Was Not Operated by an Individual

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## EVIDENCE

### *Particular Matters of Proof: Permit Authentication of Photographs, Motion Pictures, Videotapes, and Audio Recordings for Admissibility as Evidence When Witness is Unavailable and Device Was Not Operated by an Individual*

CODE SECTION:	O.C.G.A. § 24-4-48 (new)
BILL NUMBER:	HB 1235
ACT NUMBER:	743
GEORGIA LAWS:	1996 Ga. Laws 443
SUMMARY:	The Act permits authentication of photographic, videotaped, and audiotaped evidence when the witness is unavailable if the evidence was not produced by an individual and is proven to have been made contemporaneously with the event in question.
EFFECTIVE DATE:	April 2, 1996 <sup>1</sup>

#### *History*

Chris Magill, a Gwinnett County DUI Task Force Officer, was killed by a drunk driver on Highway 85 on May 23, 1993.<sup>2</sup> Because of Officer Magill's death, he could not authenticate video footage shot from his patrol car camera.<sup>3</sup> Thus, many pending cases involving Officer Magill had to be dismissed because videotapes shot from his vehicle could not be admitted into evidence.<sup>4</sup>

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1. The Act became effective upon approval by the Governor.

2. Telephone Interview with Rep. Jeffrey Williams, House District No. 83 (May 7, 1996) [hereinafter Williams Interview]. Special thanks to Holly Williams, Representative Williams' wife, for her assistance.

3. Authentication of such videotapes includes showing that: 1) the mechanical transcription device was capable of taking the testimony; 2) the operator was competent to operate such equipment; 3) the recording is authentic and correct; 4) changes, additions, or corrections have not been made; 5) the manner of preservation is shown; 6) the speakers are identified; and 7) the testimony was given freely, without duress. *Allen v. State*, 146 Ga. App. 815, 247 S.E.2d 540 (1978). No chain of custody proof is required because "a videotape, like an audiotape or a photograph, is a distinct recognizable physical object that can be identified upon observation." *Gadson v. State*, 263 Ga. 626, 627, 437 S.E.2d 313 (1993) (citation omitted). Generally, any witness "familiar with the scene depicted can authenticate the photograph" without having been the photographer or having been present when the portrayed event occurred. *Issacs v. State*, 259 Ga. 717, 732, 386 S.E.2d 316 (1989) (citation omitted).

4. Williams Interview, *supra* note 2. Representative Williams' recollection is that

The Gwinnett County Solicitor, Gerald N. Blaney, Jr., appealed from one case in which the exclusion of a videotape through motions in limine caused the trial court to dismiss the action.<sup>5</sup> The Georgia Court of Appeals recognized the futility of meeting authentication requirements when a police officer is unavailable, and noted that videotaped evidence is often preferable to eyewitness testimony.<sup>6</sup> After discussing how other jurisdictions treat "silent witnesses"<sup>7</sup> in robbery, sexual assault, and other cases in which recorded hearsay is often key evidence,<sup>8</sup> the court adopted three required elements for authentication when a witness is unavailable: "(1) expert testimony establishing that the videotape had not been altered or manipulated; (2) testimony establishing the date and place the videotape was taken; and (3) testimony establishing the identity of the relevant participants depicted."<sup>9</sup> The court reversed the exclusion of the videotape and remanded with instruction to consider the "silent witness theory" in determining the admissibility of the tape.<sup>10</sup> However, in October 1995, the Georgia Supreme Court vacated the Appellate Court's decision, finding that "[t]here is no basis for the State's appeal of an order granting a defendant's motion in limine on general evidentiary grounds."<sup>11</sup> It appeared that the Supreme Court did not disagree with the "silent witness theory," but rather with the state's current lack of power to appeal on non-statutory evidentiary grounds.<sup>12</sup>

Jim Magill, Chris Magill's father, spoke with Representative Jeff Williams and told him how his son's death affected the prosecutorial

about twenty-three cases were affected by Officer Magill's death. *Id.*

5. *State v. Berky*, 214 Ga. App. 174, 447 S.E.2d 147 (1994). The only substantive evidence of defendant Berky's driving under the influence was the videotape. Without the videotape, the prosecutor could not meet the proof requirements. Telephone Interview with Gerald Blaney, Gwinnett County Solicitor (May 31, 1996) [hereinafter Blaney Interview].

6. *Berky*, 214 Ga. App. at 175, 447 S.E.2d at 148.

7. *Id.* at 177, 447 S.E.2d at 150. A majority of jurisdictions, *id.*, recognize that it is possible that recorded evidence should be admitted "even though no human is capable of swearing that he personally perceived what a photograph purports to portray . . . . Given an adequate foundation assuring the accuracy of the process producing it, the photograph should then be received as a so-called silent witness or as a witness which 'speaks for itself.'" *Id.* at 175, 447 S.E.2d at 148 (quoting *Litton v. Commonwealth*, 597 S.W.2d 616, 619 (Ky. 1980), which quoted 3 Wigmore on Evidence, § 790 (Chadbourn rev. 1970)).

8. *Id.* at 175-76, 447 S.E.2d at 148-49.

9. *Id.* at 175, 447 S.E.2d at 149.

10. *Id.* at 177, 477 S.E.2d at 150.

11. *Berky v. State*, 266 Ga. 28, 29, 463 S.E.2d 891 (1995). The court relied on O.C.G.A. § 5-7-1(a) (1994) and *State v. Land-O-Sun Dairies*, 204 Ga. App. 485, 419 S.E.2d 743 (1992). *Berky*, 266 Ga. at 29, 463 S.E.2d at 891.

12. Williams Interview, *supra* note 2; Blaney Interview, *supra* note 5.

powers of the state.<sup>13</sup> Working with Gerald Blaney, other state solicitors, DUI Task Force members, and prosecutors, Representative Williams introduced HB 1235, the "Silent Witness" bill.<sup>14</sup>

### *HB 1235*

The Act permits photographs, motion pictures, videotapes, and audiotapes to be admitted into evidence when the person who would otherwise authenticate the evidence is unavailable under the Act.<sup>15</sup> Subsection (b) of Code section 24-4-48 permits the court to maintain discretion over whether the evidence presented in support of authentication is competent, but it must admit such evidence if it "tend[s] to show reliably the fact or facts for which the items are offered."<sup>16</sup> The Act states that this method is not the only way in which such evidence may be introduced; rather, the Act supplements other laws.<sup>17</sup>

Authenticating demonstrative evidence such as films made from cameras in patrol cars, security cameras, and other video equipment in which the date and time of recording is placed on the evidence prior to admission,<sup>18</sup> requires the proponent to prove, prior to the court's determination of admissibility, that an individual did not produce the recorded evidence.<sup>19</sup> The recording must be "produced at a time when the device producing the item was not being operated by an individual person or was not under the personal control or in the presence of an individual operator."<sup>20</sup> The evidence must further be "shown to have been made contemporaneously with the events depicted."<sup>21</sup> One of the primary motivations behind this Act was eliminating any incentive to kill eyewitnesses to a crime, such as convenience store clerks, who could later identify the perpetrators.<sup>22</sup>

After its introduction, the Georgia House of Representatives referred HB 1235 to the House Judiciary Committee.<sup>23</sup> The House Committee's

13. Williams Interview, *supra* note 2.

14. *Id.* Similar bills were introduced in 1994 and 1995 but did not pass. Record of Proceedings of the Senate Judiciary Committee (Mar. 5, 1996) (remarks by Rep. Williams) (available in Georgia State University College of Law Library).

15. O.C.G.A. § 24-4-48(b) (Supp. 1996).

16. *Id.* § 24-4-48(b).

17. *Id.* § 24-4-48(d).

18. Williams Interview, *supra* note 2.

19. O.C.G.A. § 24-4-48(c) (Supp. 1996). Sections (b) and (c) are meant to be used separately; section (c) is only applicable to evidence containing date and time stamps. Williams Interview, *supra* note 2; *see infra* notes 34-42 and accompanying text.

20. O.C.G.A. § 24-4-48(c) (Supp. 1996).

21. *Id.*

22. Williams Interview, *supra* note 2.

23. Final Composite Status Sheet, Mar. 18, 1996.

greatest concern was the definition of an "unavailable" witness.<sup>24</sup> After much discussion, the committee adopted the definition of "unavailability of a witness" used in the Federal Rules of Evidence.<sup>25</sup> The language was a compromise, chosen for its established acceptance in the courts.<sup>26</sup>

Three provisions were removed from the bill in committee: a retroactive application provision, a severability clause, and a demand provision.<sup>27</sup> The retroactivity provision, which would have made the Act applicable to all cases pending as of January 1, 1994,<sup>28</sup> was unnecessary because Georgia courts give procedural statutory provisions, "including the rules of evidence, . . . retroactive effect absent an expressed contrary intention."<sup>29</sup> The severability clause would have permitted all constitutional provisions of the Act to stand if portions of the statute were declared unconstitutional.<sup>30</sup> However, because this provision was inserted to protect the Act if retroactive application was deemed unconstitutional, it was not necessary once the retroactivity provision was removed.<sup>31</sup> The demand provision, which would have

24. Williams Interview, *supra* note 2. Georgia currently does not have a statutory definition of "unavailability of a witness" for general use in procedural trial practice. *Id.* However, O.C.G.A. § 9-11-32(a)(3) (1993), sets forth a list of situations in which depositions may be used in lieu of live testimony, including when the witness has died, has left the country, is unable to attend, or is not able to testify competently.

25. Williams Interview, *supra* note 2. O.C.G.A. § 24-4-48(a), which is substantially similar to Federal Rule of Evidence 804(a), defines "unavailability of a witness" as including situations in which the "witness":

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the authentication;

(2) Persists in refusing to testify concerning the subject matter of the authentication despite an order of the court to do so;

(3) Testifies to a lack of memory of the subject matter of the authentication;

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of the authentication has been unable to procure the attendance of the authenticating witness by process or other reasonable means.

O.C.G.A. § 24-4-48(a) (Supp. 1996); FED. R. EVID. 804(a). Notice that the Federal Rule addresses admissibility, whereas the Act addresses authentication. Williams Interview, *supra* note 2.

26. Williams Interview, *supra* note 2; Blaney Interview, *supra* note 5.

27. Williams Interview, *supra* note 2. Compare HB 1235, as introduced, 1996 Ga. Gen. Assem. with HB 1235 (HCS), 1996 Ga. Gen. Assem.

28. HB 1235, as introduced, 1996 Ga. Gen. Assem.

29. *Polito v. Holland*, 258 Ga. 54, 55, 365 S.E.2d 273 (1988) (citing *Pritchard v. The Savannah Street & R. Co.*, 13 S.E. 493 (1891)); Williams Interview, *supra* note 2; see also *Logan v. State*, 212 Ga. App. 734, 736, 442 S.E.2d 883, 886 (1994) (affirming application of Rape Shield statute to act committed prior to the statute's enactment).

30. HB 1235, as introduced, 1996 Ga. Gen. Assem.

31. Williams Interview, *supra* note 2.

made law enforcement videotapes subject to mandatory discovery, was redundant because a 1995 Act created a similar demand.<sup>32</sup> The House Judiciary Committee incorporated these changes into a committee substitute.<sup>33</sup>

On the House floor, Representative Robert Reichert offered an amendment which would have required videotapes to be made from "fixed" cameras, such as security cameras and those inside Automatic Teller Machines (ATMs).<sup>34</sup> However, House Speaker Tom Murphy was concerned that the requirement that the cameras be "fixed" was overly broad.<sup>35</sup> Representatives Roy Barnes amended the Reichert amendment to require showing that the recorded evidence includes the date and time and that such evidence is "shown to have been made contemporaneously with the events depicted."<sup>36</sup> In the Senate, the Judiciary Committee heard the bill, but no changes were made either in committee or on the floor.<sup>37</sup> The bill passed both houses unanimously.<sup>38</sup>

There is some controversy as to whether the Act's language is designed to make illicit videotapes recorded by pedophiles and other sexual offenders, either for their own pleasure or for sale, admissible.<sup>39</sup> The authors of the House floor amendment tried to narrow the bill,<sup>40</sup> believing that the prohibition on equipment operated by individuals would exclude such evidence.<sup>41</sup> The language in subsection (c), however, applies only to cameras in fixed locations, on automatic timers, or with date or time stamping. Subsection (b) requires the court to admit recorded evidence if the witness is unavailable and competent evidence is presented that reliably shows the depicted fact or facts.<sup>42</sup> Thus, subsection (c) is intended to prevent fraud in the use of date-

32. 1995 Ga. Laws 1250, § 2 at 1255 (codified at O.C.G.A. § 17-16-4 (Supp. 1995)); Williams Interview, *supra* note 2.

33. HB 1235 (HCS), 1996 Ga. Gen. Assem.

34. Williams Interview, *supra* note 2.

35. Telephone Interview with Rep. Tommy Chambless, House District No. 163 (June 24, 1996) [hereinafter Chambless Interview]; Telephone Interview with Rep. Robert Reichert, House District No. 126 (June 24, 1996) [hereinafter Reichert Interview].

36. Reichert Interview, *supra* note 35; HB 1235 (HCSFA), 1996 Ga. Gen. Assem.; see Journal of the House, 1996 Ga. Gen. Assem. (Feb. 14, 1996), at 945-46.

37. Final Composite Status Sheet, Mar. 18, 1996.

38. Williams Interview, *supra* note 2.

39. Telephone Interview with Rebecca Keel, Fulton County Assistant District Attorney (June 6, 1996) [hereinafter Keel Interview].

40. Chambless Interview, *supra* note 35.

41. *Id.*; Keel Interview, *supra* note 39.

42. O.C.G.A. § 24-4-48(b) (Supp. 1996); Williams Interview, *supra* note 2; Keel Interview, *supra* note 39. Representative Reichert agreed that the Act may be applicable to sex offenders. Reichert Interview, *supra* note 35.

stamped or time-stamped evidence and can be used to limit admissibility of such evidence.<sup>43</sup>

The constitutional issue of confrontation was considered in the drafting of this legislation.<sup>44</sup> The United States Supreme Court held that if a hearsay statement bears "adequate 'indicia of reliability,'" even if the declarant is "unavailable" at trial, no confrontation clause violation arises.<sup>45</sup> Georgia courts considered this issue and adopted the approach that a criminal defendant's right to confront accusers is not infringed by the admission of evidence.<sup>46</sup> Instead, a defendant may only attack the weight the jury gives to such evidence.<sup>47</sup>

*Melissa Kiely Williams*

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43. Telephone Interview with Rep. Jeffrey Williams, House District No. 83 (Nov. 1, 1996).

44. U.S. CONST. amend. VI; GA CONST. of 1983, art. I, § 1, ¶ 14; Williams Interview, *supra* note 2.

45. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. . . . [Otherwise there must be] a showing of particularized guarantees of trustworthiness.

*Id.*; see Paul Swedlund & Mary Jane Wilson-Bilik, *Sixth Amendment Issues at Trial*, 77 GEO. L.J. 1053, 1071 (1989). However, confessions of criminal defendants raise the level of scrutiny applied to testimony of an unavailable declarant. Swedlund & Wilson-Bilik, *supra*, at 1073-76.

46. See *Barksdale v. State*, 265 Ga. 9, 453 S.E.2d 2 (1995); *Rosser v. State*, 211 Ga. App. 402, 439 S.E.2d 72 (1993); *Williams v. State*, 202 Ga. App. 82, 413 S.E.2d 256 (1991).

47. Williams Interview, *supra* note 2.