**WHY IS MERGER SO ?!#\* HARD?**

**Version 2.0**

**A discussion of the concept of merger in criminal cases**

**under Georgia law**

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 I last had the privilege of presenting on the topic of merger in August 2019. At that time, I entitled my paper, *Why is Merger So ?!#\* Hard?* After that presentation, I have continued to read appellate cases dealing with merger with great interest. I hoped that there would be a sharp decline in the number of appellate cases where merger errors were noted by our appellate courts. Some might call my focus aspirational, others egotistical. Well, it does not really matter which camp you are in because, so far, little change. But I keep telling myself that these more recent appellate cases were already tried before my last merger presentation. A guy can dream, right?

 When I presented in 2019, I revealed “Wade’s 5 Rules of Merger.” The audience seemed to grasp those rules pretty well. Unfortunately, “Wade’s Rules” have now expanded to 6 rules because I had to figure out how to address “unit of prosecution” into the larger merger analysis. I continue to believe that the rules are helpful in understanding the complicated law of merger and I will use the rules in this paper. I will now simply refer to “Wade’s Rules of Merger” and eliminate the number part. I hope that works for all of you.

**FLASHBACK – LAW SCHOOL**

 Some of you probably shudder when I mention law school. Putting aside the cocktail party conversations surrounding law school, quirky professors and the rule against perpetuities, there was one aspect of law school that caused me consternation during those years which I have only recently come to fully understand. Magically, I realized that an understanding this concept will help in comprehending the body of law that we refer to as merger. I am going to share that recent revelation and hope that I am not the last guy to the party on this topic.

 When discussing constitutional law during law school, professors would throw out the terms, “substantive” versus “procedural” when discussing constitutional rights. At the time, I really struggled to understand how a constitutional provision that was borne from a set number of words and phrases could be “substantive” or “procedural.” A person has due process rights, how could those rights be labeled “substantive” or “procedural?” Normally, when professors started talking about substantive rights and comparing those to procedural rights, I had a tendency to check out of the conversation because I was simply lost on how a single provision of the constitution could be “substantive” or “procedural.”

 We all learned that a person cannot be tried twice for the same crime. We call that double jeopardy and it can be found in the 5th Amendment to the U.S. Constitution.[[1]](#endnote-1) If a person was found not guilty of a crime, that person could not be retried. A hard and fast rule which all remember and can apply. Procedurally, a defendant may not be tried more than once for the same crime – there is a ***procedural*** bar to the subsequent prosecution. Please note the different versions of the word “procedurally” in the foregoing sentence.

If you look at the topic of merger, the cases repeatedly refer to a defendant’s “substantive double jeopardy rights” when addressing merger issues. Hornbooks refer to “substantive double jeopardy” as the concept we have shortened to the moniker of “merger.” In other words, the double jeopardy rule we all learned about in civics and that was elaborated upon a bit during law school is really the ***procedural*** bar against multiple prosecutions for the same conduct. Merger is the ***substantive*** version of the same double jeopardy concept. If a person is tried and acquitted, there is a procedural bar against that person being tried a second time for the same conduct. By comparison, there is a substantive bar against a person being convicted of two (or more) different crimes stemming from the same conduct.

The doctrine of double jeopardy has two components: the ‘procedural’ bar on double jeopardy, which places limitations on ‘multiple prosecutions for crimes arising from the same conduct,’ and the ‘substantive’ bar, which protects against ‘multiple convictions or punishments’ for such crimes.[[2]](#endnote-2)

For the scholars of the group, this ends my deep dive into the origins of merger law. I will now leave the musty halls of law schools around the country and move to real life, every day application of law in our respective courtrooms. We will leave theory behind and focus on application of this law that we all have come to know as merger.

**WHY IS MERGER SO ?!#\* HARD?**

 Why is the concept of merger so difficult for Superior Court judges to master? There is a short answer to that question and a longer, more instructive answer that requires analysis of the facts of each individual case.

Merger is a difficult concept because there are few hard and fast rules. Offenses can merge as a matter of law or as a matter of fact. In one case, two counts of aggravated assault would merge into one. In another case which seems factually similar to the first case, those two counts of aggravated assault would not merge because of slight differences in the facts of the case. As judges, we look for rules and are generally skilled at applying rules that provide clear guidance. Merger does have some of those clear and absolute rules that will be addressed within this paper. However, in many cases, the rules of merger are governed by the facts of the case and those variables prove difficult for judges to master. Therefore, creating a chart that includes words such as “always” or “never” in the context of merger is simply not possible because the facts of the case frequently dictate whether the charges will merge.

Merger is also difficult because most lawyers do not understand the concept of merger. Georgia law has matured in a manner that generally requires a contemporaneous objection to offending evidence which allows the judge to be aware of the issue and rule. There are exceptions when the error, even though not brought to the judge’s attention during trial, was so egregious that the appellate courts can address the issue through a doctrine referred to as “plain error.” Merger is much more akin to plain error. A case can be remanded following an appeal even when the issue or merger was not raised by the parties during sentencing.

The appellate courts of Georgia have the discretion to correct an illegal sentence during direct appeal, even if that issue was not raised before the trial court.[[3]](#endnote-3) However, “when a merger error benefits a defendant and the State fails to raise it by cross-appeal, we henceforth will exercise our discretion to correct the error upon our own initiative only in exceptional circumstances.”[[4]](#endnote-4) Because of this unique rule, appellate courts have the ability to remand a case to the trial court for resentencing following an appeal even when the trial judge is not afforded the benefit of having the issue of merger being brought to the judge’s attention at sentencing. Merger issues can be raised in habeas corpus petitions, cases that are not typically heard by the sentencing judge.[[5]](#endnote-5) Ruling on issues that are not raised before the court is a difficult task. Recent appellate decisions suggest that the issue is also not regularly being recognized by appellate counsel during the motion for new trial briefing process. Therefore, the trial judge is frequently the only person in the courtroom who might identify a potential merger issue before the case is appealed.

The longer answer to the question of why merger is so difficult to master requires a deeper dive into the cases, the “required evidence test,” and some of the factual scenarios where the doctrine of merger has been found to apply. I am one of those people who needs to understand ***why*** a rule exists before I can learn ***how*** to apply the rule. Even if you do not share my learning style, please consider the remainder of this paper as part of the longer answer to the question of why merger is a difficult concept to master.

**THE BASICS OF MERGER**

 Georgia law is clear that criminal defendants may be ***prosecuted*** for all offenses for which that defendant is charged.[[6]](#endnote-6) However, a ***conviction*** can only be entered once if one crime is included in the other.[[7]](#endnote-7) Merger is a post-trial protection, not a pre-trial protection.[[8]](#endnote-8) Therefore, while a pretrial plea of former jeopardy would be the appropriate vehicle to raise a procedural double jeopardy complaint, such a motion cannot be used to raise a substantive double jeopardy concern.[[9]](#endnote-9) Just because a prosecutor can prove that a defendant entered a building illegally with intent to commit both a theft and an aggravated assault, if there is only one entry into a single building, the defendant can only be convicted of one burglary.[[10]](#endnote-10) “Where a single victim is robbed of multiple items in a single transaction, there is only one robbery.”[[11]](#endnote-11) The prosecutor may choose to charge the theft of each item of the victim’s property as separate robbery counts in the indictment, but once there is a determination of guilt, either by a jury or via a guilty plea, only one count of robbery can be sentenced.

 The concept of merger arises from the larger concept of constitutional and statutory substantive double jeopardy. The law “prohibits multiple criminal convictions and punishments arising from the same conduct if one crime is included within the other.”[[12]](#endnote-12) While the legislature has the authority to declare that certain offenses do not merge within the statutory scheme they create, the court does not have that same authority.[[13]](#endnote-13) In the absence of a specific legislative determination that a particular offense does not merge with other offenses as a matter of law, the courts are required to ensure that a defendant does not face conviction and punishment for two different offenses stemming from a single act or transaction committed by the defendant.

 The focus is on the actions (“course of conduct”) of the defendant. If the legislature passes a statute that criminalizes conduct in several different ways (i.e. several different statutes make the defendant’s conduct a criminal act), the defendant cannot be convicted of multiple offenses stemming from the same course of conduct.

The criminal justice system punishes a defendant for his/her conduct. If there is a single course of conduct involving a single victim, there can only be one criminal conviction. This statement is overbroad but it forms the basis for the merger rule. As will be discussed in great detail in a later section of this paper, the first question the court should resolve in performing a merger analysis is whether the defendant’s conduct was truly part of a single transaction. The reason for the rule is to ensure that defendants are held to be responsible for their conduct but are not punished for every different way his/her act has been declared to be criminal.

When performing a merger analysis, the facts of the case impact the merger determination a great deal as will be evidenced throughout this paper. However, how the prosecution elected to charge the offenses will also play a significant role in the merger analysis. Where the indictment alleged the offense of felony murder and noted that the charge, “was predicated on ‘the commission of at least one of the following felony offenses, to wit: burglary, armed robbery, false imprisonment, aggravated assault, and home invasion,’” the predicate felony offenses listed in that count of the indictment would merge with the felony murder count because the jury was not asked to determine which of the laundry list of underlying felonies were the predicate felony they found to have existed.[[14]](#endnote-14)

**RULE 1-MERGER ONLY APPLIES TO CONVICTIONS**

There is a significant difference between a verdict returned by a jury and a “conviction.” Prosecutors can proceed to trial with any and all offenses that a grand jury chooses to bring.[[15]](#endnote-15) A jury can consider all of those charges and can even return a guilty verdict on all of those charges. Merger does not apply unless and until there is a guilty verdict or a guilty plea and the case is proceeding to sentencing. Merger does not impact which charges a prosecutor can bring, only those charges upon which the judge is expected to impose a sentence. “While an accused may be *prosecuted* for more than one crime arising out of the same criminal conduct, he may not be *convicted* of more than one crime arising out of the same criminal conduct where one crime is included in the other.”[[16]](#endnote-16) (emphasis in original)

***IMPORTANT POINT:* The doctrine of merger applies to a guilty plea just as it applies to a guilty verdict. Merger cannot be waived as part of a guilty/*nolo contendre*/*Alford* plea or plea agreement.**[[17]](#endnote-17)

Because merger cannot be waived as part of a plea agreement, the level of detail presented as part of the factual basis for the plea can significantly impact a defendant’s ability to argue the facts of the case in any appellate setting following sentencing on the plea.[[18]](#endnote-18) “While a defendant does not waive consideration of merger issues by pleading guilty, his guilty plea does waive the expansion of the factual record that occurs with a trial.”[[19]](#endnote-19) A guilty plea (or *nolo contendre* or *Alford* plea) are all “convictions” as that term is used in the context of merger.[[20]](#endnote-20)

A defendant is not convicted of a crime until a written sentence on each count of the indictment is executed by the trial judge and filed with the Clerk of Court.[[21]](#endnote-21) The question of merger should arise after the verdict has been returned and published or after a guilty plea has been entered but before sentence is imposed. Merger does not impact the trial of the case or limit a prosecutor’s ability to seek a verdict on multiple charges.[[22]](#endnote-22)

Rule One emphasizes that merger applies to “convictions” and not to “prosecutions.” However, consider the situation where a plea offer is put on the record before trial. If charges would merge at sentencing, does the defendant have a claim that his plea was not knowingly and voluntarily made if the concept of merger was not discussed and applied to the charges to which the defendant is entering a plea? In *Andrews v. State*,[[23]](#endnote-23) the defendant entered a non-negotiated plea to charges that were found to have merged while the case was on appeal. The Georgia Court of Appeals rejected the defendant’s claims that his plea was not knowingly and intelligently made but also found that several of the charges merged. While the question was not squarely answered in *Andrews*, the logical conclusion is that mistaken advice concerning merger would not render a plea involuntary unless the defendant was advised that certain charges would merge and the trial court rejected that merger during sentencing.

**RULE 2-THERE ARE SOME HARD AND FAST RULES**

 As indicated above, merger is largely fact dependent and there are few hard and fast rules in the merger arena. However, there are some clear rules that apply in every case.

1. **If there is only one victim of a homicide, there can only be a conviction for one form of homicide.**

If an indictment charges a defendant with both malice murder and felony murder of a single victim, upon a guilty plea/verdict, the defendant shall be sentenced under the malice murder count. The felony murder count is “vacated by operation of law.”[[24]](#endnote-24) The felony murder and malice murder counts do not technically merge, they are vacated by operation of law.[[25]](#endnote-25) The important point is that if there is one victim of a homicide, there can only be one conviction for a form of homicide. To be clear, this rule would apply where there is a guilty plea/verdict to any form of homicide (i.e. voluntary manslaughter, involuntary manslaughter, malice murder and felony murder). If there is only one person who is deceased, only one form of homicide can be sentenced.

It may seem to be a matter of semantics to say that the felony murder would be vacated by operation of law instead of finding that it merged with the malice murder count.[[26]](#endnote-26) However, the difference is important when considering the predicate felonies charged within the felony murder count. “Once a felony murder count has been vacated, the underlying felony cannot merge into the felony murder count.”[[27]](#endnote-27) Therefore, when the defendant is convicted of malice murder and the felony murder was vacated by operation of law, the predicate felony of armed robbery would not merge with the malice murder count.[[28]](#endnote-28) Finding that the felony murder is vacated by operation of law is much more than mere semantics.

1. **A defendant cannot be convicted of both felony murder and the predicate felony.**

If an indictment charges a defendant with felony murder and the underlying felony is an aggravated assault, the aggravated assault merges into the felony murder.[[29]](#endnote-29) For the homicide to meet the statutory definition of felony murder, the charge requires proof of a predicate felony charged in the indictment. This point needs to be emphasized: proof of felony murder requires proof of the predicate felony alleged in the indictment. Therefore, a defendant cannot be convicted twice for the same conduct and the predicate felony has already been “accounted for” in the felony murder count. “When the only murder conviction is for felony murder and a defendant is convicted of both felony murder and the predicate felony of the felony murder charge, the conviction for the predicate felony merges into the felony murder conviction."[[30]](#endnote-30)

1. **A defendant charged with homicide by vehicle in the 1st degree cannot be convicted of both the homicide and the predicate traffic offense.**

It would probably be easier to note that if a crime has a predicate offense (i.e. felony murder, vehicular homicide, etc.), the defendant cannot be convicted of both the larger crime and the predicate offense. If the prosecution is required to prove violation of a separate offense to obtain a conviction for the larger offense, the predicate offense merges into the larger offense. Specifically, the offenses of DUI, Reckless Driving, Passing a School Bus, etc. that are charged as the predicate offense(s) for a charge of Vehicular Homicide in the 1st Degree merge into the Vehicular Homicide count.[[31]](#endnote-31)

1. **DUI (less safe) merges into DUI (excessive blood alcohol).**

The defendant drove while under the influence of an intoxicant on a single occasion. Therefore, the defendant can only be convicted of one form of DUI. Occasionally, there is a debate on which way the two offenses merge. Does the “less safe” count merge into the “excessive blood alcohol” count or vice versa? That question was answered definitively in *Partridge v. State*,[[32]](#endnote-32) where the Court of Appeals held that the less safe count merges into the excessive blood alcohol count. “Because [the defendant’s] ‘conviction based on conduct violating OCGA § 40-6-391(a) [(5)], as driving with a prohibited blood-alcohol level poses the more serious risk of injury to property or the public,’ we affirm that conviction and reverse [the defendant’s] conviction under OCGA § 40-6-391(a)(1).”[[33]](#endnote-33)

By statute, a charge of DUI-Child Endangerment does not merge with any other form of DUI charge, even when the occur on the same date or within the same transaction of occurrence.[[34]](#endnote-34)

1. **When an aggravated assault results in the death of the victim in a single transaction, the aggravated assault merges into the murder count.**

I am not a sufficient wordsmith to fully explain this rule within the rule itself. The act which caused the victim’s death (i.e. aggravated assault, aggravated battery, etc.) must merge into the murder count of the indictment, whether that homicide charge be malice murder, felony murder, voluntary manslaughter or involuntary manslaughter. If the defendant is charged with malice murder and the indictment also included a separate charge of aggravated assault, the aggravated assault count merges into the murder count. The rule is obviously true if the form of homicide that is charged is felony murder.[[35]](#endnote-35)

1. **The merger doctrine does not apply when there are separate victims.**

I consider this to be a hard and fast rule, provided you understand the concept of who the victim actually is in a particular case. “[T]he merger doctrine does not apply if each of the charged crimes was committed against a different victim.”[[36]](#endnote-36) Therefore, there are no merger issues if there is a guilty plea/verdict of aggravated battery to husband and aggravated assault as to wife. When the victims are named in the indictment, this rule is easy to apply. However, be aware that there may be a slight exception to this hard and fast rule where, for example, there is an armed robbery of a commercial establishment and the robber takes property from both the commercial business and the personal property of an employee in a single act. [[37]](#endnote-37)

1. **Certain offenses do not merge based upon the language of the applicable statute.**

“The Double Jeopardy Clause imposes few limits upon the legislature's power to define offenses. Whether a particular course of conduct involves one or more distinct ‘offenses’ under the statute depends on this legislative choice.”[[38]](#endnote-38)

* 1. DUI-Child Endangerment does not merge with any other offense charged as part of that transaction.[[39]](#endnote-39)
	2. Violations of the Street Gang Act do not merge with one another.[[40]](#endnote-40) However, if they represent the predicate felony for a felony murder charge, it is possible for them to merge with the felony murder charge.[[41]](#endnote-41)
	3. Possession of a Firearm During the Commission of a felony does not merge with the predicate felony.[[42]](#endnote-42)
1. **The doctrine of merger does not apply to juvenile adjudications of delinquency.**[[43]](#endnote-43)

I am hopeful that this audience is not frequently called upon to decide juvenile adjudications of delinquency but, if that were to occur, know that merger is not an issue to be determined.

**RULE 3-START MERGER ANALYSIS BY LOOKING AT THE QUESTION OF WHETHER THERE WAS A “DELIBERATE INTERVAL” BETWEEN THE DEFENDANT’S ACTIONS**

 If you wonder whether the topic of merger causes difficulties for Superior Court judges in Georgia, a quick search of Westlaw or Lexis reveals that in the last 12 months, there have been 40 appellate opinions where the question of merger was discussed within an appellate decision. The good news is that the same quick check in 2019 showed that there were 55 Georgia appellate cases where merger was an issue on appeal during a similar 12 month period. The appellate courts of Georgia have historically (and repeatedly) attempted to define the doctrine of merger in an earnest attempt to give trial judges some guidance on the issue. The ***required evidence test*** has been in existence since 2006.[[44]](#endnote-44) The required evidence test was developed by our appellate judges in an attempt to give trial judges some guidance to utilize in deciding whether charges merge. But application of the required evidence test has obviously proven difficult to implement and apply for our trial judges. I want to humbly suggest that you look at merger in a different way.

 The very definition of merger begins with the following phrase: **“When the same conduct of an accused….”**[[45]](#endnote-45)Therefore we should begin our analysis of a merger question with a “time” question and focus on whether we are addressing a single act/transaction or whether there was more than one “act.”

**Were the acts we are examining committed in a single act or transaction OR do the facts suggest that more than one act or transaction was involved?**

If there are two different acts committed by the defendant, the offenses do not merge. The reason the two offenses do not merge is because one crime was completed before the other began.[[46]](#endnote-46) Stated another way, the definition of merger found in O.C.G.A. § 16-1-7 has not been met because the defendant committed more than one act. However, if there was a single act or transaction, you are required to apply the required evidence test which will be addressed in Rule 4 below. When examining the facts of the case, the judge’s analysis should be as to the required elements of the two crimes charged, not limited to the particular facts describing how those crimes were committed.[[47]](#endnote-47) “[T]he ‘required evidence’ test addresses the culpability of ‘a single act’ and does not apply unless the same conduct of the accused establishes the commission of multiple crimes.”[[48]](#endnote-48)

 The obvious question that is raised by this “time analysis” that I am proposing is how the judge is to decide whether there was one transaction or two transactions. If a defendant pulls a trigger of a firearm then releases the trigger and pulls it again, is that one transaction or two? When answering the question as to whether there was one transaction or two, the judge can make that determination by answering another question:

**Was there a “deliberate interval” between one act and another?**

If there is continuous action and you cannot identify a true break in the action, there is no deliberate interval, the judge would be required to note this case involved a single act and apply the required evidence test. It would obviously be helpful to all involved if lawyers had a better understanding of merger and asked questions of witnesses during the trial or plea hearing that would assist the judge in making a factual determination as to whether there was a deliberate interval between the defendant’s actions. However, the lawyers are usually focused on other issues and expecting them to fully develop facts surrounding whether there was a deliberate interval may be unrealistic.

“’That the interval is merely minutes or even seconds … cannot be a determinative factor’ … [h]owever, the greater the interval of time between acts, the greater the likelihood the acts were separate offenses.”[[49]](#endnote-49) It is virtually impossible to examine cases where the question of a “deliberate interval” has been raised and decided without considering some factual scenarios.

Where a defendant points a weapon at a victim and says “give me your wallet,” takes the wallet and flees, there is no deliberate interval between any of those actions.[[50]](#endnote-50) Therefore, if a prosecutor charged more than one crime (i.e. aggravated assault and armed robbery), the judge would be required to apply the required evidence test and those crimes would merge. All of the facts required to prove the aggravated assault count are necessary to prove the armed robbery count.[[51]](#endnote-51)

The defendant attempted to strangle the victim while both were in the same bed and, after the victim was able to free herself, both parties got out of the bed on separate sides. Once out of the bed, there was a struggle between the parties, resulting in the victim having separate injuries to her legs and feet. The appellate court found that one crime (aggravated assault-strangulation) was completed before the other crime (family violence battery) began, therefore resulting in a finding that there was a deliberate interval that could be identified (getting out of the bed) which separated one act from the other.[[52]](#endnote-52)

If a defendant initially points a firearm at the victim and then places the gun in the victim’s mouth in an attempt to get the victim to comply, there can only be one aggravated assault conviction. This factual scenario consists of a single act because it makes no legal difference where the defendant points the weapon.[[53]](#endnote-53) Similarly, where a defendant throws acid on the victim, disfiguring her face and rendering one eye useless and is charged with two counts of aggravated battery, it makes no legal difference under the aggravated battery statute as to how many body parts of the victim were rendered useless or disfigured, only one conviction for aggravated battery can be obtained.[[54]](#endnote-54)

 As I have noted several times throughout this paper, slight changes in facts makes a monumental difference in cases involving questions of merger. Assume the same scenario as above, (theft of wallet by use of a gun). However, add to that scenario that the defendant shoots at the victim. Under this scenario, the offenses of aggravated assault and armed robbery would merge. Admittedly, firing the weapon is an “extra action” but there was a continuous transaction, thereby resulting in a finding that this was a single act by the defendant. In applying the required evidence test addressed in Rule 4 below, the aggravated assault and armed robbery would merge.

Assume a slightly different scenario. The defendant approaches the victim, produces a firearm and shoots. However, the defendant missed his intended target, and then shoots a second time, striking the victim? Would the aggravated assault(s) all merge? That question can be answered by asking a second question – was there a deliberate interval between the two shots? Unless you can identify specific facts that suggest there was a deliberate interval between the two shots, the pointing of a weapon and both shots would merge into a single aggravated assault at the time of sentencing.[[55]](#endnote-55) Logic suggests that it required two separate pulls of the trigger for each separate shot to be fired but that is not a deliberate interval between the defendant’s acts that would justify a finding that the defendant committed more than one act.

 “When multiple injuries are inflicted on a single victim in quick succession and the defendant is convicted of both aggravated assault and murder, deciding whether there was aggravated assault independent of the fatal assault requires the court to consider ‘both the order and timing of the assaults.’”[[56]](#endnote-56)

‘[W]here a victim suffers a series of injuries inflicted by a single assailant in rapid succession, each injury does not constitute a separate assault.’ [cits] Separate convictions for the malice murder and aggravated assault of a single victim are authorized, however, where the evidence shows that the defendant committed an aggravated assault independent of the act that caused the victim’s death. [cits] To authorize a separate conviction, there must be a ‘deliberate interval’ separating the infliction of an initial non-fatal injury from the infliction of a subsequent fatal injury. [cit] In the absence of some evidence of a deliberate interval, the aggravated assault conviction must be vacated.[[57]](#endnote-57)

If a medical examiner or other witness cannot say which wound was fatal or in what order the wounds were inflicted in a case involving multiple injuries to the victim, the judge cannot find that there was a deliberate interval between the defendant’s actions. The charges must merge.[[58]](#endnote-58)

 In a domestic violence case where the defendant was charged with both simple battery and battery, if the evidence shows that there was a single “fight” which resulted in multiple injuries to the victim, the offenses of battery and simple battery would merge. The offenses would merge because there was no evidence of any “deliberate interval” between the different strikes or blows that the victim suffered.[[59]](#endnote-59)

 Where the defendant struck the victim and knocked out two of the victim’s teeth and then hit the victim with a wire hanger and doused her with lighter fluid and set her on fire, the aggravated battery did not merge with the aggravated assault because the first crime was completed before the second began.[[60]](#endnote-60) However, if there is no evidence to support a finding that there was a deliberate interval between a shooting and a beating, the offenses merge.[[61]](#endnote-61)

 As is apparent in this section, the facts make a significant difference in determining whether the offenses merge. However, before even reaching the required evidence test, start the analysis with a determination of whether there was a deliberate interval between one act and another. Decide whether the facts of the case support a finding that one crime was completed before the other began. If you can legitimately identify a fact or a series of facts which indicate that one crime was completed before the other began, there is no merger. Remember that the very definition of merger requires a finding that there was a single act or occurrence. If there is a deliberate interval between one act and another, the law allows you to find that there is no single act or occurrence and, therefore, no merger.

**RULE 4-APPLY THE REQUIRED EVIDENCE TEST**

 If there is no applicable “hard and fast rule” and if you are not convinced that there was a “deliberate interval” between the defendant’s actions, you must then apply the “required evidence test.” The required evidence test was first made plain by the Georgia Supreme Court in *Drinkard v. Walker.*[[62]](#endnote-62) Stated plainly, the required evidence test provides:

**If the statute which makes one act illegal requires proof of a fact that the other does not, the offenses do not merge—even if the acts are all committed in a single act or transaction. Stated another way, if the elements of one charge are all required to prove the second charge, the offenses merge.**

The more formal description of the required evidence test which has been adopted by the Georgia Supreme Court provides, ““[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.”[[63]](#endnote-63) “If so, then two offenses exist, and one is not ‘included in’ the other.”[[64]](#endnote-64) Once again, the best way to explain the required evidence test is to consider some examples.

 Consider a case where a defendant commits an armed robbery and, during the robbery, the defendant shoots and kills the victim. Malice murder has an element that must be proven (death of the victim) that armed robbery does not, and armed robbery has an element (taking of property) that malice murder does not.[[65]](#endnote-65) It is important to note that this example addresses the offense of malice murder and not felony murder. As noted above, if the defendant was only found guilty of felony murder and the indictment alleged that the predicate felony was armed robbery, proof of the felony murder would require proof of the armed robbery. In the latter scenario, the offense of armed robbery would merge into the felony murder.

 Assume for this hypothetical that, during a single transaction, a defendant pointed a weapon at the victim and took the victim’s cell phone. The defendant was charged with aggravated assault and armed robbery. All of the elements required to prove the aggravated assault charge are required to prove the armed robbery charge. The offenses would merge.[[66]](#endnote-66)

 Now consider those same facts (defendant used a gun and took the victim’s cell phone) but add an additional fact that the defendant shot the victim and fled the scene. All of the elements of the crime of aggravated assault are still required to prove the armed robbery charge and the offenses would merge. Even though the defendant could have accomplished the robbery without shooting the defendant, the charges still merge. However, if the defendant took the victim’s property, shot the victim and initially fled the scene but came back and shot the victim again once he realized the victim was still alive, there was a deliberate interval between the first shooting and the second shooting. One count of aggravated assault (the first shooting) would merge with the armed robbery count but the second shooting would not merge because of the deliberate interval between the armed robbery and the second shooting.[[67]](#endnote-67)

 When an indictment or accusation reflects charges that are indistinguishable because they charge the same crime on the same date and the charging instrument does not show that the date was a “material” or “essential” element and the charging instrument also describes the defendant’s conduct in an identical manner, only one sentence may be imposed.[[68]](#endnote-68) However, “when an averment in one count of an accusation or indictment ‘distinguishes it from all other counts, either by alleging a different set of facts or a different date which is made an essential averment of the transaction, the State may on conviction punish the defendant for the various crimes.’”[[69]](#endnote-69) “The State must make an election when it charges a defendant with multiple counts of the same crime: if the State makes the dates material averments and introduces sufficient evidence to prove the dates, it may obtain multiple convictions; if the State does not make the dates material averments, then it has a much broader time frame within which to prove the crimes were committed, but it is limited to a single conviction.”[[70]](#endnote-70)

**SPECIFIC EXAMPLES OF CRIMES THAT MERGE AND DO NOT MERGE**

 I began this paper by explaining that it would be impossible to create a chart which reflects that charges “always” or “never” merge. That is true because charges can merge as a matter or law or as a matter of fact. However, there are some examples where charges do not merge as a matter of law that are worthy of your consideration. Please note that these specific examples and citations to authority are based upon a finding that the two offenses occurred during a single act or transaction (i.e. there was no “deliberate interval” between the acts committed by the defendant). This is an important preliminary finding that should be made in the merger analysis before determining whether any charges merge under the required evidence test.

1. **Aggravated assault usually merges into armed robbery, except in unique factual situations.**[[71]](#endnote-71)
	1. “there is no element of aggravated assault with a deadly weapon that is not contained in armed robbery… [provided the] crimes are part of the same act or transaction”[[72]](#endnote-72)
2. **Aggravated assault merges with attempted armed robbery.**[[73]](#endnote-73)
3. **Aggravated assault and attempted kidnapping do not merge.**
	1. “[T]o prove the aggravated assault charge as indicted, the State was required to show that [defendant] used a deadly weapon to place the victim in reasonable apprehension of receiving a violent injury. [cits] To prove the attempted kidnapping charge, the State was required to show that [defendant] took a substantial step toward abducting the victim without lawful authority and holding her against her will. [cits] ‘Because each of these crimes was established by proof of an additional fact not at issue in the other crime, they do not merge.’”[[74]](#endnote-74)
4. **Aggravated assault merges with aggravated battery when the charges are based on the same conduct toward the victim.**[[75]](#endnote-75)(The aggravated assault merges into the aggravated battery count).
	1. The same is true where the defendant is charged with aggravated assault of a corrections officer and aggravated battery of a corrections officer, the offenses merge**.**[[76]](#endnote-76)
5. **Aggravated assault and false imprisonment do not merge.**[[77]](#endnote-77)
6. **Aggravated assault and terroristic threats do not merge.**[[78]](#endnote-78)
7. **Aggravated battery merges into attempted murder.**[[79]](#endnote-79)
8. **Kidnapping with bodily injury merges with aggravated battery.**[[80]](#endnote-80)
9. **Armed robbery and malice murder do not merge.**[[81]](#endnote-81)
10. **Malice murder and cruelty to children in the first degree do not merge, even where there was only one transaction.**[[82]](#endnote-82)
11. **Murder (malice) and burglary do not merge.**[[83]](#endnote-83)
12. **Murder (malice) and armed robbery do not merge.**[[84]](#endnote-84)
13. **Murder (malice) merges with both aggravated assault and aggravated battery.**[[85]](#endnote-85)
	1. Please note that where there is evidence of an attack that would amount to aggravated battery occurs in the house and the fatal blow with the same weapon occurred in the yard outside of the house, the offenses of murder and aggravated battery *DO NOT* merge.[[86]](#endnote-86)
14. **Armed robbery merges with theft by taking.**[[87]](#endnote-87)
15. **Attempted armed robbery and burglary do not merge.**[[88]](#endnote-88)
16. **Attempted armed robbery and attempted murder do not merge.**[[89]](#endnote-89)
17. **Robbery by force and false imprisonment do not merge.**[[90]](#endnote-90)
18. **Burglary and conspiracy to commit armed robbery do not merge.**[[91]](#endnote-91)
19. **Child molestation and cruelty to children do not merge.**[[92]](#endnote-92)
20. **Rape, incest and child molestation do not merge.**[[93]](#endnote-93)
21. **Incest and statutory rape do not merge.**[[94]](#endnote-94)
22. **Incest and aggravated child molestation do not merge.**[[95]](#endnote-95)
23. **Aggravated sodomy merges with aggravated child molestation.**[[96]](#endnote-96)
24. **Child molestation merges with statutory rape, if there is a single act of sexual intercourse.**[[97]](#endnote-97)
25. **Child Molestation and aggravated sexual battery do not merge.**[[98]](#endnote-98)
26. **Theft by taking merges with theft by conversion.**[[99]](#endnote-99)
27. **Battery and simple battery merge into aggravated assault.**[[100]](#endnote-100)
28. **Felony obstruction of an officer merges with aggravated battery**[[101]](#endnote-101) **and would also merge with aggravated assault.**[[102]](#endnote-102)
	1. Felony obstruction of an officer (based upon attempting to strike officer) and misdemeanor obstruction of an officer (for fleeing on foot from the officer or failing to obey lawful commands) would not merge.[[103]](#endnote-103)
29. **Neglect of a disabled person merges with abuse of a disabled person.**[[104]](#endnote-104)

**RULE 5-MODIFIED MERGER RULE**

 There is another related but different concept that bears discussion whenever the topic of merger is discussed. Where a defendant is found guilty of both felony murder and voluntary manslaughter based upon the same assault, the defendant should be convicted and sentenced only for voluntary manslaughter where the predicate felony for the felony murder count is “integral to the homicide.”[[105]](#endnote-105) This rule has become known as the modified merger rule.

The modified merger rule assumes that the jury found the underlying aggravated assault was the product of provocation and passion and to hold otherwise would virtually eliminate the lesser included offense of voluntary manslaughter. While the modified merger rule as established in *Edge v. State*[[106]](#endnote-106) was based upon the predicate felony for felony murder being aggravated assault, the rule has seen some expansion.[[107]](#endnote-107) Subsequent appellate decisions have extended the modified merger rule to other predicate felony offenses “that [are] equally integral to the homicide and susceptible of mitigation by the sort of provocation and passion that voluntary manslaughter involves.”[[108]](#endnote-108) Therefore, the modified merger rule has been extended to include cases where the predicate felony for felony murder was aggravated battery and arson.[[109]](#endnote-109) At the heart of the modified merger rule is an assumption that the predicate felony was not independent of the homicide and, instead, was integral to the homicide. This distinction between potential predicate felonies upon which the charge of felony murder was based is incredibly important in understanding the modified merger rule.

 “But in *Edge* we indicated that vacatur of the felony murder verdict is not required ‘if the underlying felony is independent of the killing itself, such as burglary, robbery, or even an assault that is directed against someone other than the homicide victim.’”[[110]](#endnote-110) So there is an entire line of cases where the modified merger rule has not been extended to cases where the predicate felony for felony murder was criminal street gang activity, burglary and armed robbery.[[111]](#endnote-111) The Supreme Court has repeatedly made it clear that where the predicate felony for felony murder was possession of a firearm by a convicted felon, the modified merger rule does not apply.[[112]](#endnote-112) To be clear, in those cases where the predicate felony was not integral to the homicide (i.e. susceptible to mitigation based upon passion), the modified merger rule would not apply and the defendant would be convicted and sentenced for felony murder instead of voluntary manslaughter.

 There is an important act that the trial court can take to help eliminate the possibility of a modified merger problem. Voluntary manslaughter is not usually charged in the indictment and, instead, is requested as a lesser included jury charge. Where the predicate felony upon which the felony murder count is based is one of those offenses that has been deemed to be integral to the homicide (i.e. aggravated assault, aggravated battery, etc.), pay special attention to the verdict form that the jury takes to their deliberations. The form should indicate with specificity that the jury should make a finding on that count of the indictment which charges the defendant with felony murder and make one of the following choices: guilty of felony murder, guilty of voluntary manslaughter or not guilty on that count. Make it clear to the jury that they can only find one of those potential outcomes as to that charge of the indictment. This formatting of the verdict form will ensure that the jury fully considers voluntary manslaughter as a lesser included offense and also prevents the potentiality of a modified merger problem.

**RULE 6 – UNIT OF PROSECUTION**

 As noted in the introduction of this paper, I have changed “Wade’s 5 Rules of Merger” I first presented in 2019 and added a 6th rule. The need for this sixth rule necessitated the creation of Version 2.0 of this presentation. I did not want to add a rule, but I had to do it in light of a line of cases that have underscored the “unit of prosecution” rule as a subset of merger.[[113]](#endnote-113) Before I could efficiently explain “unit of prosecution,” I needed to explain traditional merger so that the differences in the two concepts can be easily identified and grasped.

 Throughout the discussion of merger, the focus has been on whether a defendant can be convicted of different crimes for the same course of conduct. A traditional merger analysis asks whether multiple ***different***crimes have been committed. Unit of prosecution is focused upon multiple charges for the ***same*** crime. Unit of prosecution asks whether the defendant violated the same statute more than once.[[114]](#endnote-114)

[M]erger questions may also arise when a defendant is charged with multiple counts of the *same* crime – which is the situation in this case, where [defendant] was charged with and found guilty of four counts of child molestation. In this context, the merger analysis requires careful interpretation of the criminal statute at issue to identify the ‘unit of prosecution – the precise act or conduct’ that the legislature criminalized.[[115]](#endnote-115)

While the appellate decisions suggest that unit of prosecution is included within the merger analysis, I contend that unit of prosecution is really a subset of merger. It is closely related and even shares some common themes but it truly can be viewed as a separate issue from traditional merger. You may see that differentiation as a splitting of hairs but the cases involving unit of prosecution engage in a different analysis than do traditional merger cases, in my humble opinion.

The trial judge is to make a determination of what act the legislature intended to criminalize under a unit of prosecution analysis. Where an armed robbery is committed and multiple items of property are stolen from the victim, the act that the legislature intended to criminalize was taking of property with the use of a deadly weapon. The fact that multiple items were stolen during the transaction is only evidence of the underlying crime of armed robbery and do not create separate crimes. There can only be one armed robbery sentence imposed in that situation.[[116]](#endnote-116)

Just as the facts matter a great deal when addressing issues of merger, the facts of the case can dictate a result in a unit of prosecution analysis. Where the defendant is charged with two counts of child molestation, one based upon the defendant touching the child’s breasts and a second count alleging the defendant touched the child’s vagina, if the facts show that these incidents occurred more than 20 times over a lengthy period of time, a rational trier of fact could find that there were two separate incidents and the unit of prosecution analysis would not require merger.[[117]](#endnote-117) By comparison, when the indictment charges two counts of child molestation, both alleging that the defendant touched the child’s vagina in different ways, those two counts must merge under a unit of prosecution analysis.[[118]](#endnote-118)

The unit of prosecution analysis frequently arises in connection with child pornography charges and cases which charge multiple counts of illegal firearm possession by a convicted felon or during the commission of a crime. In the context of possession of child pornography (the official charge is sexual exploitation of a minor), the Georgia Supreme Court has held that the legislature made the possession of “any” child pornography illegal and, therefore, it is immaterial whether the defendant possessed one image or 100 images that qualify as child pornography, only one conviction may be had for that offense.[[119]](#endnote-119) “Under O.C.G.A. § 16-12-100(b)(8), ‘it is unlawful for any person knowingly to possess or control *any* *material* which depicts a minor or a portion of a minor’s body engaged in any sexually explicit conduct.’”[[120]](#endnote-120) “[T]he plain language of [the statute]…is unambiguous and permits only one prosecution and conviction for a single act of possession of child pornography, regardless of the number of images depicted therein.”[[121]](#endnote-121) However, the *Edvalson* Court did note in a footnote that, “because this case concerns only the simultaneous possession of multiple ‘visual media,’ we state no opinion regarding cases involving the possession of different visual media in separate places or at separate times.”[[122]](#endnote-122) In reaching a conclusion relating to unit of prosecution, the *Macky* Court held, “the gravamen of the offense is the general possession of material, rather that the specific quantity possessed.”[[123]](#endnote-123) As of this writing, a proposed change to the statute is pending in the Georgia Legislature which could alter this result.

Where a defendant is charged with possession of firearm by convicted felon and had multiple firearms in his possession, the unit of prosecution rule results in only one conviction.[[124]](#endnote-124) Similarly, where a defendant is charged with possession of a firearm during the commission of a crime in multiple counts, either because the defendant had several different guns or committed several offenses with a single gun, there can only be one conviction for that offense.[[125]](#endnote-125) It should be noted that there can be a separate charge for possession of a firearm during commission of a crime for each victim of the predicate felony crimes.[[126]](#endnote-126)

Where the prosecution charges that the same crime was committed on different dates, the dates must be alleged in the indictment as material averments if separate convictions are to be entered.

The State must make an election when it charges a defendant with multiple counts of the same crime: if the State makes the dates material averments and introduces sufficient evidence to prove the dates, it may obtain multiple convictions; if the State does not make the dates material averments, then it has a much broader time frame within which to prove the crimes were committed, but it is limited to a single conviction.[[127]](#endnote-127)

However, some of the basic principles of traditional merger do continue to be relevant in a unit of prosecution analysis. For example, where the defendant is charged with two counts of aggravated assault against a single victim (one for pointing the weapon and one for shooting the weapon), the offenses merge under a unit of prosecution analysis when the pointing and shooting occur in essentially the same location and time.[[128]](#endnote-128) However, if there is a deliberate interval between the pointing of the weapon and then the discharge of the weapon, (i.e. the defendant pointed the weapon at the victim at a party and then, 15-20 minutes later, shot the victim in the parking lot of the apartment complex) the offenses would NOT merge.[[129]](#endnote-129) Therefore, the concepts relating to a “deliberate interval” and whether the crime(s) were part of a single transaction or occurrence continue to apply under the unit of prosecution analysis.

**CASES WHERE A JURY RETURNS A VERDICT OF GUILTY ON MULTIPLE CHARGES OF FELONY MURDER INVOLVING A SINGLE VICTIM**

 In a recent case, an interesting question was raised that touches on the topic of merger but does not fit neatly within any of the discussion of Wade’s Rules of Merger. In fact, this case transcends principles discussed in both Rule 1 and 2. Therefore, this case has earned a separate section of the paper.

In *Lay v. State*,[[130]](#endnote-130) a defendant was charged with two counts of felony murder in connection with the death of a single victim. Remember, under Rule 2 above, if there is only one victim, there can only be one conviction for homicide. That principle is hopefully clear and be applied with regularity.

 The question presented was how a judge decides which felony murder charge is being sentenced and which is vacated by operation of law. You may ask why it matters which felony murder a judge sentences and which is vacated by operation of law. It matters because there is a separate predicate felony within each charge of felony murder. We have established that if a defendant is found guilty of felony murder, the charge actually requires proof of the predicate felony. Therefore, the predicate felony on the charge of felony murder merges with the felony murder count. But if a defendant is charged with two counts of felony murder as to a single victim and one is vacated by operation of law, can the predicate felony identified in the vacated charge be sentenced? And, if so, how does the court decide which count of felony murder is being sentenced and which is vacated?

 The decision in *Lay* answered this question with clarity. “[T]he decision as to which of the felony murder verdicts should be deemed vacated – a decision that may affect which other verdicts merge and thus what other sentences may be imposed – is left to the discretion of the trial court.”[[131]](#endnote-131) The trial court should consider the arguments of counsel on this point and make a determination which count of felony murder should be sentenced and which count would be vacated by operation of law. The court can then also sentence the predicate felony for the felony murder offense that was vacated.

**CONCLUSION**

Merger is so ?!#\* hard because there are few hard and fast rules that govern application of the concept. The facts of the case frequently dictate whether offenses merge. Within this paper, I have suggested six “rules” regarding merger the judge can apply to ensure that the analysis is properly performed in every case.

**RULE 1- MERGER ONLY APPLIES TO CONVICTIONS (this includes guilty pleas)**

 **RULE 2- THERE ARE SOME HARD AND FAST RULES**

**RULE 3- START MERGER ANALYSIS BY LOOKING AT THE QUESTION OF WHETHER THERE WAS A DELIBERATE INTERVAL BETWEEN THE DEFENDANT’S ACTIONS**

**RULE 4- APPLY THE REQUIRED EVIDENCE TEST**

**RULE 5- THE MODIFIED MERGER RULE**

**RULE 6- UNIT OF PROSECUTION**

These “rules” are the product of the author and there are several details that must be considered within each rule. The modified merger rule is unique and only applies to cases where murder is charged but voluntary manslaughter is also charged as a lesser included offense. The unit of prosecution rule applies when the indictment charges several counts of the same offense.

There is no guarantee that following my suggested rules will always lead to perfect results. However, following these rules will help judges perform the merger analysis properly in each case. Remember that there is no time clock running while you are sentencing a defendant. If you find yourself in a situation where merger has come to your attention, take a few moments (or days) to do the research and make the correct call on the issue of merger. Merger is not regularly raised by the lawyers appearing before you so you will likely be the only person in the courtroom looking for an issue of merger to arise.

**END NOTES**

1. Double jeopardy is also addressed in the Georgia Constitution, Art. 1, § 1, ¶ XVIII. The concept of merger can be found in O.C.G.A. § 16-1-7. Therefore, some treatises refer to “merger” as Georgia’s “substantive statutory double jeopardy” law because it appears in Georgia’s statutes. [↑](#endnote-ref-1)
2. *Williams v. State*, 307 Ga. 778 (2020), citing *Stephens v. Hopper*, 241 Ga. 596, 598-599 (1978), and *Keener v. State*, 238 Ga. 7, 8 (1976); *Dukes v. State*, 311 Ga. 561, 570-571 (2021). [↑](#endnote-ref-2)
3. *Lay v. State*, 305 Ga. 715, 722 (2019); *Dixon v. State*, 302 Ga. 691, 696 (2017); *Stribling v. State*, 304 Ga. 250, 254 (2018). See *Hulett v. State*, 296 Ga. 49, 54-55 (2014) (“Where neither party properly raises and argues a merger issue, this Court has no duty “to scour the record searching for merger issues.” *Nazario v. State*, [cit. omitted]. However, if we notice a merger issue in a direct appeal, as we have here, we regularly resolve that issue, ‘even where [it] was not raised in the trial court and is not enumerated as error on appeal.’”); *Spell v. State*, 305 Ga. 822, 824 (2919). [↑](#endnote-ref-3)
4. *West v. State*, 305 Ga. 467, 470 (2019). [↑](#endnote-ref-4)
5. *Jackson v. Crickmar*, 311 Ga. 870, 712 (2021). [↑](#endnote-ref-5)
6. “Procedural protections against double jeopardy apply only to ‘multiple prosecutions,’ meaning multiple or successive indictments or criminal prosecutions. [cits omitted] These procedural protections do not apply to a single indictment that contains multiple counts, even it those counts are deemed multiplicitous.” *Williams v. State*, 307 Ga. 778, 779 (2020). [↑](#endnote-ref-6)
7. O.C.G.A. §16-1-7(a)(1). [↑](#endnote-ref-7)
8. *Williams v. State*, 307 Ga. 778, 780 (2020); *Ohio v. Johnson*, 467 U.S. 493, 500 (1984) (“While the Double Jeopardy Clause may protect a defendant against cumulative punishments for convictions of the same offense, the Clause does not prohibit the State from prosecuting [the defendant] for such multiple offenses in a single prosecution.”). [↑](#endnote-ref-8)
9. *Williams v. State*, 307 Ga. 778, 783 (2020). [↑](#endnote-ref-9)
10. *Ward v. State*, 339 Ga. App. 621, 626 (2016). [↑](#endnote-ref-10)
11. *Jernigan v. State*, 333 Ga. App. 339, 342 (2015). [↑](#endnote-ref-11)
12. *Nolley v. State*, 335 Ga. App. 539, 544-545 (2016). [↑](#endnote-ref-12)
13. *Nolley v. State*, 335 Ga. App. 539, 545 (2016). [↑](#endnote-ref-13)
14. *Fitts v. State*, 312 Ga, 134, 146 (2021). See also *Anderson v. State*, 352 Ga. App. 275, 282-283 (2019), citing *Bonner v. State*, 308 Ga. App. 827, 830 (2011) (defendant charged with simple battery and robbery by force for slapping the victim, causing the victim to drop his car keys, and then taking the keys. This indictment essentially caused merger between two offenses that otherwise would not merge because all of the facts necessary to prove robbery (slapping being the “force”) were “used up”). [↑](#endnote-ref-14)
15. The issue of merger applies to all criminal cases, even those that are charged via an accusation. *Williams v. State*, 307 Ga. 778, 780 (2020); *Ohio v. Johnson*, 467 U.S. 493, 500 (1984) (“While the Double Jeopardy Clause may protect a defendant against cumulative punishments for convictions of the same offense, the Clause does not prohibit the State from prosecuting [the defendant] for such multiple offenses in a single prosecution.”). [↑](#endnote-ref-15)
16. *Regent v. State*, 299 Ga. 172, 175 (2016), citing O.C.G.A. §16-1-7(a)(1). [↑](#endnote-ref-16)
17. *Andrews v. State*, 328 Ga. App. 344, 347-348 (2014); *Nazario v. State*, 293 Ga. 480, 489 (2013). [↑](#endnote-ref-17)
18. *Andrews v. State*, 328 Ga. App. 344, 347-348 (2014) (“this Court is limited to finding error, as in all cases, based on the record.... While a defendant does not waive consideration of merger issues by pleading guilty, his guilty plea does waive the expansion of the factual record that occurs with a trial. The practical effect of that waiver will usually mean that he cannot establish (and the court cannot discern) that any of his convictions merged, particularly as a matter of fact, based on the limited record.”). [↑](#endnote-ref-18)
19. *Reid v. State*, 353 Ga. App. 304, 307-308 (2019), quoting *Nazario v. State*, 293 Ga. 480, 488 (2013). [↑](#endnote-ref-19)
20. *Bell v. State*, 347 Ga. App. 231 (2018). [↑](#endnote-ref-20)
21. *Keller v. State*, 275 Ga. 680 (2002); *Perry v. State*, 329 Ga. App. 121 (2014). [↑](#endnote-ref-21)
22. *Williams v. State*, 307 Ga. 778, 780 (2020); *Ohio v. Johnson*, 467 U.S. 493, 500 (1984) (“While the Double Jeopardy Clause may protect a defendant against cumulative punishments for convictions of the same offense, the Clause does not prohibit the State from prosecuting [the defendant] for such multiple offenses in a single prosecution.”). [↑](#endnote-ref-22)
23. *Andrews v. State*, 328 Ga. App. 344 (2014). [↑](#endnote-ref-23)
24. *Lucky v. State*, 286 Ga. 478 (2010); *Lay v. State*, 305 Ga. 715 (2019); *Gamble v. State*, 291 Ga. 581 (2012); *Hulett v. State*, 296 Ga. 49 (2014); *Barker v. State*, 263 Ga. 746 (1994); *Linson v. State*, 287 Ga. 881 (2010); *Graves v. State*, 298 Ga. 551 (2016). [↑](#endnote-ref-24)
25. *Graves v. State*, 298 Ga. 551, 556 (2016) (“The felony murder counts did not merge with the malice murder count, but instead, they were vacated by operation of law because they involved the same victim as the malice murder count.”); *Marshall v. State*, 309 Ga. 698, 700 (2020). [↑](#endnote-ref-25)
26. *Tyner v. State*, 305 Ga. 326, 332 (2019) (harmless error to merge felony murder and malice murder but it is error). [↑](#endnote-ref-26)
27. *Graves v. State*, 298 Ga. 551, 556 (2016), citing *Malcolm v. State*, 263 Ga. 369 (1993) and *Leeks v. State*, 296 Ga. 515 (2015); *West v. State*, 305 Ga. 467, 470 (2019); *Marshall v. State*, 309 Ga. 698, 700 (2020). [↑](#endnote-ref-27)
28. *West v. State*, 305 Ga. 467, 470 (2019). [↑](#endnote-ref-28)
29. *Donaldson v. State*, 302 Ga. 671, n. 3 (2017), citing *Carter v. State*, 285 Ga. 394, 399 (2009). [↑](#endnote-ref-29)
30. *Stewart v. State*, 311 Ga. 471, 477 (2021), citing *Allen v. State*, 307 Ga. 707, 710-711 (2020); *Rodriguez v. State*, 309 Ga. 542, 548 (2020). [↑](#endnote-ref-30)
31. *Harris v. State*, 272 Ga. App. 366, 373-374 (2005). [↑](#endnote-ref-31)
32. *Partridge v. State*, 266 Ga. App. 305 (2004); *Canelas v. State*, 345 Ga. App. 487 (2018). [↑](#endnote-ref-32)
33. *Partridge v. State*, 266 Ga. App. 305, 306 (2004); *Smith v. State*, 338 Ga. App. 635, 640 (2016). [↑](#endnote-ref-33)
34. O.C.G.A. §40-6-391(l) (“The offense of endangering a child by driving under the influence of alcohol or drugs shall not be merged with the offense of driving under the influence of alcohol or drugs for the purposes of prosecution and sentencing.”). [↑](#endnote-ref-34)
35. *Oliphant v. State*, 295 Ga. 597 (2014); *Bradley v. State*, 305 Ga. 857 (2019); *Vergara v. State*, 287 Ga. 194, 196 (2010); *Battle v. State*, 305 Ga. 268, 271-272 (2019); *Young v. State*, 305 Ga. 92, 95 (2019); *Spell v. State*, 305 Ga. 822 (2019) (both the aggravated assault and aggravated battery counts merge into the murder count-they were all based on a single act of the defendant). [↑](#endnote-ref-35)
36. *Buchanan v. State*, 357 Ga. App. 865, 868 (2020), citing *Jones v. State*, 290 Ga. 670, 672 (2012) and *Verdree v. State*, 299 Ga. App. 673, 684 (2009). [↑](#endnote-ref-36)
37. *Haynes v. State*, 356 Ga. App. 631, 644 (2020) (robbery is a crime against possession, and is not affected by concepts of ownership), citing *Creecy v. State*, 235 Ga. 542, 544 (1975). [↑](#endnote-ref-37)
38. *Scott v. State*, 356 Ga. App. 152, 155 (2020), citing *Coates v. State*, 304 Ga. 329, 330 (2018). [↑](#endnote-ref-38)
39. O.C.G.A. §40-6-391(l). [↑](#endnote-ref-39)
40. O.C.G.A. §16-5-4(m); *Nolley v. State*, 335 Ga. App. 539, 545 (2016); *Veal v. State*, 298 Ga. 691, 695 (2016); *Lupoe v. State*, 300 Ga. 233, 239 (2016) (“defendant could be convicted and sentenced for both armed robbery and a violation of the Street Gang Act established by participation in criminal gang activity through the commission of that armed robbery.”). [↑](#endnote-ref-40)
41. *Anthony v. State*, 303 Ga. 399 (2018). [↑](#endnote-ref-41)
42. *Turner v. State*, 289 Ga. App. 103, 104 (2008); *McKinney v. State*, 274 Ga. App. 32, 38 (2005). [↑](#endnote-ref-42)
43. *Interest of I.H.*, 350 Ga. App. 394 (2019) (overruling other cases which suggested that merger does apply to juvenile adjudications) A juvenile adjudication is not a conviction. [↑](#endnote-ref-43)
44. *Drinkard v. Walker*, 281 Ga. 211, 215 (2006). [↑](#endnote-ref-44)
45. O.C.G.A. §16-1-7. [↑](#endnote-ref-45)
46. *Gonzalez v. State*, 352 Ga. App. 83, 88 (2019). [↑](#endnote-ref-46)
47. *Jefferson v. State*, 360 Ga. App. 75, 79-80 (2021) (the fact that two different offensive weapons were utilized during a single attack that resulted in the theft of property does not mean that the aggravated assault would not merge with the armed robbery). [↑](#endnote-ref-47)
48. *Batchelor v. State*, 358 Ga. App. 761 (2021), citing *Robertson v. State*, 306 Ga. App. 721, 725 (2010). [↑](#endnote-ref-48)
49. *Ray v. State*, 359 Ga. App. 637 (2021). [↑](#endnote-ref-49)
50. *Wilson v. State*,344 Ga. App. 285, 290 (2018). [↑](#endnote-ref-50)
51. *Colbert v. State*,345 Ga. App. 554, 558-559 (2018) (“[T]here having been no additional violence used against the victim, it follows that the evidentiary basis for the aggravated assault conviction [in count 16] was ‘used up’ in proving the armed robbery. Merger was required.”). See *Hall v. State*, 313 Ga. App. 66, 67-68 (2011). [↑](#endnote-ref-51)
52. *Santoro v. State*, \_\_ Ga. App. \_\_, 864 S.E.2d 719 (2021). [↑](#endnote-ref-52)
53. *Oliphant v. State*, 295 Ga. 597 (2014). [↑](#endnote-ref-53)
54. *Fordham v. State*, 352 Ga. App. 520, 527 (2019). [↑](#endnote-ref-54)
55. *Grell v. State*, 291 Ga. 615, 617 (2012); *Donaldson v. State*, 302 Ga. 671, 674-675 (2017); *Coleman v. State*, 286 Ga. 291, 295 (2009). [↑](#endnote-ref-55)
56. *Sears v. State*, 292 Ga. 64, 73 n. 7 (2012). [↑](#endnote-ref-56)
57. *Edwards v. State*, 301 Ga. 822, 828 (2017); *Wade v. State*, 304 Ga. 5 (2018); *Coleman v. State*, 286 Ga. 291, 295 (2009); *Russell v. State*, 309 Ga. 772, 784 (2020), citing *Young v. State*, 305 Ga. 92, 95 (2019). Note that in *Russell*, it was proven that the attack on the victim was committed with two different offensive weapons – but because there was no evidence of a deliberate interval, the aggravated assault merged into the murder count. [↑](#endnote-ref-57)
58. *Coleman v. State*, 286 Ga. 291 (2009); Compare *White v. State*, 297 Ga. 218 (2015) (evidence suggested that it took the victim “a long time” to fall after being shot and before being beaten to death-that is a deliberate interval and, hence, no merger); *Young v. State*, 305 Ga. 92, 95 (2019). [↑](#endnote-ref-58)
59. *Lopez v. State*, 355 Ga. App. 319, 325-326 (2020), citing *Gomez v. State*, 301 Ga. 445, 455-456 (2017) and *Thompson v. State*, 291 Ga. App. 355, 360-361 (2008). [↑](#endnote-ref-59)
60. *Outz v. State***,** 344 Ga. App. 616, 617 (2018). [↑](#endnote-ref-60)
61. *Outler v. State*, 305 Ga. 701, 704-705 (2019). [↑](#endnote-ref-61)
62. *Drinkard v. Walker*, 281 Ga. 211, 215 (2006). [↑](#endnote-ref-62)
63. *Drinkard v. Walker*, 281 Ga. 211, 215 (2006). [↑](#endnote-ref-63)
64. *Jackson v. State*, 305 Ga. 614, 623 (2019), citing *Womac v. State*, 302 Ga. 681, 684 (2017). [↑](#endnote-ref-64)
65. *Dixon v. State*, 302 Ga. 691, 698 (2017), citing *Culpepper v. State*, 289 Ga. 736, 739 (2011). [↑](#endnote-ref-65)
66. *Chambers v. Hall*, 305 Ga. 363, 365 (2019). The “deadly weapon” requirement of aggravated assault is the equivalent of the “offensive weapon” requirement of armed robbery. *Long v. State*, 287 Ga. 886, 889 (2010). [↑](#endnote-ref-66)
67. *Oliphant v. State*, 295 Ga. 597 (2014). The *Oliphant* case is a virtual law school exam question on the topic of merger. In this case, the defendant committed a variety of acts that merged and some that did not merge. [↑](#endnote-ref-67)
68. *Jones v. State*, 333 Ga. App. 796, 800 (2015); *Dukes v. State*, 311 Ga. 561, 571-572 (2021). [↑](#endnote-ref-68)
69. *Anderson v. State*, 350 Ga. App. 369 (2019); *Cameron v. State*, 358 Ga. App. 131, 134 (2021). [↑](#endnote-ref-69)
70. *Jones v. State*, 333 Ga. App. 796, 800 (2015). [↑](#endnote-ref-70)
71. *Chambers v. Hall*, 305 Ga. 363, 365 (2019); *Jefferson v. State*, 360 Ga. App. 75, 79 (2021). The “deadly weapon” requirement of aggravated assault is the equivalent of the “offensive weapon” requirement of armed robbery. *Long v. State*, 287 Ga. 886, 889 (2010); *Wainwright v. State*, 305 Ga. 63 (2019); *Marlowe v. State*, 258 Ga. App. 152, 152-153 (2002) (“The offenses of aggravated assault and armed robbery do not merge as a matter of law, but the offenses may merge as a matter of fact.”). [↑](#endnote-ref-71)
72. *Chambers v. Hall*, 305 Ga. 363, 365 (2019). [↑](#endnote-ref-72)
73. *Reeves v. State*, 309 Ga. 645, 649 (2020). [↑](#endnote-ref-73)
74. *Carpenter v. State*, 343 Ga. App. 355, 358-359 (2017). [↑](#endnote-ref-74)
75. *Wofford v. State*, 305 Ga. 694, 696 (2019), citing *Regent v. State*, 299 Ga. 172, 176 (2016); *Harris v. State*, 309 Ga. 599, 610 (2020), citing *Douglas v. State*, 303 Ga. 178, 183 (2018); *Fordham v. State*, 352 Ga. App. 520, 526 (2019). [↑](#endnote-ref-75)
76. *Gaines v. State*, 360 Ga. App. 546, 547-548 (2021). [↑](#endnote-ref-76)
77. *Jackson v. State*, 305 Ga. 614, 623-624 (2019). “OCGA § 16-5-21 (a) (2) provides that ‘[a] person commits the offense of aggravated assault when he or she assaults ... [w]ith a deadly weapon[.]’ OCGA § 16-5-41 (a) provides that ‘[a] person commits the offense of false imprisonment when, in violation of the personal liberty of another, he arrests, confines, or detains such person without legal authority.’ The crime of false imprisonment includes the violation of liberty without lawful authority through arrest, confinement, or detention. None of these elements must be satisfied in order to prove an aggravated assault with a deadly weapon. Moreover, neither an assault nor the use of a deadly weapon must be proven in order to prove a false imprisonment. Thus, because under *Drinkard* each offense requires proof of facts which the other does not, these offenses do not merge as a matter of law.” [↑](#endnote-ref-77)
78. *Petro v. State*, 327 Ga. App. 254 (2014). “To prove the two counts of aggravated assault, the State had to show that [defendant] committed an assault upon his girlfriend and her ex-boyfriend with the knife, an object, which when used offensively against another, is likely to result in serious bodily injury...To prove the two counts of terroristic threats, the State had to show that [defendant] threatened to murder his girlfriend and her ex-boyfriend, with the purpose of terrorizing them. As such, the crimes of aggravated assault and terroristic threats required the State to prove as least one fact different from the other and no merger occurred;” *Batchelor v. State*, 358 Ga. App. 761 (2021). [↑](#endnote-ref-78)
79. *Marshall v. State*, 309 Ga. 698, 701 (2020). See *Jackson v. Crickmar*, 311 Ga. 870, 874 (2021) (aggravated assault and aggravated battery both merge into attempted murder). [↑](#endnote-ref-79)
80. *Woodard v. State*, 352 Ga. App. 322, 327 (2019). For clarity, the aggravated battery counts merge into the kidnapping with bodily injury counts. [↑](#endnote-ref-80)
81. *Dixon v. State*, 302 Ga. 691, 698 (2017), citing *Culpepper v. State*, 289 Ga. 736, 739 (2011). “because malice murder has an element that must be proven (death of the victim) that armed robbery does not, and armed robbery has an element (taking of property) that malice murder does not.” [↑](#endnote-ref-81)
82. *Vasquez v. State*, 306 Ga. 216 (2019). [↑](#endnote-ref-82)
83. *Marshall v. State*, 309 Ga. 698, 700-701 (2020), citing *Favors v. State*, 296 Ga. 842, 848 (2015). [↑](#endnote-ref-83)
84. *Baines v. State*, 276 Ga. 117, 119-120 (2003). [↑](#endnote-ref-84)
85. *Spell v. State*, 305 Ga. 822, 824 (2019); *Kim v. State*, 309 Ga. 612, 617 (2020). See *Priester v. State*, 309 Ga. 330, 334-335 (2020) which held that aggravated battery merges into attempted murder. *Priester* overturned a large number of prior cases which has held the opposite to be correct. [↑](#endnote-ref-85)
86. *Byers v. State*, 311 Ga. 259, 266-268 (2021); *White v. State*, 297 Ga. 218, 221 (2015). [↑](#endnote-ref-86)
87. *McDonald v. State*, 296 Ga. 643, 650 (2015). [↑](#endnote-ref-87)
88. *Ward v. State*, 339 Ga. App. 621, 627-628 (2016) (“Under Georgia law, a person commits the offense of burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another. A person commits the offense of criminal attempt when, with intent to commit a specific crime, he performs any act which constitutes a substantial step toward the commission of that crime. A person commits the offense of armed robbery when, with intent to commit theft, he or she takes property of another from the person or the immediate presence of another by use of an offensive weapon, or any replica, article, or device having the appearance of such weapon. Thus, the elements of burglary and attempted armed robbery and the culpable mental states required of these crimes are different.”), citing *Culbreath v. State*, 328 Ga. App. 153, 156-157 (2014). [↑](#endnote-ref-88)
89. *Jackson v. Crickmar*, 311 Ga. 870, 874-875 (2021) (“Attempted murder and attempted armed robbery do not simply involve different degrees of injury but rather ‘entirely different *categories* of injury – depriving a victim…of his life versus depriving the victim of property.’”). [↑](#endnote-ref-89)
90. *Bonner v. State*, 308 Ga. App. 827. 831-832 (2011). [↑](#endnote-ref-90)
91. *Owens v. State*, 353 Ga. App. 616, 619-620 (2020). [↑](#endnote-ref-91)
92. *Womac v. State*, 302 Ga. 681, 685 (2017). These offenses do not merge because the offense of child molestation requires proof that the defendant committed sexual acts with the intent to arouse his sexual desires but the offense of cruelty to children in the first degree requires proof that the defendant maliciously caused the child cruel or excessive physical or mental pain. Each crime requires proof of elements that the other does not require. Therefore, they do not merge. [↑](#endnote-ref-92)
93. *Dew v. State*, 292 Ga. App. 631, 635 (2008); *Drinkard v. Walker*, 281 Ga. 211, 213 (2006); *Jones v. State*, 333 Ga. App. 786, 800-801 (2015); *Castenda v. State*, 315 Ga. App. 723 (2012); *Stone v. State*, 358 Ga. App. 98, 104-105 (2021) (aggravated child molestation and rape do not merge). [↑](#endnote-ref-93)
94. *Jones v. State*, 333 Ga. App. 796, 800 (2015) (“To establish the crime of incest, the State was required to prove that the victim was related to the defendant by blood or marriage within a certain degree of consanguinity, including that of uncle and niece. OCGA § 16–6–22(a)(6). On the statutory rape charge, the State introduced evidence that the victim was younger than 16, a fact that was not required to prove incest.”). [↑](#endnote-ref-94)
95. *Jones v. State*, 333 Ga. App. 796, 802 (2015) (child molestation requires proof that the victim was younger than 16; incest requires proof of consanguinity, and these elements do not overlap); *Zerbarini v. State*, 359 Ga. App. 153, 168 (2021). [↑](#endnote-ref-95)
96. *Hamby v. State*, 358 Ga. App. 105, 108-109 (2021) (in *Hamby*, the court found that there was evidence of two separate occasions when the defendant committed an act of sodomy upon the victim, therefore, the offenses did not merge under those facts. However, the court acknowledged that where there is evidence of a single act of sodomy, the offenses would merge). [↑](#endnote-ref-96)
97. *McCranie v. State*, 335 Ga. App. 548, 553-554 (2016); *Dorsey v. State*, 265 Ga. App. 404, 406 (2004). But where the evidence shows that more than one single act of sexual intercourse occurred, the offenses do not merge. *Hixon v. State*, 251 Ga. App. 27, 29-30 (2001); *Wilder v. State*, 290 Ga. 13, 16-17 (2011). [↑](#endnote-ref-97)
98. *Hogg v. State*, 356 Ga. App. 11, 16 (2020) (The offense of aggravated sexual battery requires proof of lack of consent and child molestation requires proof of “with intent to arouse the sexual desires of either the child or the person” – they do not merge). [↑](#endnote-ref-98)
99. *Mathis v. State*, 343 Ga. App. 206, 211-212 (2017). This assumes a single transaction and a single victim. [↑](#endnote-ref-99)
100. *Chadwick v. State*, 360 Ga. App. 491, 499 (2021), citing *Hicks v. State*, 337 Ga. App. 567, 570 (2016). [↑](#endnote-ref-100)
101. *Cooper v. State*, 350 Ga. App. 365 (2019). [↑](#endnote-ref-101)
102. *Reid v. State*, 353 Ga. App. 304, 308-309 (2019). [↑](#endnote-ref-102)
103. Honestly, these are not the “same transaction or occurrence” so they do not merge because the elements of the two crimes require different proof. *Reid v. State*, 353 Ga. App. 304, 309 (2019). [↑](#endnote-ref-103)
104. *Hawkins v. State*, 350 Ga. App. 862 (2019). This decision should be considered because it acknowledged that comparison of the elements of the two crimes in question must occur “both ways.” The crime of neglect of an elderly person requires proof of an additional element (deprivation to the extent that the health or well-being is jeopardized) that abuse of an elderly person does not – but there are no elements of the crime of abuse of an elderly person that are not also required to prove neglect of an elderly person. In this case, it was decided that the crimes of abuse of an elderly person merged into the crime of neglect of an elderly person. [↑](#endnote-ref-104)
105. *Edge v. State*, 261 Ga. 865, 865-866 (1992); *Griggs v. State*, 304 Ga. 806, 807 (2018); *Gardhigh v. State*, 309 Ga. 153, 159-161 (2020). [↑](#endnote-ref-105)
106. *Edge v. State*, 261 Ga. 865, 865-866 (1992). [↑](#endnote-ref-106)
107. *Owens v. State*, 303 Ga. 254 (2018). [↑](#endnote-ref-107)
108. *Anthony v. State*, 303 Ga. 399, 402 (2018). [↑](#endnote-ref-108)
109. *Sanders v. State*, 281 Ga. 36, 37-38 (2006). This topic of expansion of the rule initially announced in *Edge* is fully addressed in *Griggs v. State*, 304 Ga. 806, 807-808 (2018). [↑](#endnote-ref-109)
110. *Griggs v. State*, 304 Ga. 806, 808 (2018). [↑](#endnote-ref-110)
111. *Griggs v. State*, 304 Ga. 806, 808 (2018), citing *Anthony v. State*, 303 Ga. 399, 403 (2018), *Clough v. State*, 298 Ga. 594, 598 (2016), and *Smith v. State*, 272 Ga. 874, 879-880 (2000). [↑](#endnote-ref-111)
112. *Griggs v. State*, 304 Ga. 806, 808 (2018), citing *DuBose v. State*, 299 Ga. 652, 653-654 (2016); *Amos v. State*, 297 Ga. 892, 893-894, (2015); *Wallace v. State*, 294 Ga. 257, 258-259, (2013); *Lawson v. State*, 280 Ga. 881, 883, (2006); and *Sims v. State*, 265 Ga. 35, 36, (1995). [↑](#endnote-ref-112)
113. During 2021, there have been six cases decided which included a “unit of prosecution” analysis. *McDaniel v. State*, 360 Ga. App. 194 (2021) (child cruelty); *Ray v. State*, 359 Ga. App. 637 (2021) (child cruelty); *Dukes v. State*, 311 Ga. 561 (2021) (possession of firearm during crime/by 1st Offender); *State v. Palacio-Gregorio*, \_\_ Ga. App. \_\_, 862 S.E.2d 605 (2021) (child pornography); *State v. Owens*, 312 Ga. 212 (2021) (aggravated assault); and *Edvalson v. State*, 359 Ga. App. 431 (2021) (remand from Supreme Court – child pornography). There were 11 such cases decided in 2019-2020. [↑](#endnote-ref-113)
114. *Hogg v. State*, 356 Ga. App. 11, 16 (2020), quoting *Busby v. State*, 332 Ga. App. 646, 650 (2015) (“Typically, the question is whether the same conduct may be punished under different criminal statutes. In that situation, it is appropriate to apply the ‘required evidence’ test[;] [h]owever, a different question is presented here: whether a course of conduct can result in multiple violations of the same statute[, which] requires a determination of the ‘unit of prosecution....’”). [↑](#endnote-ref-114)
115. *Scott v. State*, 306 Ga. 507, 509 (2919); *Dukes v. State*, 311 Ga. 561, 571 (2021). [↑](#endnote-ref-115)
116. *Haynes v. State*, 356 Ga. App. 631, 644 (2020) (“this holding comports with the unit of prosecution analysis applicable when a defendant is charged with multiple counts of the same crime, given that the unit of prosecution is the robbery of a person, regardless of how many items are taken”); *Jernigan v. State*, 333 Ga. App. 339, 342 (2015). [↑](#endnote-ref-116)
117. *Cobb v. State*, 356 Ga. App. 187, 191-193 (2020). [↑](#endnote-ref-117)
118. *Hogg v. State*, 356 Ga. App. 11, 17 (2020). [↑](#endnote-ref-118)
119. *Edvalson v. State*, 310 Ga. 7 (2020); *Macky v. State*, 360 Ga. App. 189 (2021); *McCurdy v. State*, 359 Ga. App. 885, 890-891 (2021). [↑](#endnote-ref-119)
120. *Macky v. State*, 360 Ga. App. 189, 192 (2021). [↑](#endnote-ref-120)
121. *Macky v. State*, 360 Ga. App. 189, 192 (2021), quoting *Edvalson v. State*, 310 Ga. 7, 8 (2020). [↑](#endnote-ref-121)
122. *Edvalson v. State*, 310 Ga. 7, n.8 (2020). [↑](#endnote-ref-122)
123. *Macky v. State*, 360 Ga. App. 189, 193 (2021). [↑](#endnote-ref-123)
124. *Coates v. State*, 304 Ga. 329 (2018). [↑](#endnote-ref-124)
125. *Outler v. State*, 305 Ga. 701, 704-705 (2019) (multiple underlying felonies); *Miller v. State*, \_\_ Ga. \_\_, 864 S.E.2d 451 (2021) (multiple weapons – involved both possession of firearm during a crime and possession of a firearm by a convicted felon). [↑](#endnote-ref-125)
126. *State v. Marlowe*, 277 Ga. 383, 386 (2003); *State v. Stovall*, 287 Ga. 415, 421 (2010) (“where multiple crimes are committed together during the course of one continuous crime spree, a defendant may be convicted once for possession of a firearm during the commission of a crime as to every individual victim of the crime spree, as provided under OCGA § 16–11–106(b)(1)....”); *Gutierrez v. State*, 285 Ga. 878 (2009) (three victims of the underlying felony offenses resulted in three charges of possession of a firearm during commission of a crime). [↑](#endnote-ref-126)
127. *Jones v. State*, 333 Ga. App. 796, 800 (2015). [↑](#endnote-ref-127)
128. *State v. Owens*, 312 Ga. 212, 223 (2021). However, please note that where there is a deliberate interval, the offenses do NOT merge as in *Owens*. [↑](#endnote-ref-128)
129. *State v. Owens.* 312 Ga. 212. 223 (2021), citing *Ortiz v. State*, 291 Ga. 3, 6-7 (2012). [↑](#endnote-ref-129)
130. *Lay v. State*, 305 Ga. 715, 722 (2019). [↑](#endnote-ref-130)
131. *Lay v. State*, 305 Ga. 715, 722 (2019), citing *Cowart v. State*, 294 Ga. 333, 336 (2013). [↑](#endnote-ref-131)