

OFFICIAL  
CODE  
OF  
GEORGIA  
—  
ANNOTATED

15

Title  
17

*Criminal Procedure*

2013  
Edition

Ref.  
KFG  
30  
1981  
A24  
v.15  
2013

OFFICIAL CODE  
OF  
GEORGIA  
—  
ANNOTATED



VOLUME 15

Title 17. Criminal Procedure

2013 Edition

## CHAPTER 11

## ASSESSMENT AND PAYMENT OF COSTS OF CRIMINAL PROCEEDINGS

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**U.S. Code.** — Stay of execution and the manner of prosecuting offenses punishable by death, Federal Rules of Criminal Procedure, Rules 38(a) and 7(a).

## ARTICLE 1

## GENERAL PROVISIONS

**Cross references.** — Assessment of costs in criminal cases, Uniform Superior Court Rules, Rule 36.15.

## 17-11-1. Imposition of costs of prosecution upon defendant generally.

The costs of a prosecution, except the fees of his own witnesses, shall not be demanded of a defendant until after trial and conviction. If convicted, judgment may be entered against the defendant for all costs accruing in the committing and trial courts and by any officer pending the prosecution. The judgment shall be a lien from the date of his arrest

on all the property of the defendant. The clerk shall issue an execution on the judgment against the property. (Laws 1816, Cobb's 1851 Digest, p. 857; Laws 1820, Cobb's 1851 Digest, p. 859; Laws 1826, Cobb's 1851 Digest, p. 859; Laws 1830, Cobb's 1851 Digest, p. 860; Code 1863, § 4581; Code 1868, § 4602; Code 1873, § 4699; Code 1882, § 4699; Penal Code 1895, § 1078; Penal Code 1910, § 1105; Code 1933, § 27-2801.)

**Cross references.** — Duty of Department of Offender Rehabilitation to bear costs and expenses of trial involving inmate of state penal system who is charged with crime of escape or attempted escape or with offense occurring within confines of state correctional institution, § 42-5-3. Lien for costs of prosecution, § 44-5-210.

**Law reviews.** — For article on whether one's property is forfeited after a conviction based on a nolo contendere plea, see 13 Ga. L. Rev. 723 (1979). For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986).

### JUDICIAL DECISIONS

**Misdemeanor prosecutions.** — O.C.G.A. § 17-11-1 applies to misdemeanor prosecutions. *Gibson v. State*, 187 Ga. App. 769, 371 S.E.2d 413, cert. denied, 187 Ga. App. 907, 371 S.E.2d 413 (1988).

**"Trial" defined.** — "Trial" means such trial in the court having original trial jurisdiction of the case as is the basis of the entry of judgment finally disposing of the action in such court and does not apply to proceedings in an appellate court. *Wynne v. Stonecypher*, 146 Ga. 5, 90 S.E. 284 (1916).

**Judge has no discretion in the matter of taxing costs.** — While the word "may" ordinarily denotes permission and not command, the use of that word in the second sentence of this section cannot be construed to mean that the trial judge is vested with discretion in the matter of taxing the costs against the convicted defendant. There is no provision of law for the payment of the fees of the officers of the court when the judge in the judge's discretion fails to tax the costs against the convicted defendant, and it cannot be assumed that it was ever intended that the compensation of these officers should rest in the discretion of the judge. *Pound v. Faulkner*, 193 Ga. 413, 18 S.E.2d 749 (1942).

**Judge's duty to enter judgment for costs.** — Since the law allows the judge no discretion as to entering judgment for

costs against the convicted defendant, but imposes the burden of paying costs as an incident to conviction, the verdict of guilty against the defendant imposes upon the judge the duty of entering judgment against the defendant for the costs. *Pound v. Faulkner*, 193 Ga. 413, 18 S.E.2d 749 (1942).

**Amendment of judgment to provide for costs.** — If a defendant is convicted, but the judge fails to enter a judgment for costs, it is proper for the judge to enter a nunc pro tunc order amending the former judgment to provide for the payment of costs after the expiration of the term at which the judgment was entered, and even after an execution for the costs has issued. *Pound v. Faulkner*, 193 Ga. 413, 18 S.E.2d 749 (1942).

**Judgment for other costs illegal.** — It is illegal for a magistrate to give judgment against the prisoner for costs other than those of the prisoner's own witnesses or the prisoner's commitment. *Hayden v. State*, 40 Ga. 476 (1869).

**Costs of bailiffs and jurors are not taxable to criminal defendants.** *Walden v. State*, 258 Ga. 503, 371 S.E.2d 852 (1988); *Smith v. State*, 262 Ga. 67, 414 S.E.2d 653 (1992).

Fees paid for special grand jurors, traverse jurors, and bailiffs could not properly be included in the sum which the defendant was ordered to pay the defen-

dant's victim as restitution. *Martin v. State*, 189 Ga. App. 483, 376 S.E.2d 888 (1988).

**Assessment of court costs.** — Sum which convicted defendant was ordered to pay represented court costs, rather than fine, which trial court is allowed to assess. *Carpenter v. State*, 167 Ga. App. 634, 307 S.E.2d 19 (1983), *aff'd*, 252 Ga. 79, 310 S.E.2d 912 (1984).

**Costs in cases which have been nol prossed.** — No officer has the right to demand or receive of one accused of crime costs on a criminal case which has been nol prossed. *Hunter v. State*, 104 Ga. App. 576, 122 S.E.2d 172 (1961).

**If acquitted on subsequent trial no longer liable for costs.** — If one accused of crime is convicted but, upon a subsequent trial granted, is thereafter acquitted, the defendant is no longer liable for the costs. *Land v. Jolley*, 175 Ga. 788, 166 S.E. 217 (1932).

**Amount paid by defendant who is eventually acquitted is without consideration.** — Due bill given by the defendant to the clerk in settlement of a bill for costs before there had been any conviction of the accused, who was eventually acquitted, was without legal consideration. *Wells v. Potter*, 120 Ga. 889, 48 S.E. 354 (1904).

**Costs to which district attorney entitled if defendant escapes.** — If a prisoner escapes before trial, the solicitor general (now district attorney) is only entitled to the costs which have accrued up to the time of such escape. *Robinson v. Smith*, 57 Ga. 332 (1876).

**Witness costs.** — Payment of hotel and airline ticket costs for witnesses come within the meaning of "all costs accruing in the . . . trial courts." *Smith v. State*, 236 Ga. App. 548, 512 S.E.2d 19 (1999).

There is no specific statutory authorization for assessing a criminal defendant for the lodging and airfare costs of witnesses for the state. *Smith v. State*, 272 Ga. 83, 526 S.E.2d 59 (2000).

**Procedure for objecting to amounts claimed by witnesses.** — If the clerk issues an execution for the costs due witnesses, and the defendant meets the execution with an affidavit of illegality on the ground that the witnesses have claimed

and procured the execution to issue for more fees than the witnesses are entitled to receive, it is incumbent upon the defendant to pay amounts appearing to be due in order to authorize the levying officer to stay further proceedings. *State v. Everett*, 93 Ga. 575, 20 S.E. 73 (1894).

**Costs may not be demanded before providing transcript for appeal, if trial not had.** — If the accused excepts to the overruling of a demurrer (now motion to dismiss) to the indictment, and brings the case to the Supreme Court before there has been any trial on the merits, the clerk of the court in which the case is pending has no right to demand, as a condition precedent to sending up a transcript of the record, the payment of accrued costs. *Wells v. Potter*, 120 Ga. 889, 48 S.E. 354 (1904).

**If no supersedeas is obtained,** the clerk of the trial court is entitled to have judgment awarded against the defendant for the costs accruing in connection with the defendant's prosecution of a writ of error (see O.C.G.A. §§ 5-6-49, 5-6-50) to the Court of Appeals, while the defendant's case is pending in that court. *Wynne v. Stonecypher*, 146 Ga. 5, 90 S.E. 284 (1916).

**Costs are not recoverable in proceeding to recover forfeited recognizance.** — Costs of the criminal case out of which a recognizance arises are not recoverable in a proceeding by scire facias to enforce the recognizance as forfeited. When such costs have been taxed in the judgment rendered in the scire facias proceeding a motion to retax, so as to exclude from that judgment these nontaxable costs, should be granted. *Cade v. Gordon*, 88 Ga. 461, 14 S.E. 706 (1892).

**Imprisonment for failure to pay costs.** — One adjudged guilty of a misdemeanor and sentenced to pay the costs of the prosecution, and in default of the payment thereof to be confined in the chain gang for a stated term, cannot be held in custody or compelled to labor on the chain gang for fees due officers of court for services which the officers were required by law to render in proceedings instituted by that person, subsequently to the person's conviction and sentence, to review and reverse such judgment and

sentence, though liable under the judgment for such fees as costs. *Alexander v. Walton*, 151 Ga. 645, 107 S.E. 862 (1921).

**Extent and priority of lien generally.** — All the property of a person arrested and convicted upon a criminal charge, or who may escape from jail, or from any officer, owned by the person at the time of the arrest, is bound for the costs of prosecution, by statutory lien, which attaches also upon the proceeds of the property, when identified. This lien overrides a title to property made by the person, upon the sale for professional services, after the person's arrest and before conviction. *Morgan v. Collier*, 13 Ga. 493 (1853).

**Costs are collectible by levy of fi. fa.** — Costs in a criminal prosecution are collectible of the defendant by the levy of a fi. fa. at the termination of a prosecution, if it finally results in the conviction of the defendant. *Land v. Jolley*, 175 Ga. 788, 166 S.E. 217 (1932).

**Judge has the power to order the clerk to issue an execution** against the property of the defendant to enforce the

collection of the fine and costs. *McMeekin v. State*, 48 Ga. 335 (1873).

**Lien for costs puts purchasers on notice.** — If the vendor of an interest in real property is in prison, the vendee is put on notice of the lien for costs, or notice of a fact which, if diligently investigated, would have disclosed the lien. *Pound v. Faulkner*, 193 Ga. 413, 18 S.E.2d 749 (1942).

**Cost of paternity blood test in child abandonment case.** — When the state requests pretrial paternity blood testing for a defendant charged with child abandonment, the state must initially pay the cost. A verdict incorporating a finding of parentage would authorize the court to tax the cost of the blood test against the defendant, or under certain circumstances against the prosecutor/prosecutrix or complainant. *State v. Slavny*, 195 Ga. App. 818, 395 S.E.2d 56 (1990).

**Cited in Lumpkin County v. Davis**, 185 Ga. 393, 195 S.E. 169 (1938); *Holloway v. State*, 178 Ga. App. 141, 342 S.E.2d 363 (1986); *Alliston v. State*, 183 Ga. App. 462, 359 S.E.2d 220 (1987).

#### OPINIONS OF THE ATTORNEY GENERAL

**Ultimate responsibility for costs** will fall upon the defendant, the prosecutor, or the fine and forfeiture fund, depending upon the circumstances. 1971 Op. Att'y Gen. No. U71-42.

**Court of inquiry is not trial.** — This section meant that the costs allowed an officer cannot be collected from a defendant until after the defendant's conviction on trial, and the court of inquiry was not the trial. 1950-51 Op. Att'y Gen. p. 265.

**Costs of feeding prisoner while prisoner is imprisoned awaiting trial** are part of court costs collectible from defendant. 1962 Op. Att'y Gen. p. 121.

**Application fee for warrant.** — Fee for application for an arrest or search warrant under O.C.G.A. § 15-10-82 is not part of the costs. 1988 Op. Att'y Gen. No. U88-24.

**Fee for issuance of criminal warrant.** — Affiant (prosecutor) may not be required to pay the fee for the issuance of a criminal warrant at the time of such issuance. A clear intent is shown to determine the responsibility for such payment at a subsequent time, rather than at the time of the issuance of the criminal warrant. 1969 Op. Att'y Gen. No. 69-364.

**Claim of county for fees of county officers.** — In cases which are never signed by the defendant or a judge, which are not nol prossed and which are transmitted to the clerk's office prior to the return of the indictment against the officer, the county does not have a claim for any portion of the money received in the clerk's office from an officer of the court based on chargeable fees of the county's officers. 1974 Op. Att'y Gen. No. U74-90.

#### RESEARCH REFERENCES

**ALR.** — Validity of employment to obtain evidence, 16 ALR 1433.

Validity of contract to testify, 41 ALR 1322; 45 ALR 1423.

dant's victim as restitution. *Martin v. State*, 189 Ga. App. 483, 376 S.E.2d 888 (1988).

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#### RESEARCH REFERENCES

**ALR.** — Validity of employment to obtain evidence, 16 ALR 1433.

Validity of contract to testify, 41 ALR 1322; 45 ALR 1423.

Power of court which appoints or employs expert witnesses to tax their fees as costs, 39 ALR2d 1376.

Right of witness detained in custody for future appearance to fees for such detention, 50 ALR2d 1439.

Appealability of order or judgment awarding or denying costs but making no other adjudication, 54 ALR2d 927.

Items of cost of prosecution for which defendant may be held, 65 ALR2d 854.

Indigency of offender as affecting validity of imprisonment as alternative to payment of fine, 31 ALR3d 926.

Storage or similar caretaking charges as taxable costs in proceeding to forfeit personal property, 60 ALR3d 813.

### 17-11-2. Liability of defendant for costs of witnesses.

No defendant shall be liable for the costs of any witness of the state, unless such witness was subpoenaed, sworn, and examined during the trial, nor for the costs of more than two witnesses testifying on the same point, unless the court shall certify that the question at issue was of such a character as to require the testimony of more than two witnesses. (Laws 1799, Cobb's 1851 Digest, p. 277; Code 1863, § 3608; Code 1868, § 3632; Code 1873, § 3682; Code 1882, § 3682; Penal Code 1895, § 1079; Penal Code 1910, § 1106; Code 1933, § 27-2802.)

**Law reviews.** — For article on conviction based on a nolo contendere plea, see 13 Ga. L. Rev. 723 (1979).

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**Limitation as to witnesses testifying on same point applies only to those subpoenaed, sworn, and examined.** — Prohibition in this section against charging the accused with the costs of more than two witnesses to the same point relates only to witnesses who have actually been subpoenaed, sworn, and examined. *Herrington v. Flanders*, 115 Ga. 823, 42 S.E. 222 (1902).

**Residence of witnesses.** — Person

tried and convicted of a criminal offense is taxable for costs with the fees of witnesses sworn and examined in behalf of the state whether the witnesses reside in the county or not. *Brown v. State*, 86 Ga. 375, 12 S.E. 649 (1890).

**Cited in** *Lumpkin County v. Davis*, 185 Ga. 393, 195 S.E. 169 (1938); *Holloway v. State*, 178 Ga. App. 141, 342 S.E.2d 363 (1986).

## RESEARCH REFERENCES

**ALR.** — Validity of contract to testify, 41 ALR 1322; 45 ALR 1423.

Power of court which appoints or employs expert witnesses to tax their fees as costs, 39 ALR2d 1376.

Right of witness detained in custody for future appearance to fees for such detention, 50 ALR2d 1439.

Items of cost of prosecution for which defendant may be held, 65 ALR2d 854.

Allowance of mileage or witness fees with respect to witnesses who were not called to testify or not permitted to do so when called, 22 ALR3d 675.



### 17-11-3. Liability of defendant for costs of inquest.

Any person convicted of murder or manslaughter in a case where an inquest has been held concerning the cause of death of the victim shall be charged for the costs of the inquest as part of the costs of prosecution. (Orig. Code 1863, § 572; Code 1868, § 636; Code 1873, § 595; Code 1882, § 595; Penal Code 1895, § 1080; Penal Code 1910, § 1107; Code 1933, § 27-2803.)

**Law reviews.** — For article on conviction based on a nolo contendere plea, see 13 Ga. L. Rev. 723 (1979).

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This section was an exception to the general rule as to how fees shall be paid. *Davis v. County of Bibb*, 116 Ga. 23, 42 S.E. 403 (1902).

Cited in *Lumpkin County v. Davis*, 185 Ga. 393, 195 S.E. 169 (1938).

### RESEARCH REFERENCES

**ALR.** — Items of cost of prosecution for which defendant may be held, 65 ALR2d 854.

### 17-11-4. Imposition of costs and jail fees upon prosecutor or complainant.

(a) The prosecutor's name shall be endorsed on every indictment, and he shall be compelled to pay all costs and jail fees upon the acquittal or discharge of the person accused when:

- (1) The grand jury, by its foreman, on returning "no bill," expresses as its opinion that the prosecution was unfounded or malicious;
- (2) A jury on the trial of the prosecution finds it to be malicious; or
- (3) The prosecution is abandoned before trial. When it is thus abandoned, the officer who issued the warrant shall enter a judgment against the prosecutor for all the costs and enforce it by an execution in the name of the state or by an attachment for contempt.

(b) A magistrate may, in his discretion, assess costs and jail fees against the person who instigated the prosecution when, at a committal hearing, the action is dismissed for want of probable cause and the magistrate finds that the complaint was unfounded and malicious. This subsection shall not apply to law enforcement personnel. (Laws 1833, Cobb's 1851 Digest, p. 833; Code 1863, § 4518; Code 1868, § 4537; Ga. L. 1871-72, p. 53, § 1; Code 1873, § 4630; Code 1882, § 4630; Penal Code 1895, § 1082; Penal Code 1910, § 1109; Code 1933, § 27-2805; Ga. L. 1982, p. 3, § 17; Ga. L. 1986, p. 282, § 1.)

**Cross references.** — Assessment of costs in magistrate court criminal cases, Uniform Rules for the Magistrate Courts, Rule 12.3.

### JUDICIAL DECISIONS

**“Prosecutor” defined.** — “Prosecutor,” for purposes of this section, was one who instigates a prosecution by making an affidavit charging a named person with the commission of a penal offense on which a warrant was issued or an indictment or accusation was based. *Sampson v. State*, 43 Ga. App. 89, 157 S.E. 915 (1931); *In re Herring*, 185 Ga. App. 541, 365 S.E.2d 139 (1988).

“Prosecutor” for purposes of this section was the person who voluntarily goes before the grand jury with the prosecutor’s complaint. *Sampson v. State*, 43 Ga. App. 89, 157 S.E. 915 (1931).

**Evidence that return of “no bill, malicious prosecution” is not well-founded.** — When a prosecutor is required by rule to show cause why the prosecutor should not be compelled to pay the costs of a criminal case, because of a return by the grand jury of “no bill, malicious prosecution” upon a bill of indictment, it is not incompetent for the prosecutor to show by evidence that such return was not well-founded in the fact. *Green v. State*, 112 Ga. 52, 37 S.E. 93 (1900).

**Whether paragraph (a)(2) or (a)(3) is applicable depends on attachment of jeopardy.** — Paragraph (3) (see paragraph (a)(3)) of this section applied when the prosecution is abandoned before the trial, that is, before the trial has reached such a stage as to put the defendant in jeopardy. Paragraph (2) of the section (see paragraph (a)(2)) applied when the trial has reached such a stage as to put the defendant in jeopardy and the jury to find the prosecution to be malicious. Thus, if before the defendant is put in jeopardy the prosecutor abandons the prosecution, the prosecutor may be liable for the costs, but, if the trial before the jury has reached such a stage as to put the defendant in jeopardy it then becomes a jury question whether or not the prosecution is malicious, and, if the jury finds the prosecution is malicious, the costs may be assessed against the prosecutor. *Rainey v. State*, 50 Ga. App. 256, 177 S.E. 757 (1934).

**Failure to endorse prosecutor’s name on indictment.** — Fact that the name of the prosecutor was not endorsed upon the indictment as required by this section did not involve any right and privileges of a defendant, but only affected the prosecutor, who must pay costs upon the acquittal or discharge of the person accused under circumstances set forth in that section, and any error in this regard was not harmful to a defendant. *Lewis v. State*, 144 Ga. App. 847, 242 S.E.2d 725 (1978).

**Execution on warrant when prosecution abandoned before trial.** — When a prosecution is abandoned before trial, the officer who issued the warrant is authorized to enter a judgment against the prosecutor for all costs and enforce the judgment by an execution in the name of the state. An execution on such judgment issued in the name of the accused in the warrant is void. *Underwood v. Harvey*, 106 Ga. 268, 32 S.E. 124 (1898).

**Consent agreement and dismissal of prosecution for child abandonment.** — If the prosecuting attorney in a child abandonment case, and not the mother (who was the prosecuting witness), made the determination to enter into a consent agreement and to permit the dismissal of the action against the putative father, the state could not then cast the costs against the prosecuting witness, the trial court having made no finding that the mother abandoned the prosecution. *In re Herring*, 185 Ga. App. 541, 365 S.E.2d 139 (1988).

**Cost of paternity blood test in child abandonment case.** — When the state requests pretrial paternity blood testing for a defendant charged with child abandonment, the state must initially pay the cost. A verdict incorporating a finding of parentage would authorize the court to tax the cost of the blood test against the defendant, or under certain circumstances against the prosecutor/prosecutrix or complainant. *State v. Slavny*, 195 Ga. App. 818, 395 S.E.2d 56 (1990).

**Payment of costs may be enforced by imprisonment.** Green v. State, 112 Ga. 52, 37 S.E. 93 (1900). **Cited in Lumpkin County v. Davis**, 185 Ga. 393, 195 S.E. 169 (1938).

#### OPINIONS OF THE ATTORNEY GENERAL

**Ultimate responsibility for costs** will fall upon the defendant, the prosecutor, or the fine and forfeiture fund, depending upon the circumstances. 1971 Op. Att'y Gen. No. U71-42.

**"Discharge before trial"** occurs at any time before the trial has reached such a stage as to put the accused in jeopardy. 1969 Op. Att'y Gen. No. 69-364.

**Fee for issuance of criminal warrant.** — Affiant (prosecutor) may not be required to pay the fee for the issuance of a criminal warrant at the time of such issuance. A clear intent is shown to determine the responsibility for such payment at a subsequent time than at the time of the issuance of the criminal warrant. 1969 Op. Att'y Gen. No. 69-364.

#### RESEARCH REFERENCES

**ALR.** — Appealability of order or judgment awarding or denying costs but making no other adjudication, 54 ALR2d 927.

#### 17-11-5. Payment of costs and expenses when venue changed.

(a) When the venue in a case is changed, the whole costs of the case, jail fees of the person to be tried, and expenses of the trial in the county to which it was transferred shall be paid by the county from which the case was removed.

(b) The entire court costs, including the costs of the sheriff, bailiff, clerks, and jurors, shall also be paid by the county from which the case was removed and shall have the same priority as jail fees. The county in which the case is tried shall be reimbursed after paying the court costs incurred. (Ga. L. 1871-72, p. 49, § 1; Code 1873, § 4689; Code 1882, § 4689; Ga. L. 1895, p. 70, § 4; Penal Code 1895, § 1083; Penal Code 1910, § 1110; Code 1933, § 27-2806.)

#### JUDICIAL DECISIONS

**Cited in Johnston v. State**, 118 Ga. 310, 45 S.E. 381 (1903); **Lumpkin County v. Davis**, 185 Ga. 393, 195 S.E. 169 (1938).

#### OPINIONS OF THE ATTORNEY GENERAL

**Costs to be paid from general funds of the county.** — Under former Code 1933, § 27-2806 and Ga. L. 1950, p. 175, § 1 (see O.C.G.A. § 17-11-5), costs in criminal cases transferred to another county on a change of venue should be paid out of the general funds of the county. 1958-59 Op. Att'y Gen. p. 46.