Georgia Death Penalty Law

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This Article covers death penalty decisions from the Georgia Supreme Court for the period from January 1, 1999 to May 31, 2000. It primarily discusses direct appeal decisions but reaches cases in a few other settings as well. This Article does not discuss holdings in capital cases that are common to all criminal appeals but is limited to death penalty law. Recent developments in Georgia death penalty law are considered in the order they would appear in a capital trial. In the period covered by this Article, the Georgia Supreme Court considered thirteen death sentences imposed in superior courts following a trial, one capital resentencing, one opinion following a remand on jury misconduct claims, and one interim appeal. On October 1, 2000, 135 men and one woman were on the Georgia death row.[1] On May 31, 2000, eighty-one cases were pending statewide in which the district attorney had filed a Notice of Intent to Seek Death.[2]

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1. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, DEATH ROW, U.S.A. (Fall 2000).

2. The Unified Appeal rules require that at the first proceeding the district attorney notify the defendant in writing of his intention to seek a death sentence. A copy of the written notice must be filed with the clerk of the superior court who, within ten days, must forward a copy to the clerk of the Georgia Supreme Court. GA. R. UNIFIED APP. 2(C)(1) (2000).

I. PRE-TRIAL ISSUES

This discussion includes pretrial motions, discovery, pleas, and other matters taking place before jury selection begins. James Ringo McDaniel was about to proceed with a Butts County jury trial for the murder of his grandparents and ten-year-old brother. After the preliminary voir dire of the jurors, the trial court called the parties in chambers for a conference. The judge restated earlier discussions with counsel in which he said that, as an individual or as a judge, he would be reluctant to impose a death sentence.[3] He went on to say that if defendant entered a guilty plea and waived a jury at his sentencing hearing, the trial court was "'90 percent certain [to] impose a life without parole sentence.'"[4] The prosecution would not agree to a negotiated plea of life without parole, insisting on the state's right to put up evidence and argue for a death sentence. Consequently, McDaniel entered a guilty plea and waived a jury. After a sentencing hearing, the trial court sentenced McDaniel to death for the murder of his brother.[5]

The Georgia Supreme Court held this exchange violated Uniform Superior Court Rule ("USCR") 33.5(A),[6] prohibiting judicial participation in the plea negotiation process and reversed.[7] A unanimous court wrote:

> Due to the force and majesty of the judiciary, a trial court's participation in the plea negotiation may skew the defendant's decision-making and render the plea involuntary because a defendant may disregard proper considerations and waive rights based solely on the trial court's stated inclination as to sentence.
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> In this case, McDaniel heard the trial court repeatedly state its reluctance to impose a death sentence and give ninety percent odds on a sentence of life without parole if permitted to impose sentence. That participation by the trial court in the plea negotiation process rendered the resulting guilty plea involuntary.[8]

In *Gulley v. State*,[9] the defense filed a motion requesting 120 days notice of the Dougherty County District Attorney's intention to rely upon "'other crimes or bad acts or similar transactions or occurrences in

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3. McDaniel v. State, 271 Ga. 552, 553, 522 S.E.2d 648, 649 (1999).
4. *Id.*
5. *Id.*
6. GA. UNIF. SUPER. CT. R. 33.5(A) (2000).
7. 271 Ga. at 553, 522 S.E.2d at 650.
8. *Id.* at 554, 522 S.E.2d at 650 (internal citations omitted).
9. 271 Ga. 337, 519 S.E.2d 655 (1999).

evidence against him.'"[10] The motion was grounded in USCR 31, which governs the introduction of similar transactions evidence. Twenty-seven days before trial, the prosecutors notified the Gulley defense team of their intention to use testimony about an as yet unprosecuted East Point double murder during the sentencing phase. Defense counsel was previously aware of the East Point situation, and the trial court had ordered open file discovery.[11] The Georgia Supreme Court held that this was not the kind of evidence contemplated by USCR 31 and that the state had satisfied Offical Code of Georgia Annotated ("O.C.G.A.") section 17-10-2, which required pretrial notice of such testimony.[12]

In *Johnson v. State*,[13] a Dougherty County defendant wished to question the district attorney and former district attorney regarding cases in which the prosecution did not seek death, which he alleged were more heinous than his crime.[14] The trial court quashed the subpoenas, and the Georgia Supreme Court found no error.[15] The court reasoned that district attorneys did "not have unfettered discretion to seek the death penalty" because a jury could always decline to find the necessary statutory aggravating circumstance.[16] The court also found that policy considerations disfavored such a defense tactic.[17] The court further pointed out that Johnson was invited to file a written proffer of more heinous cases in which the State declined to seek the death penalty, but he failed to do so.[18]

In 1994 the General Assembly enacted the Criminal Procedure Discovery Act, which provides for extensive reciprocal discovery for those defendants who elect to take advantage of it.[19] By opting in, the defendant receives extensive materials from the State, some of which previously had been unavailable.[20] At the same time, reciprocal discovery requires the defense to disclose things it otherwise could keep confidential.[21] The defendant who does not opt in receives minimal discovery under the Act.[22] The Act is silent as to its application in

10. *Id.* at 341, 519 S.E.2d at 660.
11. *Id.*
12. *Id.*, 519 S.E.2d at 660-61.
13. 271 Ga. 375, 519 S.E.2d 221 (1991).
14. *Id.* at 379, 519 S.E.2d at 227.
15. *Id.*
16. *Id.* (quoting McClain v. State, 267 Ga. 378, 389, 477 S.E.2d 814, 825 (1996)).
17. *Id.* (citing Perkins v. State, 269 Ga. 791, 794, 505 S.E.2d 16, 19 (1998)).
18. 271 Ga. at 379, 519 S.E.2d at 227.
19. O.C.G.A. § 17-16-1 et seq. (1998).
20. *Id.* § 17-16-4.
21. *Id.*
22. *Id.* § 17-16-3.

capital cases. The multicounty public defender challenged the constitutionality of the Act through an interim appeal in the Clayton County death penalty prosecution of John Lucious.[23]

In *State v. Lucious*,[24] the Georgia Supreme Court held the Act was constitutional in a 4-3 decision.[25] In a short one-paragraph discussion, the majority held that the Act did not apply to presentence hearings in capital and noncapital cases.[26] Death penalty defendants could safely opt in without having to give away their sentencing phase strategy in advance. Justice Fletcher, concurring in part and dissenting in part, set out a list of thirteen types of information available to the defense through federal and state constitutional law or other statutory authority without opting in.[27] These include but are not limited to exculpatory evidence;[28] evidence of an understanding, agreement, or promise of leniency;[29] victim impact testimony;[30] and notice of similar transaction evidence.[31]

In another case, the court affirmed that "[i]t is not incumbent upon the state to notify a defendant prior to trial of every statutory aggravating circumstance that it might seek to prove."[32]

II. JURY SELECTION

This section concerns jury arrays and jury selection in capital cases. Death penalty juries differ from other criminal juries in that they must be "death qualified."[33] This means they can consider and impose a death sentence. Individuals who object to the death penalty on religious, moral, or any other grounds can be excluded from jury service. In some communities these individuals constitute a substantial part of the venire and are more likely to be racial minorities. "The death qualification of prospective jurors is not unconstitutional."[34]

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23. State v. Lucious, 271 Ga. 361, 362, 518 S.E.2d 677, 679-80 (1999).
24. 271 Ga. 361, 518 S.E.2d 677 (1999).
25. *Id.* at 366, 518 S.E.2d at 682.
26. *Id.*
27. *Id.* at 368-70, 518 S.E.2d at 683-85 (Fletcher, J., concurring in part and dissenting in part).
28. Brady v. Maryland, 373 U.S. 83, 87-88 (1963).
29. Giglio v. United States, 405 U.S. 150, 154-55 (1972).
30. O.C.G.A. § 17-10-1.2 (1998); *see also* Livingston v. State, 264 Ga. 402, 404, 444 S.E.2d 748, 751 (1994); Turner v. State, 268 Ga. 213, 215, 486 S.E.2d 839, 842 (1997).
31. 271 Ga. at 368, 518 S.E.2d at 683-85.
32. Sears v. State, 270 Ga. 843, 842, 514 S.E.2d 426, 435 (1999).
33. Witherspoon v. Illinois, 391 U.S. 510 (1968).
34. Cromartie v. State, 270 Ga. 780, 783, 514 S.E.2d 205, 210 (1999).

The most striking jury selection decision was *Nance v. State*,[35] in which a Gwinnett County capital defendant secured a new sentencing proceeding because the trial court failed to remove a juror for cause. The juror stated three times that she would automatically vote for death upon a conviction for murder and a finding of a statutory aggravating circumstance.[36] A unanimous Georgia Supreme Court wrote that "the trial court erred by failing to excuse prospective juror Johnson for cause because her views in favor of capital punishment would prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and oath."[37]

The standard of review when a trial court denies a challenge to a prospective juror for cause is "some manifest abuse of discretion," which on appeal required giving "deference [to] the trial court's resolution of any equivocations or conflicts in the prospective juror's responses on voir dire" based upon a review of the record as a whole.[38]

In *Terrell v. State*,[39] a Newton County conviction and death sentence was reversed on another jury error.[40] A military policeman for the Georgia National Guard who had arrest powers was allowed to sit on the capital jury of defendant Brian Keith Terrell. Defendant moved to strike him for cause, but the trial court denied the motion. After being convicted, defendant moved for a new trial. The motion was denied, and defendant appealed. Reversing the trial court, the supreme court observed that

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35. 272 Ga. 217, 526 S.E.2d 560 (2000).

36. *Id.* at 222-23, 526 S.E.2d at 566-67.

37. *Id.* at 222, 526 S.E.2d at 567 (citing Wainwright v. Witt, 469 U.S. 412, 424 (1985)); *see also* Morgan v. Illinois, 504 U.S. 719, 729 (1992).

38. *Id.* at 222-23, 526 S.E.2d at 566-67; *see also* Wilson v. State, 271 Ga. 811, 815-16, 525 S.E.2d 339, 345 (1999). *Cf.* Pace v. State, 271 Ga. 829, 834, 524 S.E.2d 490, 499 (1999) (holding that "[a] prospective juror is not subject to excusal for cause for merely leaning for or against a death sentence"); Gulley v. State, 271 Ga. 337, 345, 519 S.E.2d 655, 662-63 (1999) (holding that the trial court did not abuse its discretion by excusing a prospective juror who knew the victims but could never vote to impose the death penalty, excusing another who "vacillated about whether he could impose the death penalty," and retaining a third who had heard about the case from the news but could set that information aside and decide the case based solely on what he heard in court); *Cromartie*, 270 Ga. at 784, 514 S.E.2d at 211 (holding that, in general, "'a juror who merely "leans" one way or the other before hearing any evidence is not disqualifed;'") (quoting Jarrell v. State, 261 Ga. 880, 881, 413 S.E.2d 710, 712 (1992)); Pruitt v. State, 270 Ga. 745, 751, 514 S.E.2d 639, 647 (1999) (denying relief when "three prospective jurors expressed a strong preference for the death penalty, [but] also stated that they could consider all the circumstances and both life and death as possible sentences").

39. 271 Ga. 783, 523 S.E.2d 294 (1999).

40. *Id.* at 789, 523 S.E.2d at 299.

> [i]t is well-settled that full-time police officers with arrest powers must be excused if challenged for cause, because it "is inherent in the nature of police duties and the closeness with which such officers are identified with criminal procedures that questions regarding possible bias, fairness, prejudice or impermissible influence upon jury deliberations inevitably arise."[41]

In *Pace v. State*,[42] the supreme court distinguished a corrections officer and a private security guard, neither of whom had arrest powers, from a police officer.[43] The trial court refused to strike both jurors for cause.[44] The supreme court affirmed.[45]

In *Wilson v. State*,[46] defendant Marion Wilson, Jr. was prosecuted for the 1996 murder of a correctional officer in a county where many people were employed by the Department of Corrections. The defense moved for a blanket disqualification of all venirepersons so employed and was denied by the trial court.[47] The supreme court affirmed, commenting that "the trial court adequately considered the potential bias of individual jurors connected to the Department of Corrections, and, accordingly, we conclude that the trial court did not err in denying Wilson's blanket motion."[48]

In *Cromartie v. State*,[49] the victim, a convenience store clerk, posed a similar jury selection issue. When two prospective jurors who had business connections with the convenience store industry were questioned about their ability to judge the case without bias, they gave what the court called "some equivocal responses."[50] On appeal the supreme court declined to second guess the trial court's acceptance of the prospective jurors' statements that they "could lay aside their opinions regarding convenience store robberies and render a verdict based solely on the evidence."[51]

At least two defendants challenged the exclusion of jurors who opposed the death penalty on religious grounds, and both claims were rejected by

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41. *Id.* at 783, 523 S.E.2d at 296 (quoting Hutcheson v. State, 246 Ga. 13, 14, 268 S.E.2d 643, 644 (1980)).
42. 271 Ga. 829, 524 S.E.2d 490 (1999).
43. *Id.* at 834, 524 S.E.2d at 500.
44. *Id.* at 834-35, 524 S.E.2d at 500.
45. *Id.* at 846, 524 S.E.2d at 512.
46. 271 Ga. 811, 525 S.E.2d 339 (1999).
47. *Id.* at 816-17, 525 S.E.2d at 346.
48. *Id.* at 816-17, 525 S.E.2d at 346.
49. 270 Ga. 780, 514 S.E.2d 205 (1999).
50. *Id.* at 784-85, 514 S.E.2d at 211-12.
51. *Id.* at 784, 514 S.E.2d at 211-12.

the Georgia Supreme Court.[52] "The standard for excusing a prospective juror based upon the prospective juror's views on the death penalty draws no religious or secular distinction."[53] The court, in *Pace*, found that the excusal of jurors opposed to the death penalty on religious grounds did not violate state and federal constitutional guarantees of religious freedom.[54]

Defendant in *Sears v State*[55] argued he was entitled to a new trial because a juror lied on the questionnaire completed before voir dire. The question at issue concerned whether the juror or any member of his family had been the victim of a crime. On remand the juror, explaining why he had not listed the unreported rape of his daughter by a brother-in-law, testified that he answered the question correctly as he understood it.[56] The Georgia Supreme Court did not see this as a lie and commented that even a correct answer would not have given rise to a challenge for cause.[57] The court quoted with favor a federal court decision stating that "'we must be tolerant, as jurors may forget incidents long buried in their minds, misunderstand a question or bend the truth a bit to avoid embarrassment.'"[58]

In *Speed v. State*,[59] an African-American venirewoman was excused because of a comment made in her presence by defense counsel. The woman indicated she believed the criminal justice system was biased against blacks and that the death penalty was more likely to be sought against African-Americans charged with killing whites. When the prosecutor asked how strongly she held these beliefs, defense counsel objected with the statement, "It's a fact. [The assistant district attorney] knows that his office seeks the death penalty more often against black defendants."[60] The State's request to have the woman excused for cause based upon the statement by defense counsel was granted by the trial court and affirmed on appeal.[61]

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52. *Id.* at 785, 514 S.E.2d at 212; *Pace*, 271 Ga. at 836, 524 S.E.2d at 501.
53. 270 Ga. at 785, 514 S.E.2d at 212.
54. 271 Ga. at 836, 524 S.E.2d at 501.
55. 270 Ga. 834, 514 S.E.2d 426 (1999).
56. *Id.* at 839-40, 514 S.E.2d at 433-34.
57. *Id.* at 840, 514 S.E.2d at 434.
58. 270 Ga. at 839-40, 514 S.E.2d at 433-34 (quoting Dyer v. Calderon, 151 F.3d 970 (9th Cir. 1998)).
59. 270 Ga. 688, 512 S.E.2d 896 (1999).
60. *Id.* at 691, 512 S.E.2d at 903.
61. *Id.*

III. TRIAL ON GUILT/INNOCENCE

This section will discuss those trial issues particularly relevant to a death penalty case. In *Nance v. State*,[62] the defense announced before trial its intention to present expert mental health testimony in a possible sentencing phase.[63] An established rule provides that in this circumstance, the defendant is required to submit to a mental health examination by a state expert who could then respond to such defense testimony.[64] In the course of this examination by Dr. Theresa Sapp and after *Miranda* warnings, Michael Wayne Nance told her he had used cocaine and marijuana before the bank robbery and accompanying murder.[65] In its case in chief during the guilt phase, the prosecutor called Dr. Sapp as a lay witness. Over Nance's objection she testified to the admissions of drug use the morning of the crime.[66] The supreme court held this was error, noting that "[a]ccess to the defendant's psyche was permitted so the State could respond to the defendant's mental health expert, *not to gather incriminating statements that bolster the State's case.*"[67] The court concluded by stating:

> We therefore restate our holding in *Abernathy* that when a defendant must submit to a court-ordered mental health examination because he wishes to present expert mental health testimony at trial, *the State expert may only testify in rebuttal to the testimony of the defense expert or to rebut the testimony of the defendant himself.* The trial court erred by allowing the State to introduce this evidence other than in rebuttal; however, we conclude that the evidence that Nance ingested alcohol and illegal drugs on the morning of the murder was harmless due to the overwhelming evidence of his guilt.[68]

In *Cromartie*, which dealt with the murder of a convenience store clerk during a robbery, the defense sought to have the jury instructed on felony murder as a lesser included offense of malice murder.[69] Ray Jefferson Cromartie was not indicted for felony murder but for malice murder. The supreme court held the issue was controlled by *Henry v.*

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62. 272 Ga. 217, 526 S.E.2d 560 (2000).
63. *Id.* at 218, 526 S.E.2d at 564.
64. Abernathy v. State, 265 Ga. 754, 755, 462 S.E.2d 615, 616 (1995); Jenkins v. State, 265 Ga. 539, 540, 458 S.E.2d 477, 478 (1995).
65. 272 Ga. at 219, 526 S.E.2d at 564.
66. *Id.*
67. *Id.* at 220, 526 S.E.2d at 565 (emphasis added).
68. *Id.* at 220-21, 526 S.E.2d at 565-66 (emphasis added) (citations ommitted).
69. 270 Ga. at 787, 514 S.E.2d at 213.

State,[70] and that the defense was not entitled to such a jury charge.[71] The court stated that this was a meaningless distinction because evidence in the record was sufficient to make defendant eligible for a death sentence under *Tison v. State*[72] and *Jefferson v. State*,[73] had he been convicted of felony murder.[74]

The Georgia Supreme Court has also said a defendant asserting at the guilt phase his ineligibility for the death penalty under O.C.G.A. section 17-7-131(c)(3) because of mental retardation still had the burden of proof "beyond a reasonable doubt."[75]

The court in *Sears* affirmed that the crime of kidnapping with bodily injury, when the injury was the death of the victim, was a capital offense.[76]

IV. THE SENTENCING HEARING

A Georgia defendant convicted of murder under O.C.G.A. section 16-5-1,[77] in a case in which the district attorney has announced his intention to seek a death penalty, then proceeds to a sentencing hearing before the same jury.[78] In *Wilson* the supreme court reaffirmed that "[a]llowing opening statements at the beginning of the sentencing phase is the better practice, *but is not required.*"[79]

In *Carruthers v. State*,[80] victim impact testimony by a psychiatrist who treated the victim's mentally handicapped child, both before and after the murder, was held to be proper.[81] The court observed that O.C.G.A. section 17-10-1.2 specifically authorized testimony from witnesses "having personal knowledge of the impact of the crime on the victim, the victim's family, or the community."[82] The court went on to

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70. 265 Ga. 732, 462 S.E.2d 737 (1995) (holding that felony murder is not a lesser included offense of malice murder because it requires additional proof).

71. 270 Ga. at 787, 514 S.E.2d at 213.

72. 481 U.S. 137 (1987).

73. 256 Ga. 821, 353 S.E.2d 468 (1987).

74. 270 Ga. at 787-88, 514 S.E.2d at 213-14.

75. Palmer v. State, 271 Ga. 234, 237, 517 S.E.2d 502, 506 (1999).

76. 270 Ga. at 841, 514 S.E.2d at 434.

77. O.C.G.A. § 16-5-1 (1998).

78. *Id.* §§ 17-10-2, -30.

79. 271 Ga. at 818, 525 S.E.2d at 347 (emphasis added) (citing Smith v. State, 270 Ga. 240, 250, 510 S.E.2d 1, 11 (1998)).

80. 272 Ga. 306, 528 S.E.2d 217 (2000).

81. *Id.* at 317, 528 S.E.2d at 227.

82. *Id.* (quoting O.C.G.A. § 17-10-1.2 (1998)).

observe "the testimony was narrowly tailored"[83] as required by *Turner v. State*.[84]

Similarly, the supreme court reiterated the general rule that "it is not error to admit a photograph of the victim while in life."[85] However, the court in *Wilson* observed that "the better practice is to have the photograph identified by someone other than a close relative of the victim."[86]

Also in *Wilson,* the court held that prosecutors could present the jury with evidence of a defendant's juvenile record as well evidence of adult conduct that had not resulted in a conviction.[87] So long as "[e]vidence of bad character and previous crimes [was] reliable," it could go to the jury.[88] Such "evidence of acts reflecting bad character need not be evaluated according to the reasonable doubt standard."[89]

In a 1998 decision the Georgia Supreme Court held that "no unnecessary restrictions should be imposed on the mitigation evidence that a defendant can present in the sentencing phase regarding his individual background and character."[90] In *Barnes v. State*,[91] the trial court excluded love poems defendant had written to his wife, and defendant won a new sentencing phase because of the error.[92]

The court returned to and appeared to limit *Barnes* in *Pace*.[93] The court affirmed the exclusion of mitigation testimony as hearsay. A friend had been offered to testify about the contents of inspirational letters she had received from the defendant but had later thrown away. Pace argued that the rules of evidence were relaxed in the sentencing phase of a capital trial.[94] In affirming the trial court, the supreme

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83. *Id.*

84. 268 Ga. 213, 214-16, 486 S.E.2d 839, 841-42 (1997).

85. 271 Ga. at 344, 519 S.E.2d at 662.

86. 271 Ga. at 819, 525 S.E.2d at 347-48; *see also Speed*, 270 Ga. at 692, 512 S.E.2d at 904.

87. 271 Ga. at 822, 525 S.E.2d at 350.

88. *Id.*

89. *Id.* at 823, 525 S.E.2d at 350; *see also Pace*, 271 Ga. at 842, 524 S.E.2d at 505 (allowing evidence of burglaries and other crimes committed by defendant); *Terrell*, 271 Ga. at 788, 523 S.E.2d at 299 (approving as non-statutory aggravation testimony that defendant "set a fire in his jail cell while awaiting trial"); *Gulley*, 271 Ga. at 345, 519 S.E.2d at 663 (allowing as bad character evidence testimony by a court-appointed psychiatrist that defendant said he did not use drugs but had sold cocaine for several years).

90. Barnes v. State, 269 Ga. 345, 360, 496 S.E.2d 674, 689 (1998).

91. 269 Ga. 345, 496 S.E.2d 674 (1998).

92. *Id.* at 360, 496 S.E.2d at 689.

93. 271 Ga. at 843, 524 S.E.2d at 505.

94. *Id.*

court wrote "the hearsay rule is not suspended in the sentencing phase, and the defense made no proffer to enable the Court to determine if the mitigating influence of the excluded testimony outweighed the harm from violation of the hearsay rule."[95]

A similar issue arose in *Gulley*.[96] Defendant sought to introduce a 1992 *Atlanta Journal-Constitution* newspaper article crediting a Bill Gulley with saving the lives of two people over a three-day period. Gulley sought to introduce the evidence through a friend he had shown the clipping to, claiming to be the Bill Gulley mentioned in the article. The State objected on hearsay grounds.[97] Defendant did not take the stand, and the *Constitution* reporter who wrote the article sought to quash his subpoena, stating that he could not "swear that the defendant is even the 'Bill Gulley' whom he reported on in 1992."[98] The Georgia Supreme Court ruled against Gulley, stating that "the hearsay rule is not suspended in the sentencing phase"[99] and that there were "insufficient circumstances of reliability regarding the article."[100]

In *Sears* after nine hours of sentencing phase deliberation, the jury sent a note to the trial judge stating "there is a hopeless deadlock with no hope of resolution."[101] The note indicated the jurors were split eleven to one. Defendant argued that the deadlock was a verdict for life, but the trial court declined to accept the verdict and gave the jury an *Allen* charge.[102] Deliberations continued to be extremely contentious for another period before the jury was excused for the evening. The next day, after more deliberation, the foreman and the hold-out juror both sent notes to the trial court accusing each other of misconduct. The jury was again given a form of *Allen* charge, and it retired for another two and a half hours before returning a verdict of death.[103]

On this record, the Georgia Supreme Court declined to find that the verdict was coerced by the trial court.[104] The court stated the standard of review was the totality of the circumstances.[105] "Although the jury

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95. *Id.* at 842, 524 S.E.2d at 505.
96. 271 Ga. at 346, 519 S.E.2d at 663-64.
97. *Id.*, 519 S.E.2d at 664.
98. *Id.* at 347, 519 S.E.2d at 664.
99. Smith v. State, 270 Ga. 240, 249, 510 S.E.2d 1, 9-10 (1998).
100. 271 Ga. at 347, 519 S.E.2d at 664; *see also Smith*, 270 Ga. at 249, 510 S.E.2d at 10.
101. 270 Ga. at 835, 514 S.E.2d at 430.
102. Allen v. United States, 164 U.S. 492, 494-95 (1896); *see also* WILLIAM W. DANIEL, GEORGIA CRIMINAL TRIAL PRACTICE § 24 (1999).
103. 270 Ga. at 835-39, 514 S.E.2d at 430-33.
104. *Id.* at 837, 514 S.E.2d at 432.
105. *Id.* (citing to Jenkins v. United States, 380 U.S. 445, 446 (1965)).

twice stated that it was at an eleven to one 'deadlock,' the trial court was not bound by those pronouncements."[106] The court also observed that nine hours of deliberation in a capital sentencing phase was not enough to amount to hopeless deadlock.[107] Justice Fletcher dissented with a lengthy opinion, writing that he found the threats against the holdout juror and the trial court's refusal to give the jury any guidance coercive.[108]

A similar issue was raised in *Cromartie* when, after three hours of deliberation, the jury sent out a note asking, "As jurors, we would like to know what happens if we do not come up with a unanimous vote?"[109] The trial court responded that it could not answer the jury's question and it should continue to deliberate until it reached a unanimous verdict.[110] On appeal the charge was held not to be error.[111]

The Georgia Supreme Court held that it was not error to fail to instruct the sentencing jury on specific kinds of mitigation, including residual doubt.[112] Nor was it error to decline to instruct the jury that life was the presumptive sentence and that it could only return a death sentence by unanimously finding a statutory aggravating circumstance.[113] The trial court was not required to reinstruct the jury on the definition of reasonable doubt at the sentencing hearing.[114]

In *Pruitt* defense counsel informed the court his client was acting irrationally in the sentencing hearing and sought a psychological evaluation. It turned out Pruitt was telling his lawyer he preferred a death sentence to life in prison. On appeal, the defense argued that it was error not to have an evaluation at that point.[115] But the Georgia Supreme Court found there were no indications of mental health problems with defendant.[116] "After having been informed, a competent defendant, and not his counsel, makes the ultimate decision about whether to testify or present mitigation evidence."[117]

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106. *Id.* at 838, 514 S.E.2d at 432.
107. *Id.*
108. *Id.* at 846-47, 514 S.E.2d at 438-40.
109. 270 Ga. at 789, 514 S.E.2d at 214.
110. *Id.*
111. *Id.*
112. *Id.* at 788, 514 S.E.2d at 214; *Johnson*, 271 Ga. at 385, 519 S.E.2d at 231
113. 271 Ga. at 385, 519 S.E.2d at 231.
114. 270 Ga. at 788, 514 S.E.2d at 214.
115. 270 Ga. at 756, 514 S.E.2d at 650.
116. *Id.*
117. *Id.* (citing Morrison v. State, 258 Ga. 683, 686, 373 S.E.2d 506, 508-09 (1988)).

V. PRESERVATION OF ERROR

Several times the Georgia Supreme Court refused to consider relief on an otherwise arguable claim because trial counsel had failed to properly preserve the error for review. The most striking example of the need to preserve error came in *Holsey v. State*[118] in which the jury was taken to view a crime scene without defendant being present. Robert Wayne Holsey was being prosecuted in Morgan County for robbing a convenience store and later shooting a responding deputy to death. At a viewing of the convenience store, a juror asked questions about the physical layout which, with the agreement of defense counsel, were answered by an unsworn and unidentified witness. When the situation was later discussed in court, defendant's attorney again made no objection, and Holsey made no comment. Holsey objected for the first time on appeal.[119] The Georgia Supreme Court found that Holsey acquiesced and that the issue was not preserved for appellate review.[120]

Another viewing by a jury was appealed in *Wilson*.[121] This time the trial judge was not present when the jury drove by the crime scene in a bus, pausing momentarily to observe.[122]

> The defense objected to having the trial judge travel on the bus with the jury, and the trial court acceded to the objection . . . . The trial court dismissed the jury from the courtroom to board the bus with instructions . . . that they were to recognize their arrival at the crime scene based on their memory of street names discussed at trial and by the momentary pause of the bus.[123]

Defendant did not raise any objections to any aspect of this procedure until the appeal.[124] The Georgia Supreme Court found no error, stating that:

> the absence of the trial judge from the trial proceedings is reversible error *when it is objected to and when it results in some harm.* However, in this case, *no objection was made to the trial judge's brief*

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118. 271 Ga. 856, 524 S.E.2d 473 (1999).
119. *Id.* at 860-61, 524 S.E.2d at 477-78.
120. *Id.*
121. 271 Ga. at 817, 525 S.E.2d at 346.
122. *Id.*
123. *Id.*
124. *Id.*

> *absence*, and the defendant and his counsel, who were both present at the jury view, are unable to demonstrate any harm.[125]

Also in *Wilson* the defense sought to introduce hearsay evidence that a codefendant had told fellow inmates that he was involved with the actual murder.[126] Invoking O.C.G.A. section 24-3-5, "Declarations of conspirators,"[127] the defense tried to present this hearsay evidence to the jury.[128] In discussing the issue on appeal, the Georgia Supreme Court observed that "this type of hearsay evidence is generally inadmissible" but that "there may be exceptional circumstances that make the hearsay evidence sufficiently reliable and necessary to require its admission."[129] The majority went on to state that:

> whenever defense counsel seeks to admit this type of hearsay evidence to support a claim that someone other than the defendant is responsible for the crimes being tried [counsel must follow certain procedures]: it "must make a proffer in which the reliability and necessity of the hearsay evidence are thoroughly set out and the trial court's ruling must reflect consideration of the proffered evidence and a determination that the evidence does or does not show 'persuasive assurances of trustworthiness,' or was made under circumstances providing considerable assurance of its reliability."[130]

Wilson failed to follow these procedures.[131] Therefore, the supreme court held that the trial court did not err in failing to address whether the hearsay evidence "was sufficiently reliable, relevant, and necessary to require its admission in the guilt/innocence phase of Wilson's trial."[132]

At another point in the *Wilson* trial, the prosecution introduced sentencing hearing evidence that defendant was involved with the "Folks gang," that he was "claiming to be the gang's 'chief enforcer,' that the gang required its members to commit violent criminal acts, and that his residence contained materials consistent with his gang membership."[133] On appeal Wilson argued that under *Dawson v. Delaware*,[134] this

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125. *Id.* (citations omitted) (emphasis added).
126. *Id.* at 814, 525 S.E.2d at 345.
127. O.C.G.A. § 24-3-5 (1998).
128. 271 Ga. at 814, 525 S.E.2d at 345.
129. *Id.* at 814-15, 525 S.E.2d at 344-45.
130. *Id.* at 815, 525 S.E.2d at 345 (quoting Turner v. State, 267 Ga. 149, 155, 476 S.E.2d 252, 258-59 (1996)).
131. *Id.*
132. *Id.*
133. *Id.* at 814, 525 S.E.2d at 344.
134. 503 U.S. 159 (1992).

evidence violated his constitutional rights to free speech and association.[135] The Georgia Supreme Court declined to discuss the claim, pointing out that "[b]ecause the evidence in question was not objected to at trial, Wilson is barred from challenging its introduction on appeal."[136]

In *Pace* defendant complained on appeal about the prosecutor's closing argument at the sentencing phase in which he called upon biblical parables and urged the jurors to put themselves in the shoes of the four elderly victims when considering defendant's sentence.[137] The Georgia Supreme Court, finding no error, pointed out that in both instances, defense counsel had failed to object.[138]

VI. MANDATORY REVIEW

Georgia's death penalty statute requires an appeal to the supreme court whether a defendant seeks it or not.[139] Three areas of mandatory review in the statute are: 1) whether the death sentence was the result of "passion, prejudice, or any other arbitrary factor"; 2) whether the record supports the finding of the necessary statutory aggravating circumstance; and 3) whether the death sentence was "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[140]

The death sentence in a Clayton County case was set aside on the basis of passion, prejudice, or any other arbitrary factor when biblical quotes had become a feature of the prosecutor's closing argument.[141] Anthony Carruthers' defense counsel filed a pretrial motion in limine to prevent the use of biblical passages or otherwise to ask the jury to impose a death sentence based upon religion.[142] In his closing the assistant district attorney said, "[L]et me talk to you a moment about some biblical references that help us in this case," and went on to

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135. 271 Ga. at 813, 525 S.E.2d at 344.

136. *Id.* at 814, 525 S.E.2d at 344.

137. 271 Ga. at 844, 524 S.E.2d at 506-507.

138. *Id.* at 843-44, 524 S.E.2d at 506-07; *see also Wilson*, 271 Ga. at 816, 524 S.E.2d at 345 (a venireman had conversed with the murder victim about the Bible three times, but defense counsel failed to move to strike for cause); *Gulley*, 271 Ga. at 344-46, 519 S.E.2d at 662-64 (counsel failed to object at trial to evidence of a crime victim praying out loud in the moments before she died, claims of trial court bias, and to improper closing argument by prosecution); *Palmer*, 271 Ga. at 240, 517 S.E.2d at 508 (failure to request a victim-impact evidence jury charge precluded the issue from being challenged on appeal).

139. O.C.G.A. § 17-10-35 (1998).

140. *Id.*

141. Carruthers v. State, 272 Ga. 306, 528 S.E.2d 217 (2000).

142. *Id.* at 308, 528 S.E.2d at 221.

discuss how he read the Bible to require a death sentence.[143] Because the trial court denied the motion in limine, the standard of review was "not whether the improper argument in reasonable probability changed the result of the trial, but simply whether the argument was objectionable and prejudicial."[144] In discussing the issue the majority noted that a defendant's "right to due process" was secured by the review required by O.C.G.A. section 17-10-35.[145]

In its discussion the majority recognized that the court has "long declined to disapprove of passing, oratorical references to religious texts in arguments by counsel."[146] It went on to state:

> It is difficult to draw a precise line between religious arguments that are acceptable and those that are objectionable, but we conclude that the assistant district attorney in this case overstepped the line in directly quoting religious authority as mandating a death sentence. In citing specific passages, he invoked a higher moral authority and diverted the jury from the discretion provided to them under state law. One passage cited explicitly states that whoever sheds another person's blood shall have his own blood shed by man; another states that those "who take the sword shall die by the sword." The prosecutor was equally emphatic on the conclusion to be drawn from these passages: "this is a message that is very clear, that society must deter criminals." *Language of command and obligation from a source other than Georgia law should not be presented to a jury.*[147]

In *Drane v. State*,[148] the question of whether Leonard Drane's Elbert County death sentence was proportionate to the life sentence received by his codefendant, David Willis, was discussed at length.[149] Drane and Willis were convicted of murdering a prostitute by savagely beating her and cutting her throat. At jury trials the codefendant received a life sentence, and Drane was sentenced to death. Drane argued for the second time that his sentence was disproportionate to that received by Willis.[150] The court rejected his claim with a recital of facts it thought were established by the record:

> The state presented evidence that Drane cut the victim's throat while she was still breathing, helped dump her body and destroy evidence,

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143. *Id.*
144. *Id.* at 308-10, 528 S.E.2d at 221-22.
145. *Id.* at 311, 528 S.E.2d at 222-23.
146. *Id.* at 309, 528 S.E.2d at 221.
147. *Id.* at 310, 528 S.E.2d at 222 (emphasis added).
148. 271 Ga. 849, 523 S.E.2d 301 (1999).
149. *Id.* at 855, 523 S.E.2d at 306-07.
150. *Id.* at 849, 523 S.E.2d at 303.

> and made disparaging remarks about the victim after her murder. There was also penalty phase evidence that Drane sexually assaulted another woman on the same night as the murder .... The death sentence is also not disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.[151]

VII. STATE HABEAS CORPUS

State and federal post conviction proceedings are almost always a feature of prosecutions resulting in a death penalty that is affirmed on direct appeal. Often such petitions for habeas corpus relief include claims of ineffective assistance of counsel.

Tommy Lee Waldrip was sentenced to death, and his conviction was affirmed by the Georgia Supreme Court.[152] He sought habeas relief alleging ineffective assistance of counsel.[153] The court granted the government's motion to compel access to trial and appellate counsel's entire file in discovery.[154] Waldrip appealed the scope of that discovery order to the Georgia Supreme Court.[155] The court agreed with Waldrip that complete disclosure was too broad:

> Following the rule adopted in other states, we hold that the filing of an ineffective assistance claim is an implied waiver of the attorney-client privilege limited to the documents that are relevant to the petitioner's claim. Because of the potential problems that would be created by public disclosure of the documents, we further conclude that Waldrip is entitled to a protective order prohibiting disclosure of the files obtained in this habeas proceeding to persons other than those needed to assist the warden in rebutting the claim of ineffectiveness.[156]

VIII. THE GEORGIA ELECTRIC CHAIR

The court had several opportunities to comment on the constitutionality of execution in the Georgia electric chair. The court was likely

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151. *Id.* at 855, 523 S.E.2d at 306-07. Other decisions gave only perfunctory discussion of the issue. *See, e.g., Wilson*, 271 Ga. at 823-24, 525 S.E.2d at 351; *Gulley*, 271 Ga. at 348, 519 S.E.2d at 664-65; *Johnson*, 271 Ga. at 385, 519 S.E.2d at 232; *Pruitt*, 270 Ga. at 756, 514 S.E.2d at 651; *Sears*, 270 Ga. at 845-46, 514 S.E.2d at 437; *Cromartie*, 270 Ga. at 789, 514 S.E.2d at 215; and *Speed*, 270 Ga. at 700, 512 S.E.2d at 910.

152. Waldrip v. State, 267 Ga. 739, 482 S.E.2d 299 (1997).

153. Waldrip v. Head, 272 Ga. 572, 572, 532 S.E.2d 380, 383 (2000).

154. *Id.*

155. *Id.*

156. *Id.* at 573, 532 S.E.2d 384.

mindful of recent developments on the Florida[157] and Alabama[158] electric chairs. Even against that backdrop the majority of the court rejected challenges to the electric chair with no discussion.[159] Justice Sears dissented as to the constitutionality of the electric chair in *Wilson*, writing that the majority made its decision "without the benefit of forthcoming guidance from the United States Supreme Court on that issue, and without an analysis of the voluminous evidence that is available regarding the constitutional implications of electrocution."[160]

The 2000 General Assembly addressed the issue by amending the relevant statutes to provide that after May 1, 2000, or in the event a court of competent jurisdiction found the electric chair violated the state or federal constitution, all inmates sentenced to death in Georgia would be executed by lethal injection.[161]

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157. A series of botched electrocutions brought two 4-3 decisions by the Florida Supreme Court barely approving the continued use of the electric chair. Jones v. State, 701 So. 2d 76 (Fla. 1997); Provenzano v. Moore, 744 So. 2d 413 (Fla. 1999). On October 26, 1999 the Supreme Court granted certiorari and a stay of execution in an Eighth Amendment challenge to the Florida electric chair. Bryan v. Moore, 120 S. Ct. 394, 394 (1999). This was followed by a special session of the Florida Legislature, which enacted a lethal injection "election" statute at section 922.10, Florida Statutes. Based upon this legislative response, the Supreme Court then granted a motion by the Florida Attorney General to dismiss the grant of certiorari as improvidently granted. Bryan v. Moore, 120 S. Ct. 1003, 1003 (2000).

158. Less than a month after withdrawing certiorari in the Florida case, the Supreme Court entered a stay in another Eighth Amendment electric chair challenge out of Alabama. Tarver v. Alabama, 120 S. Ct. 1005, 1005 (2000). This was widely read as a signal that the electric chair's days were numbered. Three weeks later in an unusual memorandum opinion that announced four justices would have set the case for oral argument the Supreme Court denied certiorari. *In re* Tarver, 120 S. Ct. 1235, 1235 (2000). Robert Lee Tarver Jr. was subsequently electrocuted. Killer who called chair cruel is executed in it, ATLANTA CONST., April 15, 2000, at A9.

159. *See, e.g., Holsey*, 271 Ga. at 863, 524 S.E.2d at 480; *Sears*, 270 Ga. at 845, 514 S.E.2d at 437 (relying upon DeYoung v. State, 268 Ga. 780, 786, 493 S.E.2d 157, 165 (1997), where Presiding Justice Fletcher was joined by Chief Justice Benham in an unusual concurring opinion urging that the Georgia Assembly revisit the electric chair).

160. 271 Ga. at 824-25, 525 S.E.2d at 351 (Sears, J., dissenting). Justice Sears dissented on the same grounds in subsequent cases. *See, e.g., Pace*, 271 Ga. at 846, 524 S.E.2d at 508; *Holsey*, 271 Ga. at 864, 524 S.E.2d at 480; *Drane*, 271 Ga. at 856, 523 S.E.2d at 307.

161. O.C.G.A. §§ 17-10-33, -38, -41 (Supp. 2000). Each of these provisions was amended to remove language referring to the electric chair, and, when necessary, to replace it with language referring to lethal injection. *See also* 2000 GA. LAWS 947, § 1 (stating that the Georgia Assembly intends "to provide for execution by lethal injection for persons sentenced to death after conviction of capital crimes committed on or after May 1, 2000" and to provide for execution by lethal injection for those "sentenced to death for crimes committed prior to the effective date" if a court of competent jurisdiction finds that electrocution violates either the Georgia Constitution or the United States Constitutuion).

IX. UNIFIED APPEAL

The supreme court amended the rules of the Unified Appeal with significant changes effective January 27, 2000.[162] Established in 1989, the Unified Appeal begins, "[t]he proceedings outlined here shall be applicable only in cases in which the death penalty is sought."[163]

The Unified Appeal mandates two defense attorneys in all death penalty cases, a lead counsel and cocounsel, often called second chair.[164] For the first time, the lead attorney must: 1) have a minimum experience level consisting of one death penalty trial to verdict or three capital but nondeath penalty trials to verdict; 2) be familiar with the Unified Appeal procedures; 3) be familiar with the kinds of expert testimony that is commonly part of death penalty trials; and 4) have attended at least ten hours of specialized training on death penalty defense preceeding trial and an additional ten hours for each year during the life of the case.[165] The second chair must 1) have three years of criminal trial experience; 2) have been lead or cocounsel in at least one nondeath penalty murder trial or two felony jury trials; and 3) meet the same specialized training requirements as lead counsel.[166] Trial judges can make exceptions to these minimum requirements "for good cause" provided the reasons are set forth on the record.[167]

Also, for the first time, the court has included the twelve-page form for the required Judge's Report.[168] The amendments also update the law set out in the checklist.

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162. GA. R. UNIFIED APP. (2000).
163. *Id.*
164. *Id.* 2(A)(1).
165. *Id.* 2(A)(1)(a)(2), (3), (4) & (5).
166. *Id.* 2(A)(1)(b)(1), (2) & (3).
167. *Id.* 2(A)(3).
168. O.C.G.A. § 17-10-35(a) (2000) requires a trial judge's report "in the form of a standard questionnaire prepared and supplied by the Supreme Court."

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