Death Penalty Law

by Michael Mears*

This Article is a survey of death penalty decisions from the Georgia Supreme Court for the period of June 1, 2001 through May 31, 2002.[1] The discussion encompasses cases heard by the Georgia Supreme Court both on direct appeal and on review of habeas corpus decisions related to death penalty law in Georgia. The scope of this Article is limited to decisions that affect the trial and appeal of death penalty cases. Therefore, with a few exceptions, this Article does not discuss holdings in capital cases that are common to all criminal appeals. Because of their significant impact on Georgia's death penalty law, two recently decided U.S. Supreme Court decisions are included in the survey.

I. PRETRIAL ISSUES

This section covers prosecutorial discretion in seeking the death penalty, indictment, search and seizure, confessions and admissions, discovery, change of venue, and recusal of the district attorney.

A. Prosecutorial Discretion in Seeking the Death Penalty

Appellant in *Lance v. State*[2] was convicted of two counts of malice murder, burglary, and possession of a firearm during the commission of a crime. Appealing his death sentence, Lance sought review of a denied motion to quash the State's notice of intent to seek the death penalty.[3]

---

* Director of the Georgia Multi-County Public Defender since 1992. Mississippi State University (B.S., 1968; M.A., 1969); University of Georgia School of Law (J.D., 1977). Member, State Bar of Georgia. The author of this Article would like to acknowledge the researching and writing assistance of Shelby C. Harrell, J.D. class 2004, Hastings College of Law. The author would also like to acknowledge the editing and blue-booking assistance of Irene I. Kim, J.D. class 2003, Boston College Law School, Executive Editor of Boston College Third World Law Journal.

1. For a survey of death penalty decision handed down during the prior year, see Mike Mears & Ken Driggs, *Georgia Death Penalty Law*, 52 MERCER L. REV. 29 (1999-2000).
2. 275 Ga. 11, 560 S.E.2d 663 (2002).
3. *Id.* at 14, 560 S.E.2d at 671.

The Georgia Supreme Court affirmed the trial court's decision, finding that the evidence was sufficient to enable a rational trier of fact to find proof beyond a reasonable doubt that the statutory aggravating circumstance supported the death sentence for the murder.[4] Referring to *Speed v. State*[5] and *Jenkins v. State*,[6] the court stated, "in order for the trial court to have granted appellant's motion, appellant would have had to prove that the State could not prove its case against him."[7]

The court, using the same reasoning, made a similar ruling in *McPherson v. State*.[8] Appellant, convicted of malice murder, financial transaction card theft, and two counts of theft by taking, filed a motion to quash the State's notice of intent to seek the death penalty.[9] As in *Lance*, the trial court denied the motion, and the decision was affirmed by the Georgia Supreme Court because it found sufficient evidence to prove beyond a reasonable doubt the aggravating circumstances that made appellant eligible for a death sentence.[10]

Further, the court in *Brannan v. State*[11] held that the trial court was correct in denying appellant's motion to exclude the death penalty on account of the arbitrary use of prosecutorial discretion in the plea bargaining process.[12] Brannan, convicted of malice murder, contended that the State had too much discretion in choosing either to seek the death penalty or to offer a plea bargain.[13] Citing *Gregg v. Georgia*,[14] the court found Brannan's contention without merit, noting, "Georgia law authorizes the death penalty for Brannan's crime, and he has failed

---

4. *Id*.

5. 270 Ga. 688, 512 S.E.2d 896 (1999). In *Speed* the court stated that

> "after reviewing the evidence in the light most favorable to the jury's determination of guilt, we conclude that a rational trier of fact could have found Speed guilty of malice murder beyond a reasonable doubt. The evidence was also sufficient to enable the jury to find the existence of the statutory aggravating circumstances beyond a reasonable doubt."

Id. at 689-90, 512 S.E.2d at 902.

6. 269 Ga. 282, 498 S.E.2d 502 (1998). The court in *Jenkins* held, "The evidence adduced was sufficient to enable a rational trier of fact to find Jenkins guilty of the crimes charged beyond a reasonable doubt." *Id.* at 284, 498 S.E.2d at 507.

7. 275 Ga. at 14, 560 S.E.2d at 671.

8. 274 Ga. 444, 446, 553 S.E.2d 569, 573 (2001).

9. *Id*. at 446, 553 S.E.2d at 573.

10. *Id*.

11. 275 Ga. 70, 561 S.E.2d 414 (2002).

12. *Id.* at 72, 561 S.E.2d at 420.

13. *Id.*

14. 428 U.S. 153, 199 (1976) (holding that the death penalty was constitutional so long as the states did not enforce it arbitrarily).

to show that the prosecutor acted in an unconstitutional manner with respect to his case."[15]

B. Indictment

Appellant in *Raheem v. State*[16] argued that the trial court erred in overruling his demurrer of the indictment that charged him with felony murder and possession by a convicted felon of a firearm, which caused the victims' deaths.[17] Appellant argued that

> because the contested counts of his indictment did not specify how or why the possession of the firearm was necessarily inherently dangerous to the victims, those counts failed to satisfy the requirement that a charge in an indictment be "wholly complete within itself, and plainly, fully, and distinctly set out the crime charged in that count."[18]

The court ruled appellant's argument was without merit because the indictment was "in the 'terms and language' of the Code and was fully sufficient to place him on notice of the issues to be decided and to allow him an opportunity to prepare his defense."[19]

The court similarly upheld the trial court's denial of a demurrer to the indictment in *Lucas v. State*[20] because the indictment "tracked the language of the Georgia Code, could be clearly and easily understood, and provided adequate notice of the crimes charged."[21]

C. Search and Seizure

In *Raheem* appellant Raheem appealed his death sentence for two counts of malice murder and four counts of felony murder, arguing that his arrest was unlawful because it was made in his residence without a warrant.[22] Appellant was living with his girlfriend, the sole lessee of the apartment. The trial court found that because appellant's girlfriend gave valid consent for police entry into the apartment, the entry was

---

15. 275 Ga. at 72, 561 S.E.2d at 420 (citing Jenkins v. State, 269 Ga. 282, 498 S.E.2d 502 (1998); Rower v. State, 264 Ga. 323, 443 S.E.2d 839 (1994)).

16. 275 Ga. 87, 560 S.E.2d 680 (2002).

17. *Id.* at 87-88, 560 S.E.2d at 682.

18. *Id*. at 89, 560 S.E.2d at 683 (quoting Smith v. Hardrick, 266 Ga. 54, 55, 464 S.E.2d 198, 200 (1995)).

19. *Id.* (quoting O.C.G.A. § 17-7-54 (1997), which provides that "[e]very indictment of the grand jury which states the offense in the terms and language of this code or so plainly that the nature of the offense charged may easily be understood by the jury shall be deemed sufficiently technical and correct.").

20. 274 Ga. 640, 555 S.E.2d 440 (2001).

21. *Id.* at 645, 555 S.E.2d at 446.

22. 275 Ga. at 92, 560 S.E.2d at 685.

lawful.[23] The Georgia Supreme Court noted that "[a] warrant is required for an arrest made inside the arrested person's residence, absent consent or exigent circumstances."[24] Here, the court concluded that Raheem's girlfriend's consent to search the apartment was valid, and obviated the need for an arrest warrant because the requirement for a warrant "does not apply where entry into the arrested person's residence is consented to by a third party who shares common authority over the residence."[25]

Likewise, the court in *Presnell v. State*[26] upheld the admission of a handgun and books of child pornography seized from appellant's residence during a warrantless police search.[27] There, a search warrant was not necessary because appellant's mother consented to the search of his bedroom.[28] Appellant lived with his mother in the apartment, but "his mother had common control and authority over his bedroom and . . . she could therefore consent to a search of that area."[29] Presnell also argued that a warrant issued later to search his vehicle was illegal because the magistrate was not neutral and had a pecuniary interest in issuing the warrant.[30] The court, without sharing its reasoning, dismissed this argument, stating instead that the search warrant was "facially valid and supported by probable cause."[31]

Appellant in *Brannan* contended that the hospital employee who took a blood sample, which was later used to test for marijuana, was acting as an agent of the State, thereby requiring the suppression of the evidence.[32] However, the court, without explanation, stated there was not enough evidence to prove the allegation.[33] The court then summarily affirmed the trial court's ruling that the evidence was admissible and that the warrant used to obtain the blood sample was proper and based on probable cause.[34]

---

23. *Id.* at 92-93, 560 S.E.2d at 685-86.
24. *Id.* at 92, 560 S.E.2d at 646 (citing Payton v. New York, 445 U.S. 573, 583 (1980)).
25. *Id*. at 93, 560 S.E.2d at 686 (citing Illinois v. Rodriguez, 497 U.S. 177, 181 (1990)); *See also* Payton v. New York, 445 U.S. 573 (1980); Thompson v. State, 248 Ga. 343, 285 S.E.2d 685 (1981).
26. 274 Ga. 246, 551 S.E.2d 723 (2001).
27. *Id.* at 252, 551 S.E.2d at 731.
28. *Id*.
29. *Id*.
30. *Id*.
31. *Id.*
32. 275 Ga. at 73, 561 S.E.2d at 420.
33. *Id.*
34. *Id*.

Brannan also contended that two searches of his home were improper. Police had an arrest warrant, but when they came to the house, appellant was not there as he had run to the woods. Police seized two rifles that were leaning against the side of the house, one of which was the murder weapon.[35] Both the trial court and the Georgia Supreme Court admitted the evidence, stating that "a police officer inside a suspect's home pursuant to a valid arrest warrant may seize evidence in plain view."[36]

In *Lance* appellant argued that evidence obtained during an unlawful arrest should have been suppressed. The search produced an empty shoebox that was of the size and type of shoe that matched the imprints found at the scene of the crime and an unspent shotgun shell that matched ammunition used in the murder.[37] The Georgia Supreme Court rejected the argument and affirmed the trial court's admission of the evidence, noting, "There is no merit in this argument since the consent form Lance signed clearly indicated the potentially extensive scope of the search to be conducted, Lance gave oral consent to the scope of the search actually conducted, and Lance attended the actual search and never withdrew his consent."[38] Appellant further complained that police improperly relied upon a confidential witness to show probable cause for a warrant. He maintained that several unnamed witnesses, who were not proved to be reliable, were described in the affidavit and used in the application for the warrant.[39] Although the court admitted this was true, the court continued by saying the witnesses were likely to have been "merely 'citizen informers' rather than the sort of 'informants' typically deemed suspect without a showing of reliability."[40] Additionally, sufficient facts "from named and reliable sources were presented in the affidavit to show probable cause," making the issued warrant legal.[41]

---

35. *Id*.

36. *Id.* (citing May v. State, 181 Ga. App. 228, 351 S.E.2d 649 (1986)).

37. 275 Ga. at 12-13, 19, 560 S.E.2d at 670.

38. *Id*. at 20, 560 S.E.2d at 675 (citing Hall v. State, 239 Ga. 832, 832-33, 238 S.E.2d 912, 913 (1977) (holding where actual consent is given, considerations applicable to non-consensual searches generally do not apply)).

39. *Id.* at 20-21, 560 S.E.2d at 675.

40. *Id*. at 21, 560 S.E.2d at 675. *See* LA FAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.3, at 88-89, § 3.4(a), at 205 (3d ed. 1996).

41. 275 Ga. at 21, 560 S.E.2d at 675.

D. Confessions and Admissions

In *Rhode v. State*,[42] appellant sought review of the trial court's refusal to suppress evidence and statements made in interviews at appellant's home, the County Sheriff's office, and later statements made after police had advised appellant of his *Miranda*[43] rights. In the interviews, appellant admitted he fired at the victims. Following the interviews, appellant led law enforcement officers to two locations where he and co-appellant had secreted weapons and other items.[44] The supreme court affirmed the lower court's decision, stating first that "*Miranda* warnings were not required to be given at any point before they actually were because Rhode was not then under arrest or confronted with circumstances that would have led a reasonable person in his position to believe he or she was under arrest."[45] Secondly, "Rhode's statements were voluntary[;] . . . he never requested an attorney or wished to remain silent."[46]

The court ruled that videotaped confessions in both *Lucas* and *Raheem* were voluntarily made after appellants had been advised of and waived their rights.[47] In *Lucas* appellant made a videotaped confession to investigators and testified regarding his inculpatory statement to a friend.[48] The Georgia Supreme Court found that, consistent with section 24-3-50 of the Official Code of Georgia Annotated ("O.C.G.A."), the statements were "not induced by 'the slightest hope of benefit or remotest fear of injury,'" and were therefore admissible.[49]

In *Raheem* appellant argued, based on an inaudible section of a videotaped interview, that the previous consent to questioning was interrupted when he asked if the statement could be used in court and the police answered negatively. The trial court denied appellant's motion to suppress the videotape after first examining the officers present at the interview and reviewing the inaudible section of the tape where the alleged question was asked.[50] The trial court determined "there is no evidence that whatever inquiry the [appellant] was making at the time in question was any inquiry as to whether or not his

---

42. 274 Ga. 377, 552 S.E.2d 855 (2001).
43. *See* Miranda v. Arizona, 384 U.S. 436 (1966).
44. 274 Ga. at 381, 552 S.E.2d at 861.
45. *Id. See also Miranda*, 384 U.S. 436 (1966); Hightower v. State, 272 Ga. 42, 526 S.E.2d 836 (2000).
46. 274 Ga. at 381, 552 S.E.2d at 861.
47. 274 Ga. at 644, 555 S.E.2d at 445-46; 275 Ga. at 93, 560 S.E.2d at 686.
48. 274 Ga. at 641, 555 S.E.2d at 443.
49. *Id.* at 644, 555 S.E.2d at 446 (quoting O.C.G.A. § 24-3-50 (1995)).
50. 275 Ga. at 93, 560 S.E.2d at 686.

statement would be used in court . . . ."[51] The supreme court affirmed the trial court's assessment.[52]

The Georgia Supreme Court also admitted appellant's confession in *Johns v. State*.[53] Without explanation, the court determined that appellant's statements, "'I'm sorry. I'm so sorry I done it. I'm sorry.' . . . were spontaneous and voluntary . . . [and] not made in response to custodial interrogation or its functional equivalent."[54] Appellant contended that he had not yet been advised of his rights, and therefore, the statements were inadmissible.[55] The court rejected his contention, saying that because the statements were voluntary, it was irrelevant that appellant had not yet been advised of his *Miranda* rights.[56]

In *Taylor v. State*,[57] appellant showed that she made an unambiguous request for counsel during her interview with police.[58] When officers asked her to talk about what happened on the date of the crime, she replied, "Can I have a lawyer present when I do that?"[59] Although officers answered that she could, they continued to question her about the events.[60] The Georgia Supreme Court concluded that the request was not ambiguous because she did not use "equivocal words such as 'might' or 'maybe' when referring to her desire for a lawyer . . . . Under the circumstances, a reasonable police officer would have understood that Taylor asked if she could have a lawyer because she wanted one."[61] It has been long recognized that the Fourth Amendment requires that "[a] suspect who asks for a lawyer at any time during a custodial interrogation may not be subjected to further questioning by law enforcement until an attorney has been made available or until the suspect reinitiates the conversation."[62] As a result, statements subsequent to Taylor's request should have been suppressed.[63]

However, the suppression of Taylor's statement, in which she referred to the gun used in the crime, does not necessarily deem the gun

---

51. *Id*.
52. *Id*. at 95, 560 S.E.2d at 687.
53. 274 Ga. 23, 549 S.E.2d 68 (2001).
54. *Id*. at 24, 549 S.E.2d at 70.
55. *Id.*
56. *Id*.
57. 274 Ga. 269, 553 S.E.2d 598 (2001).
58. *Id.* at 269, 553 S.E.2d at 598.
59. *Id*. at 270, 553 S.E.2d at 601.
60. *Id*.
61. *Id*. at 272, 553 S.E.2d at 602. *See* Davis v. United States, 512 U.S. 452 (1994).
62. 274 Ga. at 271-72, 553 S.E.2d at 661-62. *See also* Edwards v. Arizona, 451 U.S. 477, 484-85 (1981).
63. 274 Ga. at 272-73, 553 S.E.2d at 602.

inadmissible, as appellant argued.[64] The gun would be admissible if its discovery were inevitable without the statement, or if the statement is voluntary, thereby not violating the suspect's Fifth Amendment protection against self-incrimination.[65] Here, the discovery of the gun was not inevitable without the appellant's statement, but the court determined that the statement was voluntary and in keeping with constitutional demands.[66] The court explained, "a violation of a suspect's rights under *Edwards v. Arizona* does not mean that the suspect's ensuing statement was involuntary. Under Georgia law, '[t]o make a confession admissible, it must have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury.'"[67] The court further reasoned, "It is not improper for the police to encourage a suspect to help herself by telling the truth. It also does not render a statement involuntary for the police to tell a suspect that the trial judge may consider her truthful cooperation with the police."[68] Additionally, the court noted that the video revealed that "Taylor was not threatened or coerced and that the interview lasted only one hour. Taylor asked for medication during the interview and said she was manic-depressive, but she appeared to be lucid and sober . . . ."[69] In conclusion, the court held that "[t]he police in this case failed to honor Taylor's request for counsel, but they did not violate her Fifth Amendment right against coerced self-incrimination. Therefore, because the gun was the fruit of a voluntary statement, we conclude that it is admissible at Taylor's trial."[70]

E. Discovery

In *Lance* appellant filed a motion for funds to obtain the services of a scientific expert. The trial court denied the motion, and appellant was convicted and sentenced to death on two counts of malice murder.[71] On appeal, the Georgia Supreme Court upheld the trial court's denial of funds, noting that a motion on behalf of an indigent appellant for funds for an expert should disclose "'with a reasonable degree of precision, why certain evidence is critical, what type of scientific testimony is needed,

---

64. *Id*. at 274-77, 553 S.E.2d at 603-05.
65. *Id.* at 274-75, 553 S.E.2d at 603.
66. *Id*. at 275, 553 S.E.2d at 604.
67. *Id.* at 273, 553 S.E.2d at 603 (alteration in original) (quoting O.C.G.A. § 24-3-50 (1995)).
68. *Id*.
69. *Id*. at 274, 553 S.E.2d at 603.
70. *Id.* at 276, 553 S.E.2d at 605.
71. 275 Ga. at 13-14, 560 S.E.2d at 669-71.

what that expert proposes to do regarding the evidence, and the anticipated costs for services.'"[72] Upon review of appellant's motion, the Georgia Supreme Court concluded that the request was "too unspecific, uncertain, and conclusory to support a finding that the trial court abused its discretion in concluding that the requested funds were not necessary to a fair trial."[73]

The court remanded *Lance* for an evidentiary hearing regarding the trial court's possible error in suppressing exculpatory evidence.[74] Lance, based on a letter written to a newspaper by one of the State's witnesses, alleged that the State had reneged on a promise to move the witness closer to his home, which was made in exchange for his testimony against appellant. In hearings while on remand, the State's witness indicated that he had lied about the offer and that the State had made no such deal. Because of the falsity of the letter, the court rejected the claim of alleged suppression of exculpatory material.[75]

In *Lucas* the State sought funds from the court to hire an expert witness regarding appellant's alleged intoxication at the time of the crime.[76] Appellant later argued that the State

> suppressed exculpatory evidence in violation of *Brady v. Maryland*[77] by failing to discover and disclose the fact that the expert witness in question had previously pled guilty to a charge of sexual battery or, alternatively, by amending its notice of witnesses for whom no criminal history search had been performed.[78]

The Georgia Supreme Court, noting that *Brady* does not require the State to obtain the criminal histories of its witnesses,[79] rejected appellant's argument.[80]

In *Brannan* appellant filed a motion to exclude evidence due to prosecutorial misconduct. Brannan, arrested for murdering a deputy, owned a white truck that was impounded while he was in custody. He filed a motion to preserve, inspect, and examine all physical evidence,

---

72. *Id*. at 14, 560 S.E.2d at 671 (quoting Roseboro v. State, 258 Ga. 39, 41, 365 S.E.2d 115, 117 (1988)).

73. *Id*.

74. *Id*. at 25, 560 S.E.2d at 678.

75. *Id.* at 25-26, 560 S.E.2d at 678-79.

76. 274 Ga. at 647, 555 S.E.2d at 448.

77. 373 U.S. 83 (1963).

78. 274 Ga. at 647, 555 S.E.2d at 448.

79. *Id.* at 647-48, 555 S.E.2d at 448 (citing Carter v. State, 252 Ga. 502, 506, 315 S.E.2d 646, 650-51 (1984); Hines v. State, 249 Ga. 257, 258-59, 290 S.E.2d 911, 912-13 (1982)).

80. *Id.* at 648, 555 S.E.2d at 448.

including his truck, which had been struck with bullets. When Brannan asked about inspecting the truck, both the State and the defense attorneys learned for the first time that the vehicle had been released to the lienholder, repaired, and resold. Appellant claimed that the failure to preserve the truck prevented his expert from determining bullet trajectories and extrapolating from the trajectories the actions of the victim during the shootings.[81] The trial court held that police did not act in bad faith when they failed to preserve the truck and that the truck was not material evidence that had "apparent exculpatory value before it was lost, and . . . of such a nature that the [appellant] cannot obtain comparable evidence by other reasonable means."[82] At trial, experts testified that it would be impossible to put the truck back in the exact position or determine accurate bullet trajectories.[83] The Georgia Supreme Court agreed the case did not need to be dismissed or the evidence excluded because police did not act in bad faith.[84] The court further ruled that the truck was immaterial.[85]

Brannan also made the argument that the State's notice of intent to present non-statutory aggravating evidence while appellant was in jail was untimely. Upon receiving the notice, appellant filed a motion for continuance, but the trial court denied the motion.[86] Without stating its reason, the Georgia Supreme Court affirmed the trial court's decision, ruling that the State's notice was not untimely.[87]

F. Change of Venue

Appellant in *McPherson* filed a motion for change of venue based on the publicity the case received from two local newspapers that printed a discussion of McPherson's case and portions of a speech by the district attorney commenting on recent capital cases.[88] However, the Georgia Supreme Court ruled that the trial court properly denied the motion "because there was not extensive pre-trial publicity and few prospective jurors had heard about McPherson's case. No prospective jurors were excused for cause due to bias resulting from pre-trial publicity."[89]

---

81. 275 Ga. at 73-74, 561 S.E.2d at 420-21.
82. *Id*. at 74, 561 S.E.2d at 421 (citing Walker v. State, 264 Ga. 676, 449 S.E.2d 845 (1994); Arizona v. Youngblood, 488 U.S. 51 (1988)).
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 75, 561 S.E.2d at 421-22.
87. *Id*.
88. 274 Ga. at 447, 553 S.E.2d at 574.
89. *Id.* at 450, 553 S.E.2d at 575-76 (citation omitted).

The trial court granted appellant's motion for change of venue in *Lucas*, but then modified the ruling before the new venue had been chosen. The trial court, granting a motion by the State, ruled that the jury was to be selected in the new venue, but then return to the original venue for trial.[90] The Georgia Supreme Court, without giving further reason, stated that the modification was not an abuse of discretion by the trial court.[91]

G. Recusal of District Attorney

The Georgia Supreme Court remanded *Lance* to investigate a letter a newspaper received from one of the State's witnesses.[92] The letter contended that the State had reneged on a promise to exchange the witness's testimony against appellant in return for moving the witness to a prison closer to his home. Although the trial court concluded that the letter contained lies and the State had made no such promise, appellant alleged that the trial court erred in permitting the attorney to continue to serve as prosecutor after the attorney testified in the post-trial hearing.[93] The court did not recognize the error, saying "[i]nasmuch as the district attorney's testimony was limited to a rebuttal of the contents of [the witness's] letter and was given nearly a year after the jury found appellant guilty, none of the dangers inherent in having an attorney testify in court was present."[94]

The district attorney in *McPherson* made statements in a speech to the Rotary Club regarding recent crimes that were "violent to the extreme, definitely death penalty type cases."[95] A local newspaper quoted the district attorney and included a discussion of McPherson's case. Two months later, the trial court issued a gag order to limit pre-trial publicity.[96] McPherson filed a motion to disqualify the district attorney for violating the gag order, but the trial court denied the motion, stating, "There was no evidence that the district attorney had specifically mentioned McPherson's case, and . . . the newspaper article and Rotary Club speech were too far removed from the time of the trial to possibly taint the jury pool."[97] The Georgia Supreme Court concluded that the

---

90. 274 Ga. at 644, 555 S.E.2d at 445.
91. *Id*.
92. 275 Ga. at 25, 560 S.E.2d at 678.
93. *Id.*
94. *Id*. at 26, 560 S.E.2d at 679 (citing Timberlake v. State, 246 Ga. 488, 271 S.E.2d 792 (1980)).
95. 274 Ga. at 447, 553 S.E.2d at 574.
96. *Id*.
97. *Id*.

trial court did not err "because there was not any valid basis for disqualifying the district attorney or any evidence that the trial setting was made inherently prejudicial."[98]

II. JURY SELECTION

This section includes a discussion of permissible scope of examination, challenges for cause, preemptory challenges, juror misconduct, and attorney misconduct.

A. *Scope of Examination*

On appeal, appellant in *Fults v. State*[99] argued that the trial court erred in "refusing to allow defense counsel to ask a juror who had previously stated that she would be unable to vote for a death sentence whether she understood that she would cast her vote as a member of a jury."[100] The Georgia Supreme Court, using an abuse of discretion standard that allows the trial court to limit "'repetitive, misleading, and irrelevant questions,'"[101] found that the "trial court correctly focused voir dire on the individual juror's ability to cast a vote for the death penalty under any circumstances."[102]

In *Lucas v. State*,[103] the trial court and the Georgia Supreme Court ruled that it is "improper to require the juror to enumerate hypothetical circumstances in which she might or might not vote to impose the death penalty."[104] Rather, the proper inquiry "'is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"[105] The court held that appellant's questions about possible situations where the death penalty would be an appropriate sentence were properly prohibited by the district court.[106]

---

98. *Id.* (citing O.C.G.A. § 15-18-5(a) (1998); Barnes v. State, 269 Ga. 345, 269 S.E.2d 674 (1998)).

99. 274 Ga. 82, 548 S.E.2d 315 (2001).

100. *Id.* at 85, 548 S.E.2d at 320.

101. *Id*. (quoting Gissendaner v. State, 272 Ga. 704, 709, 532 S.E.2d 677, 685 (2000)); *see also Barnes*, 269 Ga. 345, 351-52, 496 S.E.2d 674, 683 (1998).

102. 274 Ga. at 85, 548 S.E.2d at 320.

103. 274 Ga. 640, 555 S.E.2d 440 (2001).

104. *Id*. at 646, 555 S.E.2d at 447 (quoting Carr v. State, 267 Ga. 547, 554, 480 S.E.2d 583, 591 (1997)).

105. *Id*. (quoting Greene v. State, 268 Ga. 47, 48, 485 S.E.2d 741, 743 (1997)).

106. *Id*.

The trial court in *Lance v. State*[107] denied appellant's request to inquire into the potential jurors' views on the meaning of a life sentence.[108] The Georgia Supreme Court upheld the trial court's decision, holding that "criminal [appellants] and the State are entitled to examine potential jurors on their inclinations and biases regarding parole, but the examination 'should be limited to jurors' willingness to consider both a life sentence that allows for the possibility of parole and a life sentence that does not.'"[109]

B. Challenges for Cause

Appellant in *Brannan v. State*[110] contended that the trial court erred "by failing to excuse for cause three prospective jurors who were allegedly biased in favor of the death penalty."[111] The Georgia Supreme Court, upon review, noted that "[t]he proper standard for determining the disqualification of a prospective juror based upon his views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[112] The court acknowledged that three prospective jurors preferred the death penalty for a convicted murderer, and one of the jurors expressed a reluctance to impose life imprisonment with the possibility of parole, but noted that all jurors indicated they could vote for all three possible sentences and consider mitigating evidence.[113] Therefore, the court ruled that the trial court did not abuse its discretion by finding the jurors qualified to serve.[114]

Appellant in *Raheem v. State*[115] made a similar argument, asserting that a prospective juror was unqualified because of her bias in favor of the death penalty based on her responses regarding her statements about a friend's murder. The prospective juror spoke of her friend's murderer, who, while imprisoned, had stabbed a prison guard and had himself been killed in an attempted escape.[116] The trial court decided "that the juror would remain impartial despite her past experience and her honestly expressed concerns about the possible impact of that past

107. 275 Ga. 11, 560 S.E.2d 663 (2002).
108. *Id*. at 15, 560 S.E.2d at 671.
109. *Id*. (quoting Zellmer v. State, 272 Ga. 735, 732, 534 S.E.2d 802, 802 (2000)).
110. 275 Ga. 70, 561 S.E.2d 414 (2002).
111. *Id.* at 76, 561 S.E.2d at 422.
112. *Id.* (quoting *Greene*, 268 Ga. at 48, 485 S.E.2d at 743).
113. *Id*. at 77, 561 S.E.2d at 423.
114. *Id*.
115. 275 Ga. 87, 560 S.E.2d 680 (2002).
116. *Id*. at 91, 560 S.E.2d at 685.

experience upon her deliberations."[117] The Georgia Supreme Court, deferring to the trial court's findings, affirmed the decision.[118]

The Georgia Supreme Court made a similar finding in *Lance* when appellant contended that the trial court erred by failing to excuse prospective jurors who allegedly would have automatically imposed a death sentence for a convicted murderer.[119] The court, recognizing that "'[a] juror who will automatically vote for the death penalty in every case' upon a conviction for murder is not qualified to serve,"[120] found that the jurors had not expressed an inability to vote for a life sentence.[121]

Lance also argued that three prospective jurors were unqualified to serve based on opinions formed through exposure to pretrial influences.[122] Without stating its reasons, the Georgia Supreme Court ruled that the trial court did not commit error or abuse its discretion in finding that the prospective jurors "did not hold any fixed opinions that would require [their] disqualification."[123]

Likewise, in *Fults* the court ruled that jurors with opinions about guilt of a particular appellant "need be excused only when it is shown that the opinion is so fixed and definite that the juror will be unable to set the opinion aside and decide the case based upon the evidence and the charge of the trial court."[124] Despite a prospective juror's indication that she had read newspaper reports about the crime and arrest of appellant and admitted that she had an initial opinion of guilt, the juror said that she would try to set aside those opinions to make a decision based on the evidence presented at trial.[125] The trial court found the prospective juror qualified to serve, and the Georgia Supreme Court affirmed the decision.[126]

A prospective juror in *McPherson v. State*[127] was a former police officer and admitted that he "would tend to give more credence to a police officer's testimony."[128] However, the prospective juror knew nothing of McPherson's case, was not familiar with any of the witnesses,

---

117. *Id*. (citing Johnson v. State, 262 Ga. 652, 424 S.E.2d 271 (1993)).
118. *Id*.
119. 275 Ga. at 15, 560 S.E.2d at 671-72.
120. *Id*., 560 S.E.2d at 672 (quoting Morgan v. Illinois, 504 U.S. 719, 729 (1992)).
121. *Id*. at 16, 560 S.E.2d at 672-73.
122. *Id*. at 17, 560 S.E.2d at 673.
123. *Id*.
124. 274 Ga. at 85, 548 S.E.2d at 360.
125. *Id*.
126. *Id*.
127. 274 Ga. 444, 553 S.E.2d 569 (2001).
128. *Id.* at 449, 553 S.E.2d at 575.

claimed he would follow all the judge's instructions, and would not be predisposed to any verdict. Another juror was a friend of the manager of the restaurant where both the appellant and the victim worked. She admitted that she and her friend had conversations about the case at the time of the murder, but that she did not know the appellant, nor had she formed an opinion about the case. Appellant made the argument that both jurors should have been excused, but the trial court found that both prospective jurors' opinions were not fixed, and as a result, both were qualified.[129] The Georgia Supreme Court affirmed the trial court's decision.[130]

C. Preemptory Challenges

Appellant in *Raheem* argued that the State engaged in racial discrimination in striking prospective jurors.[131] At trial, the prosecutor, learning that one of the prospective jurors attended church, inquired into members of that church and received reports that the juror was "'odd, . . . exhibited some weird personality traits, [and that church members] wouldn't put him on any kind of jury.'"[132] The Georgia Supreme Court reviewed the State's reasons for striking the juror and determined that there was no merit to "Raheem's contentions that the State's proffered reasons relied upon racial stereotypes or were too vague."[133]

The court made a similar finding in *Brannan* when appellant alleged the State violated *Batson v. Kentucky*[134] by using its preemptory strikes to racially discriminate.[135] The State used seven of its ten preemptory strikes on African-American prospective jurors.[136] Upon review, the Georgia Supreme Court found that each individual had been struck because he "expressed reservations about imposing the death penalty, in addition to other valid race-neutral reasons, such as being previously charged with a criminal offense, claiming hardship due to

---

129. *Id*.
130. *Id*.
131. 275 Ga. at 90, 560 S.E.2d at 684.
132. *Id*. (alteration in original).
133. *Id*. *See also* Barnes v. State, 269 Ga. 345, 349, 496 S.E.2d 674, 681 (1998); Turner v. State, 267 Ga. 149, 151, 476 S.E.2d 252, 256 (1996) (citing Purkett v. Elem, 514 U.S. 765 (1995)).
134. 476 U.S. 79 (1986).
135. 275 Ga. at 75, 561 S.E.2d at 422.
136. *Id.*

bankruptcy or physical disability, or having a relative currently facing criminal prosecution."[137]

Appellant in *Lance* also made an argument alleging racially discriminatory jury selection by the State.[138] Appellant contended that one juror was struck on the basis of his religious beliefs, but the trial court concluded that the strike was valid because the juror demonstrated that "he did not believe it would be possible for anything presented at trial to overcome his strong religious conviction that he must not take part in imposing a death sentence."[139] In addition, appellant argued that the State struck three African-American jurors on account of their race. Without sharing its analysis, the trial court concluded the State made its determinations on a race-neutral basis.[140] The Georgia Supreme Court agreed.[141]

In *Rhode v. State*,[142] appellant alleged that seven jurors were improperly disqualified on account of their religious views that prevented them from considering a death sentence, but the Georgia Supreme Court waived the claim because "Rhode raised no objection to their disqualification other than a meritless challenge to the practice of qualifying jurors according to their death penalty views."[143]

Rhode also contended that three prospective jurors were erroneously excused when they expressed a reluctance or unwillingness to consider the death penalty based on their understanding of Georgia's law, which required execution by electrocution.[144] The Georgia Supreme Court stated,

> [J]urors in Georgia death penalty trials play no role in determining the method by which a death sentence is carried out. However, where a prospective juror is unable or unwilling, for any reason, to consider one or more of the sentences authorized by law, that juror should be excused for cause upon motion by one of the parties.[145]

The court held that the prospective jurors were properly excused.[146]

---

137. *Id*. (citing Jenkins v. State, 269 Ga. 282, 498 S.E.2d 502 (1998); Sears v. State, 268 Ga. 759, 493 S.E.2d 180 (1997)).
138. 275 Ga. at 117, 560 S.E.2d at 687.
139. *Id.*
140. *Id*.
141. *Id*.
142. 274 Ga. 377, 552 S.E.2d 855 (2001).
143. *Id.* at 380-81, 552 S.E.2d at 861.
144. *Id*. at 380, 552 S.E.2d at 860.
145. *Id.*
146. *Id*.

D. *Juror Misconduct*

At the trial court, defense counsel in *Brannan* asked a potential juror if he was aware that jurors vote individually for the death penalty.[147] The juror replied, "'Yes, that's what everybody in the back was talking about.'"[148] Defense counsel then asked, "'Any particular discussions about what life sentences or death sentences mean or what the process is among these fifteen or sixteen folks [on your jury panel]?'"[149] The juror replied, "'No, I'm the one who brought it up.'"[150] This line of questioning served as the basis for appellant's argument that juror misconduct invalidated the eventual guilty verdict.[151] The Georgia Supreme Court did not agree, referring to an interview with a prospective juror who said, "[W]e're here on the fellow who shot the police officer over in Laurens County, or Dublin," but the discussion did not go any further.[152] The court concluded, "The alleged statements did not involve deliberation or any discussion of the merits of the case and were harmless beyond a reasonable doubt," and so jury misconduct was not significant enough to taint the verdict.[153]

Appellant in *Lucas* argued that untruthful answers given by one of the jurors during voir dire amounted to jury misconduct and required a new trial.[154] The Georgia Supreme Court stated,

> "[I]n order for [an appellant] to secure a new trial because a juror did not give a correct response to a question posed on voir dire . . ., the [appellant] must show that the juror failed to answer the question truthfully and that a correct response would have been a valid basis for a challenge for cause."[155]

E. *Attorney Misconduct*

The Georgia Supreme Court reviewed possible attorney misconduct in *McPherson*.[156] On the first day of voir dire, prosecutors asked prospective jurors "whether they believed [an appellant] was more or less

---

147. 275 Ga. at 78, 561 S.E.2d at 423.
148. *Id*.
149. *Id*. (alteration in original).
150. *Id*.
151. *Id*.
152. *Id*., 561 S.E.2d at 424.
153. *Id.*
154. 274 Ga. at 647, 555 S.E.2d at 447.
155. *Id*. (quoting Sears v. State, 270 Ga. at 834, 840, 514 S.E.2d 426, 433 (1999)).
156. 274 Ga. at 448, 553 S.E.2d at 574-75.

responsible for his actions if on drugs or trying to obtain drugs."[157] On the second day of voir dire, the defense objected to the questioning. The prosecution rephrased the question and, instead, asked if the prospective juror could follow the law, which states that someone voluntarily using mind-altering drugs is as responsible for their actions as someone not on drugs. On appeal, appellant admitted he did not object on the first day for strategic reasons, but argued that the question was improper and constituted reversible error by allowing the prosecutor to ask the question on the first day of voir dire.[158] The court, unsympathetic, answered, "Even assuming that the original question was improper, a party during trial cannot deliberately ignore what he perceives to be error and then complain on appeal."[159]

III. GUILT AND INNOCENCE

This section contains a discussion of admissible demonstrative evidence; victims' character evidence; evidence of contemporaneous crimes; psychological evidence; scientific evidence; victim impact and emotive evidence; hearsay and testimony by the appellant; closing arguments; and misconduct by judges, attorneys, and jurors.

A. Admissibility

1. Demonstrative Evidence. The Georgia Supreme Court explained in *McPherson v. State*[160] that photographs of the victim at the crime scene are generally admissible "if they show the nature and extent of the wounds and the relation of the body to other crime scene evidence."[161] The court, without further analysis, concluded that the trial court did not err in admitting photos of the victim at the crime scene and before autopsy.[162]

Likewise, in *Brannan v. State*[163] the court decided that photos of the victim at the crime scene were admissible because "[t]he photographs were relevant and admissible to show the nature and location of the wounds on the victim's [body] caused by being struck by ten bullets, and

157. *Id*. at 448, 553 S.E.2d at 574.
158. *Id*., 553 S.E.2d at 575.
159. *Id*. (citing Pye v. State, 269 Ga. 779, 505 S.E.2d 4 (1998); Warbington v. State, 267 Ga. 462, 479 S.E.2d 733 (1997)).
160. 274 Ga. 444, 553 S.E.2d 569 (2001).
161. *Id.* at 450, 553 S.E.2d at 576.
162. *Id*.
163. 275 Ga. 70, 561 S.E.2d 414 (2002).

the location of the victim's body in relation to crime scene evidence such as shell casings, blood stains, and the patrol car."[164]

The court in *Brannan* further allowed the admission of victim's bloodstained pants. The court explained that the pants were relevant in proving that the material could have absorbed the blood, which explained why there were no bloodstains on the road near the body.[165] Appellant objected to the evidence, asserting that "the victim's mother silently doubled over in pain when the pants were displayed and that ten jurors looked at her while she reacted."[166] The trial court denied appellant's motion for mistrial and gave a curative instruction demanding that the jurors "not be affected in any way whatsoever from any reaction from the audience."[167] On appeal, the Georgia Supreme Court ruled that the instruction was a sufficient protection against prejudice.[168]

The Georgia Supreme Court stated in *Lucas v. State*[169] that the trial court has discretion in "weighing the allegedly-improper prejudicial aspects of [the] photographs of victims against the photographs' probative value."[170] The justices concluded that the trial court properly admitted photos showing the location and nature of the victim's wounds.[171] The court went so far as to commend the trial court for following the "recommended better practice of having someone other than a family member identify the photographs."[172]

In *Rhode v. State*,[173] the court held that photographs and exhibits illustrating the victims and the crime scene were properly admitted.[174] Without analysis, the court held that there was "nothing in the record to support Rhode's contention that the trial court abused its discretion in weighing the probative value of any contested items against their allegedly improper prejudicial impact."[175]

---

164. *Id.* at 81, 561 S.E.2d at 424 (citing Barnes v. State, 269 Ga. 345, 357, 496 S.E.2d 674, 687 (1998)).

165. *Id.*, 561 S.E.2d at 425.

166. *Id.*, 561 S.E.2d at 426.

167. *Id.*

168. *Id.*

169. 274 Ga. 640, 555 S.E.2d 440 (2001).

170. *Id.* at 648 n.32, 555 S.E.2d at 448 n.32 (citing Woods v. State, 265 Ga. 685, 687, 461 S.E.2d 535, 537 (1995)).

171. *Id.* at 648, 555 S.E.2d at 448.

172. *Id.*

173. 274 Ga. 377, 552 S.E.2d 855 (2001).

174. *Id.* at 381, 552 S.E.2d at 861.

175. *Id.*

The court in *Lance v. State*[176] issued the same ruling.[177] In this case, appellant objected to the introduction of diagrams of the crime scene, appellant's workplace, where the murder weapon and key pieces of evidence had been found.[178] Appellant gave little analysis to his objection, and the court denied the motion, concluding "Lance raised no constitutional objections to the diagrams and [there was] no merit in his conclusory appellate argument that a constitutional violation occurred."[179]

2. Victims' Character Evidence. Appellant in *Lance* argued at trial that he should be permitted to introduce evidence of alleged acts of violence by the victims upon each other and against appellant and other third parties. The defense argued that the evidence of an abusive relationship between the victims, a married couple, was necessary to support his theory that the husband may have murdered his wife and then been murdered in retaliation for the wife's death.[180] The Georgia Supreme Court, agreeing with the trial court, ruled that the theory was "too speculative and unsupported to justify a suspension of the prohibition against evidence of [the husband's] alleged bad character and past violent acts."[181] The court noted that, generally, "evidence of the character of a murder victim is irrelevant and inadmissible at trial."[182] This rule does not apply, however, "when the [appellant] can make a prima facie showing of justification: that the victim was the assailant, the [appellant] was assailed, and the [appellant] was honestly seeking to defend himself."[183] In *Lance* appellant did not assert the defense of justification; therefore, the exception did not apply, rendering the evidence of the victims' abusive relationship and violence against third parties inadmissible.[184]

3. Evidence of Contemporaneous Crimes. In *Palmer v. State*,[185] appellant argued that at trial he should have been allowed to

---

176. 275 Ga. 11, 560 S.E.2d 663 (2002).
177. *Id.* at 22, 560 S.E.2d at 676.
178. *Id*.
179. *Id*.
180. *Id*. at 17-18, 560 S.E.2d at 673-74.
181. *Id*. at 18, 560 S.E.2d at 674.
182. *Id*. at 17-18, 560 S.E.2d at 673 (citing Henderson v. State, 234 Ga. 827, 218 S.E.2d 612 (1975); O.C.G.A. § 24-2-2 (1995)).
183. *Id*. at 18, 560 S.E.2d at 673 (citing *Henderson*, 234 Ga. 827, 218 S.E.2d 612; Lewis v. State, 268 Ga. 83, 485 S.E.2d 212 (1997)).
184. *Id*.
185. 274 Ga. 796, 560 S.E.2d 11 (2002).

"introduce evidence of the solicitation and commission of other contemporaneous murders in the area."[186] The Georgia Supreme Court ruled that the trial court did not commit error in prohibiting the evidence.[187] It noted, "While [appellant] is entitled to show that another person committed the charged crime, the proffered evidence must also raise a reasonable inference of the [appellant's] own innocence."[188] Palmer, the court concluded, did not raise such an inference and failed to show that the perpetrators of the other crimes also committed the six murders for which he was charged.[189]

4. Psychological Evidence. In *Paul v. State*,[190] appellant wished to introduce psychological evidence not to establish that he suffered from insanity or mental impairment, but to negate his specific intent to kill, a requirement for malice murder.[191] The trial court did not allow the evidence, stating that "expert evidence was irrelevant to the state of mind necessary to determine guilt in light of the [appellant's] refusal to assert an insanity defense or that he was mentally ill at the time of the conduct in question."[192] The Georgia Supreme Court affirmed the trial court's decision.[193]

5. Scientific Evidence. When a State witness testified in *Lance*, during cross-examination by the defense, that he had taken and passed a polygraph examination, the trial court refused to declare a mistrial.[194] After being convicted of two counts of malice murder and sentenced to death, appellant contended that the trial court erred by merely giving a strong curative instruction and questioning "the jury regarding their ability to follow that instruction."[195] The Georgia Supreme Court ruled that the trial court's instructions and procedures were "sufficient to remedy any damage to the fairness of the proceedings" and, therefore, the trial court did not abuse its discretion in denying Lance's renewed motion for a mistrial.[196]

---

186. *Id.* at 797, 560 S.E.2d at 13.
187. *Id*.
188. *Id*. (citing Holiday v. State, 272 Ga. 779, 534 S.E.2d 411 (2000)).
189. *Id*.
190. 274 Ga. 601, 555 S.E.2d 716 (2001).
191. *Id.* at 603-04, 555 S.E.2d 718-20.
192. *Id.* at 603, 555 S.E.2d at 718 (citing Selman v. State, 267 Ga. 198, 475 S.E.2d 892 (1996)).
193. *Id*.
194. 275 Ga. at 22, 560 S.E.2d at 676.
195. *Id*. at 22-23, 560 S.E.2d at 677.
196. *Id. See also* Gully v. State, 271 Ga. 337, 519 S.E.2d 655 (1999); Crawford v. State, 256 Ga. 585, 351 S.E.2d 199 (1987); White v. State, 255 Ga. 210, 336 S.E.2d 777 (1985).

In *Durden v. State*,[197] appellant made a similar argument when the trial court denied appellant's motion for a mistrial when a witness stated that he had taken a lie detector test.[198] The Georgia Supreme Court did not find a mistrial necessary because the witness did not mention the results of the test and the trial court gave a prompt curative instruction to disregard the statement, preventing any prejudice to appellant.[199]

6. Victim Impact Evidence. Appellant in *Durden* also made the argument that the victim's mother's testimony, in which she described the phone call she had with her son before he was killed, was unduly prejudicial.[200] The Georgia Supreme Court rejected this allegation, concluding that the "testimony which was relevant to information about the chronology of the crime did not exceed acceptable boundaries because it did not unfairly prejudice the [appellant] or constitute improper victim impact testimony."[201]

7. Hearsay. In *Hayes v. State*,[202] a seven-year-old child, while in her bedroom, was awakened by her father reading Bible verses and screaming to call the police.[203] She then heard appellant ask her father "whether he 'wanted to die with a pistol or be chopped up,'" and then ask the child's stepmother if she wanted to live or die.[204] The child heard her stepmother say that she wanted to live and raise the child, to which the appellant replied she had "said the wrong thing."[205] The appellant objected to the child's testimony at trial, citing the child hearsay statute, which allows:

> A statement made by a child under the age of 14 years describing any act of . . . physical abuse performed . . . on the child by another . . . in the presence of the child is admissible in evidence by the testimony of the person or persons to whom made if the child is available to testify in the proceedings and the court finds that the circumstances of the statement provide sufficient indicia of reliability.[206]

---

197. 274 Ga. 868, 561 S.E.2d 91 (2002).
198. *Id.* at 870, 561 S.E.2d at 93-94.
199. *Id*.
200. *Id.* at 870, 561 S.E.2d at 93.
201. *Id*. (citing Butts v. State, 273 Ga. 760, 546 S.E.2d 472 (2001)).
202. 274 Ga. 875, 560 S.E.2d 656 (2002).
203. *Id.* at 875, 560 S.E.2d 657.
204. *Id.*
205. *Id.*
206. *Id*. at 877 n.2, 560 S.E.2d at 658 n.2 (quoting O.C.G.A. § 24-3-16).

Appellant further argued that the trial court erred in allowing the testimony because the child had not seen the crime and, therefore, had not witnessed the events to which she testified.[207] The Georgia Supreme Court upheld the trial court's decision, saying, "[the child] certainly was a witness to the crimes, albeit primarily through her sense of hearing, rather than of sight."[208] The court continued, stating that appellant's reliance on the statute was "misplaced because the child herself, rather than a third party, testified at trial."[209] Finally, the court said that even if the testimony was inadmissible, it was not reversible error because the conviction was not based on the child's testimony.[210]

In *McPherson* appellant complained that the trial court erred by improperly allowing hearsay testimony under the necessity exception. Three friends and co-workers of the victim testified that the victim was planning to leave appellant, who was her boyfriend.[211] The court recalled, "'To satisfy the necessity exception to the hearsay rule, the proponent must show a necessity for the evidence and a circumstantial guaranty of the statement's trustworthiness.'"[212] The Georgia Supreme Court agreed with the trial court that the "statements to others about [the victim's] intended break up with McPherson were relevant to establish motive for the murder," and were, therefore, properly allowed.[213]

Appellant in *Lance* also argued against the trial court's use of the necessity exception to the hearsay rule.[214] However, the Georgia Supreme Court rejected the argument, stating that the witnesses lived in Arizona and appellant had not attempted to subpoena them under interstate subpoena procedures.[215]

8. Appellant's Testimony. The prosecution in *Raheem v. State*,[216] when referring to appellant's videotaped statement, addressed the jury,

---

207. *Id*. at 877, 560 S.E.2d at 658.
208. *Id*.
209. *Id*.
210. *Id.*
211. *Id*. at 450, 553 S.E.2d at 576.
212. *Id*. (quoting Morrow v. State, 272 Ga. 691 ,700, 532 S.E.2d 78, 87 (2000)); *see also* Perkins v. State, 269 Ga. 791, 505 S.E.2d 16 (1998).
213. *Id.* at 450-51, 553 S.E.2d at 576.
214. 275 Ga. at 19, 560 S.E.2d at 674.
215. *Id*. *Cf.* Cook v. State, 273 Ga. 574, 543 S.E.2d 701 (2001) (holding that a witness was unavailable when the State subpoenaed the witness in Louisiana and Louisiana refused to compel the witness to testify).
216. 275 Ga. 87, 560 S.E.2d 680 (2002).

"Raheem didn't take the stand but you heard his videotaped statement. And I submit to you that it ain't true."[217] Appellant then argued that the prosecutor had made reference to Raheem's silence and moved for mistrial.[218] The trial court did not give a curative instruction, but instructed the jury:

> [T]he [appellant] in a criminal case is under no duty to produce any evidence tending to prove innocence and is not required to take the stand and testify in the case. If the [appellant] elects not to testify, no inference hurtful, harmful, or adverse to the [appellant] shall be drawn by the jury, nor shall such fact be held against the [appellant] in any way.[219]

The Georgia Supreme Court noted that "a prosecutor may not make any comment upon a criminal [appellant's] failure to testify at trial."[220] However, considering that the comment "did not appear designed to or likely to urge any negative inference, the strength of the evidence against the [appellant], the charge given to the jury by the trial court, and the context in which the comment was made," the court found the error to be harmless.[221]

B. Closing Arguments

Appellant in *Brannan* complained about statements made by the prosecutor in closing arguments.[222] Appellant argued first that the prosecution's criticism of his insanity defense was improper, but the objection was not made during the trial; therefore, the court considered the issue to be waived on appeal.[223] The court further stated that "it is not improper for a prosecutor to take issue with the findings and conclusions of defense experts during closing argument."[224] Additionally, the trial court went to great lengths in jury charging to instruct that "'[e]very person is presumed to be of sound mind and discretion, but this presumption may be rebutted"[225] and then continued to give "[a] lengthy charge on the defense of insanity."[226]

---

217. *Id.* at 91, 560 S.E.2d at 685.
218. *Id*.
219. *Id*. at 91-92, 560 S.E.2d at 685.
220. *Id*. at 92, 560 S.E.2d at 685 (citing Griffin v. California, 380 U.S. 609, 615 (1977)).
221. *Id*.
222. 275 Ga. at 82, 561 S.E.2d at 426.
223. *Id*. (citing Gissendaner v. State, 272 Ga. 704, 532 S.E.2d 677 (2000); Miller v. State, 267 Ga. 92, 475 S.E.2d 610 (1996)).
224. *Id*.
225. *Id.* at 83, 561 S.E.2d at 427.
226. *Id.*

Appellant also argued that the prosecutor made an improper analogy, stating that Brannan was like Lucifer when he was kicked out of heaven and became the Devil. The prosecutor then insinuated that Brannan wanted respect from the Army but did not get it, and consequently, Brannan demanded it from the victim.[227] On appeal, the Georgia Supreme Court ruled that the objection was not timely because appellant did not object to the comments at trial.[228] The court continued, "Even if the objection was timely, the prosecutor's analogy, when viewed in context, would not provide a basis for the reversal of the murder conviction."[229]

C. Misconduct

1. Judges. In *Brannan* appellant argued that the trial judge made inappropriate and prejudicial comments. A portion of a video of the murder was admitted as evidence and shown to the jury.[230] At trial, when the prosecution showed the video, the judge reminded, "'I would ask that you arrange where it can be stopped if it doesn't do it automatically.'"[231] Appellant argued that the statement would cause the jurors to speculate about the portion of the tape they would not see.[232] The trial court then instructed the jury that the statement was "an attempt to operate the court in an orderly manner and move it along."[233] The Georgia Supreme Court determined that the statement was not prejudicial.[234]

While charging the jury, the trial court in *McPherson* defined "reasonable doubt" and then said, "'but, if that doubt does not exist in your mind as to the guilt of the [appellant], you should convict the [appellant].'"[235] Appellant argued that the charge inaccurately told the jury they had a duty to convict.[236] Although the Georgia Supreme Court recognized that judges are discouraged to use a jury instruction suggesting that the jury has a duty to convict, the practice does not

227. *Id*. at 82, 561 S.E.2d at 426-27.
228. *Id*. at 82-83, 561 S.E.2d at 427 (citing Butler v. State, 273 Ga. 380, 541 S.E.2d 653 (2001)).
229. *Id*. at 83, 561 S.E.2d at 427.
230. *Id*. at 82, 561 S.E.2d at 426.
231. *Id*.
232. *Id*.
233. *Id*.
234. *Id.*
235. 274 Ga. at 452, 553 S.E.2d at 577.
236. *Id*.

constitute a reversible error.[237] However, the court did note that "the better practice is for the trial court to instruct the jury that it is 'authorized to convict' in the absence of reasonable doubt."[238]

In *Rhode* appellant protested that lesser charges of voluntary manslaughter, involuntary manslaughter, and aggravated assault should have been presented to the jury.[239] The Georgia Supreme Court rejected the contention, saying that serious provocation was necessary for an involuntary manslaughter charge and that provocation did not exist here.[240] Furthermore, involuntary manslaughter involves unintentional killing during an unlawful act other than a felony.[241] Although appellant had argued he was guilty of trespass, a misdemeanor rather than the felony of burglary, he did not assert that the murder was committed in self-defense; therefore, "a charge on involuntary manslaughter involving a lawful act committed in an unlawful manner would not be warranted."[242] The court also noted that the jury "made an additional, specific finding that Rhode intended [the victim's] killing. In light of these circumstances, it is highly probable that the trial court's refusal to give a charge on aggravated assault did not contribute to the verdict."[243]

In *Paul v. State*,[244] the jury convicted appellant of malice murder for killing his girlfriend's ten-year-old son by severe and repetitive beating. Appellant contested the charges at trial, arguing he was entitled to a jury instruction on misdemeanor involuntary manslaughter because his lawful act of disciplining the child became unlawful when it was done in an excessive manner.[245] The court, upon review, concluded that an involuntary manslaughter charge was not appropriate.[246] The court observed, "[I]f he is justified in killing under O.C.G.A. § 16-3-21,[247] he is guilty of no crime at all. If he is not so justified, the homicide does not fall within the 'lawful act' predicate of O.C.G.A. § 16-5-3(b)[248]."[249]

---

237. *Id*.
238. *Id*. (citing Monroe v. State, 272 Ga. 201, 528 S.E.2d 504 (2000)).
239. 274 Ga. at 381-82, 552 S.E.2d at 861.
240. *Id.* at 381, 552 S.E.2d at 861.
241. *Id*. (citing O.C.G.A. § 16-5-3(a) (1999)).
242. *Id*. at 382, 552 S.E.2d at 861.
243. *Id*.
244. 274 Ga. 601, 555 S.E.2d 716 (2001).
245. *Id*. at 603, 555 S.E.2d at 719.
246. *Id*. at 604, 555 S.E.2d at 720.
247. O.C.G.A. § 16-3-21 (1999 & Supp. 2002) (self-defense statute, justifying homicide).
248. O.C.G.A. § 16-5-3 (1999) (involuntary manslaughter in the course of a lawful act).
249. 274 Ga. at 604, 555 S.E.2d at 719.

The court concluded, "the jury, in rejecting his claim of justification, has of necessity determined thereby that the act is not lawful."[250]

2. Attorneys. Appellant in *Johns v. State*[251] moved for mistrial based on attorney misconduct, alleging that the district attorney had become a witness when he interrupted a witness's testimony to rebut the witness's remark. The witness testified that the district attorney had told her to testify to what she had said to the grand jury, even though the information was incorrect. The trial court denied the motion for mistrial, but gave the jury a curative instruction explaining that the district attorney's statement was improper, should be disregarded, and should play no part in the jury's decision.[252]

Appellant then argued that the district attorney's closing argument remark, "'I believe it was somewhere around 6 o'clock at the Wal-Mart, and [appellant] was following her around the Wal-Mart every time she looked up,'"[253] was an assertion that the appellant committed the crime of stalking.[254] The trial court denied the motion for mistrial, and instead, limited the State's argument to "matters of 'identity' and 'time.'"[255] The Georgia Supreme Court found no abuse of discretion and affirmed the trial court's decision.[256]

3. Jurors. In *Lance* appellant protested certain questions for witnesses submitted to the trial court by the jury.[257] The Georgia Supreme Court stated, "While jurors may not ask questions of witnesses *directly*, a trial court may receive written questions from the jury and ask those questions the court finds proper."[258] Here, the trial court "'properly instructed the jury as to the appropriate form of asking questions' which was 'to submit any questions they might wish to have answered to the trial court in writing at the conclusion of the witness' testimony.'"[259] The court found no error.[260]

---

250. *Id*.
251. 274 Ga. 23, 549 S.E.2d 68 (2001).
252. *Id*. at 24-25, 549 S.E.2d at 70.
253. *Id.* at 25, 549 S.E.2d at 70-71.
254. *Id*.
255. *Id*.
256. *Id.*
257. 275 Ga. at 22, 560 S.E.2d at 676.
258. *Id*. (citing Hall v. State, 241 Ga. 252, 244 S.E.2d 833 (1978); Matchett v. State, 257 Ga. 785, 364 S.E.2d 565 (1988); Story v. State, 157 Ga. App. 490, 278 S.E.2d 97 (1981)).
259. *Id*. (quoting Matchett v. State, 257 Ga. 785, 787, 364 S.E.2d 565, 567 (1988)).
260. *Id.*

IV. SENTENCING

A. *Admission of Evidence*

1. Mitigation. The trial court in *Lucas v. State*[261] found that the expert on corrections was an admissible witness. The witness testified that he evaluated the potential for prison adaptability based on family history and the prisoner's background. As he began to testify about Lucas's background, the State objected that he was testifying outside the area of his expertise, and the trial court sustained the objection.[262] Upon review, the Georgia Supreme Court found that the trial court erred when it did not allow the testimony, but the error was harmless because the testimony included only "generalizations about Lucas's background, some detail about his family history, and a clear expression of the witness's conclusions."[263]

In *McPherson v. State*,[264] four jailers served as mitigation witnesses testifying to McPherson's good, obedient behavior in prison.[265] The trial court allowed the State to rebut the evidence by calling a jailer who testified that "[he] became angry with her over having to wear leg restraints while seeing his lawyer at the jail and that he gave her a 'hard, cold, dead look.'"[266] Although appellant alleged the State's testimony was improper, the Georgia Supreme Court determined, without stating its reasoning, that it was not.[267]

In *Lance v. State*,[268] the trial court refused to allow evidence regarding the possible timing of appellant's parole eligibility if the jury returned a sentence of life with the possibility of parole.[269] Again, without sharing its reasoning, the Georgia Supreme Court denied appellant's argument that the evidence should have been admissible.[270]

2. Hearsay. Appellant in *Lance* argued that the trial court violated hearsay rules when it allowed two letters written by the victim's son to

---

261. 274 Ga. 640, 555 S.E.2d 440 (2001).
262. *Id*. at 648, 555 S.E.2d at 448.
263. *Id*.
264. 274 Ga. 444, 553 S.E.2d 569 (2001).
265. *Id.* at 453, 553 S.E.2d at 578.
266. *Id*.
267. *Id*. *See generally* Kolokouris v. State, 271 Ga. 597, 523 S.E.2d 311 (1999); King v. State, 264 Ga. 502, 448 S.E.2d 362 (1994).
268. 275 Ga. 11, 560 S.E.2d 663 (2002).
269. *Id.* at 26, 560 S.E.2d at 679.
270. *Id*.

be read at trial.[271] The letters "expressed the child's love for his mother, the fact that he missed her and longed to see her, and the fact that he cried at certain times."[272] Although the Georgia Supreme Court found that the trial court did commit error in allowing the testimony, it also found that the error was harmless in light of the evidence regarding the child's thoughts and feelings, which the trial court properly admitted.[273]

3. Non-Statutory Aggravators. Trial courts have consistently ruled, and the Georgia Supreme Court has upheld, that prior convictions are admissible as evidence of non-statutory aggravators.[274] In *Raheem v. State*,[275] the State was permitted to present evidence that appellant had "previously carried a weapon on school grounds at age 15, and had stolen an automobile and fled from police at age 17."[276] The State also presented evidence that appellant had hidden a map of the prison and rudimentary weapons in his jail cell.[277]

In *Presnell v. State*,[278] the State admitted evidence regarding a Florida conviction for contributing to the delinquency of a minor and numerous arrests and convictions for motor vehicle theft that had happened nearly thirty years ago.[279] However, it is important to note that the evidence of these indictments and convictions was not presented to the jury but was used instead to establish a good faith basis for cross-examination of mitigation witnesses.[280]

The trial court in *Rhode v. State*[281] admitted two confessions of previous crimes, which were made while the appellant was a juvenile. Appellant argued that the confessions should be suppressed because the officers did not bring him before a juvenile court to determine if he was rightly retained.[282] The supreme court, noting that it had previously held that "'statements obtained in violation of the [Georgia] Juvenile

---

271. 275 Ga. at 24-25, 560 S.E.2d at 678.
272. *Id*.
273. *Id*. at 25, 560 S.E.2d at 678.
274. *See generally* Raheem v. State, 275 Ga. 87, 560 S.E.2d 680 (2002); Presnell v. State, 274 Ga. 246, 551 S.E.2d 723 (2001); Rhode v. State, 274 Ga. 377, 552 S.E.2d 855 (2001); McPherson v. State, 274 Ga. 444, 553 S.E.2d 569 (2001).
275. 275 Ga. 87, 560 S.E.2d 680 (2002).
276. *Id.* at 95, 560 S.E.2d at 687.
277. *Id*.
278. 274 Ga. 246, 551 S.E.2d 723 (2001).
279. *Id.* at 253, 551 S.E.2d at 732.
280. *Id*.
281. 274 Ga. 377, 552 S.E.2d 855 (2001).
282. *Id*. at 382, 552 S.E.2d at 862-63.

Code are not rendered per se inadmissible,'"[283] rejected the argument and found the evidence admissible.[284]

The Georgia Supreme Court, upon review of *McPherson*, stated without explanation, "Both of [appellant's] prior convictions for burglary were valid and properly admitted in the sentencing phase as non-statutory aggravating evidence."[285]

4. Statutory Aggravators. Georgia's statute allows the defendant to be sentenced to death when the jury finds beyond a reasonable doubt that the murder was "outrageously or wantonly vile, horrible, or inhuman in that it involved . . . depravity of mind."[286] Accordingly, the Georgia Supreme Court affirmed the death sentence of appellant in *Lucas*, who committed murder and aggravated battery when he inflicted a non-fatal gunshot wound and then fatally shot five more times.[287]

Likewise, in *Lance* the Georgia Supreme Court found the death sentence was reasonable because the double murder involved torture, aggravated battery, and multiple shotgun blasts.[288] In that case, there was evidence that the victim had been murdered from multiple shotgun wounds, which the victim's wife overheard. Thereafter, the wife was tortured and beaten, resulting in her death.[289]

Regarding the infliction of nonlethal injuries as aggravating circumstances, the Georgia Supreme Court clearly stated in *Rhode* that "burglary and kidnapping with bodily injury are not impermissible as statutory aggravating circumstances simply because they are less-serious crimes than murder, which can also serve as a statutory aggravating circumstance."[290]

Under similar circumstances in *Fults v. State*,[291] the Georgia Supreme Court affirmed appellant's death sentence because the murder was committed during the commission of a kidnapping with bodily injury, an enumerated statutory aggravating circumstance.[292]

---

283. *Id.*, 552 S.E.2d at 862 (quoting Lattimore v. State, 265 Ga. 102, 103-04, 454 S.E.2d 447, 476 (1995)).

284. *Id.*

285. 274 Ga. at 452, 553 S.E.2d at 577 (citing Mize v. State, 269 Ga. 646, 501 S.E.2d 219 (1998); Pope v. State, 256 Ga. 196, 345 S.E.2d 831 (1986)).

286. O.C.G.A. § 17-10-30(b)(7) (1997).

287. 274 Ga. at 649, 555 S.E.2d at 449.

288. 275 Ga. at 23, 560 S.E.2d at 677.

289. *Id.*

290. 274 Ga. at 384, 552 S.E.2d at 863.

291. 274 Ga. 82, 548 S.E.2d 315 (2001).

292. *Id.* at 84, 87, 548 S.E.2d at 322.

5. Mutually Supporting Aggravating Circumstances. The Georgia Supreme Court has consistently held that mutually supporting aggravating circumstances are "impermissible where multiple death sentences have been imposed"[293] and, in *Fults*, extended this holding to death sentences imposed with a sentence of life without the possibility of parole.[294] In *Fults* the jury sentenced appellant to death for his murder conviction because the murder was committed during the commission of a kidnapping with bodily injury, and imposed a life sentence for appellant's kidnapping conviction because the kidnapping was committed during the commission of the first murder.[295] The Georgia Supreme Court concluded, "While it was not improper for the trial court to submit all of the statutory aggravating circumstances supported by the evidence to the jury for its consideration, the jury's finding which violates the rule against 'mutually supporting aggravating circumstances' must be set aside."[296] The appellant's death sentence was upheld because the murder was committed during the commission of kidnapping, but the court set aside the jury's finding that the kidnapping with bodily injury occurred during the murder because it violated the rule against mutually supporting aggravating circumstances.[297] However, the court maintained the life sentence without parole because other aggravating circumstances supported the sentence.[298]

Similarly, the Georgia Supreme Court vacated one of the two aggravating circumstances in *Lance* because it violated the rule against mutually supporting aggravating circumstances.[299] Specifically, Lance was convicted of a double murder, and the jury used each murder as an aggravating circumstance for the other, resulting in two aggravated murders.[300]

However, in *Rhode* the Georgia Supreme Court concluded that both a death sentence and life sentence handed down for a triple murder and kidnapping did not violate the rule against mutually supporting aggravating circumstances.[301] The court simply stated,

---

293. *Fults*, 274 Ga. at 87-88, 548 S.E.2d at 322 (citing Heidler v. State, 273 Ga. 54, 65-66, 537 S.E.2d 44, 57 (2000); Wilson v. State, 250 Ga. 630, 638, 300 S.E.2d 640, 648 (1983)).
294. *Id.*
295. *Id*. at 88, 548 S.E.2d at 322.
296. *Id*. (quoting *Heidler*, 273 Ga. at 65-66, 537 S.E.2d at 57).
297. *Id.*
298. *Id*.
299. 275 Ga. at 23, 560 S.E.2d at 677.
300. *Id*.
301. 274 Ga. at 383, 552 S.E.2d at 862.

> The jury's findings that the murder of Bryan Moss was committed during the murder of Kristin Moss, that the murder of Kristen Moss was committed during the murder of Steven Moss, and that the murder of Steven Moss was committed during the murder of Bryan Moss did not violate the rule against mutually-supporting aggravating circumstances.[302]

The same sentence was given to Lucas, the co-appellant in the case.[303]

B. Closing Arguments

During closing arguments in *Presnell,* the State made a reference to appellant's future dangerousness and asked the jury to consider what was going through the victim's mind as she was abducted, forced to undress, witnessed her friend being raped, and then herself being chased and killed.[304] Appellant never objected to the references and, therefore, could only obtain relief if he could show that the "allegedly improper argument in reasonable probability changed the result of his trial."[305] The Georgia Supreme Court concluded that the State's arguments, even if improper, would not have changed the result of the trial; therefore, relief was denied.[306]

The Georgia Supreme Court came to a similar conclusion in *Brannan v. State*[307] when the State noted that the victim was a police officer "who did a difficult job for little pay, . . . remained respectful and did not swear once during the altercation, and . . . was a hero and a peacekeeper."[308] The supreme court concluded that appellant's objection at trial was untimely, and even if the statements were presumed to be improper, the court held that they were not likely to have changed the result of the trial.[309]

C. Curative Instructions

Appellant in *Raheem* argued that the trial judge erred when, in response to the State's objection to the testimony of a psychiatrist who had treated appellant as a child, the judge replied, "'[P]roceed on but let's try to maintain some relevancy to the testimony. It may be there,

---

302. *Id.* (citing Hightower v. State, 259 Ga. 770, 772, 386 S.E.2d 509, 511 (1989); O.C.G.A. § 17-10-30(b)(2) (1997)).
303. *Lucas*, 274 Ga. at 649, 555 S.E.2d at 449.
304. 274 Ga. at 255, 551 S.E.2d at 733-34.
305. *Id*. (citing Whatley v. State, 270 Ga. 296, 509 S.E.2d 45 (1998)).
306. *See id*.
307. 275 Ga. 70, 561 S.E.2d 414 (2002).
308. *Id.* at 84, 561 S.E.2d at 428.
309. *See id*.

I just haven't heard it yet. But it just seems like we're going into a great deal of detail about it.'"[310] Appellant did not move for mistrial during the trial, and upon review, the Georgia Supreme Court concluded that "there was nothing objectionable about this reasonable statement made by the trial court."[311]

In *Brannan* appellant moved for mistrial when the State presented a witness without giving appellant pre-trial notice of the evidence.[312] The trial court sustained the objection and stopped the testimony but denied a mistrial. Instead, the judge instructed the jury, "'I ask that you disregard any evidence from this witness, not consider it in making your verdict whatsoever.'"[313] The Georgia Supreme Court, after reviewing the record, concluded that the trial court did not abuse its discretion by denying the motion for mistrial and the instruction was sufficient to cure any harm done to appellant.[314] Likewise, the court ruled that a curative instruction was sufficient to protect appellant from harm caused by the prosecutor's insinuation that, if allowed to stay in a state penitentiary, the appellant would eat, breathe, play ping pong, do push-ups, and "'grow fat off our land.'"[315]

D. Jury Charge

1. Instruction on Mitigating Circumstances. It has long been held that the trial court need not instruct the jury that mitigating circumstances do not have to be unanimous.[316] In *Lance* the Georgia Supreme Court in their review noted, "The trial court did not commit error when it failed to charge the jury that findings regarding mitigating circumstances need not be unanimous since the trial court properly charged the jury it was not necessary to find *any* mitigating circumstances in order to return a sentence less than death."[317] The court reached a similar conclusion in *Rhode*, noting, "The trial court defined and set forth the function of mitigating circumstances in a manner that

---

310. 275 Ga. at 94, 560 S.E.2d at 687 (alteration in original).
311. *Id*.
312. 275 Ga. at 84, 561 S.E.2d at 427.
313. *Id*.
314. *Id*.
315. *Id*.
316. *See Lance*, 275 Ga. at 25, 560 S.E.2d at 678; *Rhode*, 274 Ga. at 384, 552 S.E.2d at 863; *Brannan*, 275 Ga. at 85, 561 S.E.2d at 428.
317. 275 Ga. at 25, 560 S.E.2d at 678 (citing Gissendaner v. State, 272 Ga. 704, 716, 532 S.E.2d 677, 689 (2000)).

would not have misled the jurors."[318] The same was said in *Brannan* when appellants challenged the trial court's charge to the jury.[319] The Georgia Supreme Court affirmed the decision, saying that "the sentencing phase jury charge was proper."[320] The court held that the trial court's charge on mitigating circumstances was adequate because the trial court had instructed the jurors that they could impose a life sentence whether they found mitigating circumstances or not.[321]

In *McPherson* the court declared, "It is well-settled that the trial court does not err by refusing to charge the jury on residual doubt since the trial court is not required to identify specific mitigating circumstances in the charge."[322] And in *Presnell* the court stated, "The trial court was not required to instruct the jury on residual doubt or any other specific mitigating circumstance as long as it charged on mitigating evidence in general."[323]

Appellant in *Clark v. State*[324] argued that in the penalty phase, the trial court improperly emphasized its charge on aggravating circumstances without addressing mitigating circumstances.[325] The Georgia Supreme Court rejected the argument, holding, "The jury was properly instructed of the function of mitigating circumstances, its duty to consider them, and that it did not have to find the existence of mitigating circumstances in order to impose a sentence of life."[326]

2. Instruction on Aggravating Circumstances. Appellant in *Lucas* alleged that the charge to the jury would have led them to believe that a death sentence is mandatory if aggravating circumstances were found.[327] The Georgia Supreme Court rejected the allegation and stated without explanation, "[W]e find that the trial court's charge to the jury on the [O.C.G.A. section] 17-10-30(b)(2) and the [O.C.G.A. section] 17-10-30(b)(7) statutory aggravating circumstances would not have misled the jury into believing that it was authorized to punish Lucas for

318. 274 Ga. at 384, 552 S.E.2d at 863 (citing Fugate v. State, 263 Ga. 260, 431 S.E.2d 104 (1993)).
319. 275 Ga. at 85, 561 S.E.2d at 428.
320. *Id*.
321. *Id*.
322. 274 Ga. at 453, 553 S.E.2d at 578 (citing Heidler v. State, 273 Ga. 54, 65, 537 S.E.2d 44, 56 (2000); Jenkins v. State, 269 Ga. 282, 296, 498 S.E.2d 502, 515 (1998)).
323. 274 Ga. at 256, 551 S.E.2d at 734.
324. 275 Ga. 220, 564 S.E.2d 191 (2002).
325. *Id.* at 221-22, 564 S.E.2d at 192.
326. *Id*.
327. 274 Ga. at 650, 555 S.E.2d at 450.

anything other than his own culpability in the murders."[328] Further, in *Lance*, the court found that "[t]he trial court's failure to charge the jury that its findings of statutory aggravating circumstances must be unanimous was not reversible error because the trial court charged the jury that its sentencing verdict must be unanimous."[329]

E. Tainted Jury

In *Presnell* the jury encountered a man in the hotel lobby who said, "'Fry him.'"[330] Appellant made an argument for mistrial in his appeal based on a tainted jury.[331] The Georgia Supreme Court denied the motion, first, because appellant did not move for mistrial at the trial and, second, because at the trial level, it was determined after individual interviews with the jurors that they were not affected by the man's remarks.[332]

F. Verdict

Although the jurors in *Brannan* returned an incomplete verdict form by failing to cross out the sentencing options they did not choose, the Georgia Supreme Court denied appellant's allegation that the mistake was a reversible error.[333] The court held that "any confusion over the verdict form was inconsequential and harmless to the [appellant]. The jury clearly selected the death penalty on the verdict form, and no deliberation remained to be conducted."[334]

G. Proportionality Review

As required by Georgia statute, the Georgia Supreme Court reviewed all the death sentences to ensure the sentence was not disproportional to the crimes committed.[335] Without further analysis, the court in *Brannan* concluded, "Considering both the crime and the [appellant], the death sentence is not disproportionate to the penalty imposed in similar cases."[336] In *Lucas* the court reasoned, "[The evidence] demonstrates the highly aggravated nature of Lucas's crimes. Although there was

---

328. *Id*.
329. 275 Ga. at 23, 560 S.E.2d at 677 (citing Wilson v. State, 271 Ga. 811, 525 S.E.2d 339 (1999)).
330. 274 Ga. at 254, 551 S.E.2d at 733.
331. *Id*. at 255, 551 S.E.2d at 733.
332. *Id*.
333. 275 Ga. at 85, 561 S.E.2d at 428-29.
334. *Id*., 561 S.E.2d at 428.
335. *See* O.C.G.A. § 17-10-35(3) (1997).
336. 275 Ga. at 86, 561 S.E.2d at 429.

evidence of alleged intoxication and other allegedly-mitigating factors presented to the jury, we do not find the jury's reaction to the evidence viewed as a whole to have been excessive."[337] In *Rhode* the court concluded similarly: "[C]onsidering both the crimes and the [appellant], that the death sentences imposed for the murders in this case were neither excessive nor disproportionate to the penalties imposed in similar cases in Georgia."[338] The court reached the same result in *Lance*, *Raheem*, and *McPherson*.[339]

H. Re-trial

Appellant in *Nance v. State*[340] argued that the rule against double jeopardy prohibited a resentencing.[341] The Georgia Supreme Court reversed appellant's previous death sentence because of the trial court's error in failing to excuse a prospective juror for cause because her views in favor of capital punishment would prevent or substantially impair the performance of her duties as a juror.[342] The Georgia Supreme Court denied appellant's motion prohibiting resentencing, stating, "The general [double jeopardy] rule is that the retrial of the [appellant] is not barred where reversal of the conviction results from trial error rather than evidentiary insufficiency."[343] Here, the reversal of the sentence was due to trial error; therefore, the Georgia Supreme Court held that the rule of double jeopardy did not apply.[344]

V. PRESERVATION OF ERROR

A. Failure to Object

1. Voir Dire. Appellant in *Lance v. State*[345] complained that three prospective jurors should have been dismissed because they were unqualified to serve based on opinions formed through exposure to pretrial influences. However, appellant did not move to disqualify the

---

337. 274 Ga. at 651, 555 S.E.2d at 450.
338. 274 Ga. at 386, 552 S.E.2d at 864 (citing O.C.G.A. § 17-10-35(c)(3) (1997 & Supp. 2002); Allen v. State, 253 Ga. 390, 321 S.E.2d 710 (1984)).
339. *See* 275 Ga. at 26, 560 S.E.2d at 579; 275 Ga. at 95, 560 S.E.2d at 687; *McPherson*, 274 Ga. at 453, 553 S.E.2d at 578.
340. 274 Ga. 311, 553 S.E.2d 794 (2001).
341. *Id.* at 311, 553 S.E.2d at 795.
342. *Id*. (citing Nance v. State, 272 Ga. 217, 526 S.E.2d 560 (2000)).
343. *Id*.
344. *Id*. at 312, 553 S.E.2d at 796.
345. 275 Ga. 11, 560 S.E.2d 663 (2002).

jurors.[346] The Georgia Supreme Court held that the trial court did not commit error by failing to excuse these two jurors sua sponte.[347]

2. Inadmissible Evidence. In *Rhode v. State*,[348] appellant complained that prospective jurors were improperly disqualified.[349] The court held that appellant had waived his right to raise these claims because he raised no objection at trial regarding these prospective jurors.[350] Rhode also argued that the State should not have been allowed to ask his mother on cross-examination if "she had been present when a trial judge in Louisiana made certain comments to Rhode when sentencing him for burglary."[351] The court refused to consider the argument, holding that by failing to object, appellant waived his right to argue that the State submitted inadmissible hearsay evidence.[352] Specifically, the court explained: "Pretermitting whether the prosecutor was attempting to elicit hearsay testimony . . . and whether the testimony would have been cumulative of other admissible evidence and thus harmless, this Court holds that Rhode waived his right to raise this issue on appeal by failing to object at trial."[353] Because Rhode failed to argue at trial that his juvenile confessions should have been suppressed, the court also held that he waived his right to appeal that issue.[354]

The Georgia Supreme Court reached a similar decision in *McPherson v. State*[355] when appellant argued that testimony of a police officer was inadmissible because it was "an attempt to mislead the jury."[356] The Georgia Supreme Court concluded, "McPherson did not object to this testimony at trial, and he has therefore waived this argument on appeal."[357]

3. Bailiff Misconduct. In *Lucas v. State*,[358] a woman testified during the motion for new trial that a bailiff refused to let her enter the

---

346. *Id*. at 17, 560 S.E.2d at 673.
347. *Id*. (citing Whatley v. State, 270 Ga. 296, 509 S.E.2d 45 (1998)).
348. 274 Ga. 377, 552 S.E.2d 855 (2001).
349. *Id.* at 380, 552 S.E.2d at 860.
350. *Id*.
351. *Id*. at 382-83, 552 S.E.2d at 862.
352. *Id*.
353. *Id*. at 383, 552 S.E.2d at 862 (citing Earnest v. State, 262 Ga. 494, 495, 422 S.E.2d 188, 190 (1992)).
354. *Id*. at 382, 552 S.E.2d at 862 (citing *Earnest*, 262 Ga. at 495, 422 S.E.2d at 190).
355. 274 Ga. 444, 553 S.E.2d 569 (2001).
356. *Id.* at 451, 553 S.E.2d at 577.
357. *Id*. (citing *Earnest*, 262 Ga. at 494-95, 422 S.E.2d at 190).
358. 274 Ga. 640, 555 S.E.2d 440 (2001).

courtroom during the closing argument of the sentencing trial. The woman later testified that, at the time, spectators filled the courtroom. She also testified that at the next break, before the jury verdict, she notified the defense of the incident.[359] The supreme court, addressing Lucas's argument on appeal, stated, "Pretermitting whether any impropriety existed under the circumstances described, we conclude that Lucas has waived his right to complain about this issue by his failure to raise it at trial."[360]

4. Closing Arguments. In *Presnell v. State*,[361] appellant argued that the prosecutor's closing arguments referring to Presnell's future dangerousness were improper.[362] However, appellant failed to object to the statements at the trial level, and therefore, the Georgia Supreme Court ruled that he waived the issue on appeal.[363]

Likewise, the court denied appellant's argument in *Brannan v. State*[364] that the State's closing argument disparaging appellant's insanity defense was improper.[365] The court held, "Brannan did not object to the prosecutor's criticism of his insanity defense during trial and, therefore, this issue is waived on appeal with regard to guilt."[366]

B. Constitutionality of Lethal Injection

In *Lucas* appellant argued that execution by electrocution was cruel and unusual punishment in violation of the Eighth Amendment.[367] However, this issue was later decided in his favor in *Dawson v. State*,[368] another Georgia Supreme Court decision. In light of *Dawson*, appellant argued that execution by lethal injection was cruel and unusual and, therefore, unconstitutional.[369] The court rejected the argument, stating only that "[b]ecause Lucas presented no evidence in support of his claim that execution by lethal injection is cruel and

---

359. *Id*. at 650-51, 555 S.E.2d at 450.
360. *Id*. at 651, 555 S.E.2d at 450 (citing Brown v. State, 261 Ga. 66, 72, 401 S.E.2d 492, 497 (1991)).
361. 274 Ga. 246, 551 S.E.2d 723 (2001).
362. *Id.* at 255, 551 S.E.2d at 733-34.
363. *Id*.
364. 275 Ga. 70, 561 S.E.2d 414 (2002).
365. *Id.* at 82, 561 S.E.2d at 426-27.
366. *Id*., 561 S.E.2d at 426 (citing Gissendaner v. State, 272 Ga. 704, 713, 532 S.E.2d 677, 688 (2000); Miller v. State, 267 Ga. 92, 475 S.E.2d 610 (1996)).
367. 274 Ga. at 651, 555 S.E.2d at 451.
368. 274 Ga. 327, 555 S.E.2d 137 (2001).
369. 274 Ga. at 651, 555 S.E.2d at 451.

unusual punishment, that claim must fail."[370] In *Rhode* the court came to the same conclusion.[371]

C. *Procedural Default*

The court in *Head v. Ferrell*[372] stated that in procedural default claims, issues the petitioner failed to raise at trial or at direct appeal cannot then be raised for the first time in habeas corpus proceedings "unless the petitioner meets the 'cause and prejudice' test."[373] First, the court defined the requisite "cause" showing as a showing of "some factor external to the defense [that] impeded counsel's efforts to raise the claim at trial or on direct appeal [or] ineffective assistance of counsel in waiving an issue at trial or omitting an issue on appeal."[374] Second, the court adopted the U.S. Supreme Court's definition of "prejudice" in *Strickland v. Washington*,[375] which requires that the prejudice was sufficient to affect the outcome of the trial.[376] Finally, the court noted the one exception to the application of the "cause and prejudice test" is in circumstances "where granting habeas corpus relief is necessary to avoid a 'miscarriage of justice,'" adding that "an extremely high standard applied in such cases."[377] The court concluded that Ferrell failed to meet the law set forth above and held that the claims in Ferrell's cross-appeal were barred by procedural default.[378]

However, the habeas court allowed Ferrell's claim of mental retardation, asserted for the first time under the "miscarriage of justice" exception.[379] The expert witness at the habeas proceeding determined that appellant was mentally retarded, but the Georgia Supreme Court held that he did not "prove beyond a reasonable doubt that he was mentally retarded."[380] The court based its decision on the fact that during trial counsel's investigation, the defense expert had not found Ferrell to be mentally retarded.[381]

---

370. *Id*.
371. 274 Ga. at 385, 552 S.E.2d at 863.
372. 274 Ga. 399, 554 S.E.2d 155 (2001).
373. *Id.* at 401-02, 554 S.E.2d at 106 (citing Turpin v. Todd, 268 Ga. 820, 824, 493 S.E.2d 900, 905 (1997); Black v. Hardin, 255 Ga. 239, 240, 336 S.E.2d 754, 755 (1985); O.C.G.A. § 9-14-48(d) (2001)).
374. *Id*. at 402, 554 S.E.2d at 160.
375. 466 U.S. 668 (1984).
376. *Head*, 274 Ga. at 402, 554 S.E.2d at 106 (citing *Strickland*, 466 U.S. 668).
377. *Id*. (citing Valenzuela v. Newsome, 253 Ga. 793, 796, 325 S.E.2d 370, 373 (1985)).
378. *Id*.
379. *Id*. at 412-13, 554 S.E.2d at 166-67.
380. *Id*., 554 S.E.2d at 167.
381. *Id*.

VI. DIRECT APPEAL

Georgia's death penalty statute requires an appeal to the supreme court whether an appellant seeks it or not.[382] Three areas of mandatory review under 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."[383]

Upon review in *Fults v. State*,[384] the Georgia Supreme Court found that "the death sentence imposed for the murder in this case was neither excessive nor disproportionate to the penalties imposed in similar cases in Georgia."[385] The evidence showed that Fults killed one victim and committed several burglaries to further his plan to murder another man.[386] In addition to the gruesome execution-style killing, Fults was uncooperative with guards while he was in jail to the extent that he was physically compelled to obey and made death threats to a fellow inmate.[387] The court also concluded that the sentence "was not imposed under the influence of passion, prejudice, or any other arbitrary factor."[388]

Similarly, in *Presnell* the Georgia Supreme Court determined that "similar cases in [Georgia] support the imposition of the death penalty in this case in that they all involve a murder during a kidnapping with bodily injury or the O.C.G.A. [section] 17-10-35(b)(7) aggravating circumstance."[389]

In *Lewis v. State*,[390] the supreme court held that it was reversible error for the trial judge to consider and rule on appellant's motion for new trial after she had testified as a material witness to some of the matters contained therein.[391] Although the judge tried to partition the issues on which she was disqualified from the issues on which she did not testify, all the issues arose in the same motion for a new trial

---

382. O.C.G.A. § 17-10-35 (1998).
383. *Id*.
384. 274 Ga. 85, 548 S.E.2d 315 (2001).
385. *Id.* at 88, 548 S.E.2d at 322.
386. *Id*.
387. *Id*.
388. *Id*.
389. 274 Ga. at 256, 551 S.E.2d at 734.
390. 275 Ga. App. 194, 565 S.E.2d 437 (2002).
391. *Id.* at 195, 565 S.E.2d at 438 (citing CODE OF JUDICIAL CONDUCT, Canon 3(E)).

proceeding and she was, therefore, disqualified.[392] The Georgia Supreme Court reversed and remanded the motion for new trial decision.[393]

VII. ELECTRIC CHAIR AND LETHAL INJECTION

In *High v. State*,[394] *Spivey v. State*,[395] and *Williams v. Head*,[396] the Georgia Supreme Court granted a stay of execution until the question of the constitutionality of electrocution was resolved.[397] The court initially addressed the electrocution question in *Esposito v. State*.[398] The majority in *Esposito* acknowledged that "[t]he continued use of electrocution as Georgia's sole method of executing persons sentenced to death for crimes committed before May 1, 2000, presents a troubling moral and legal issue."[399] Justice Fletcher stated that the Georgia Supreme Court and other courts have also raised grave concerns over the "humaneness" of electrocution.[400] The majority stated, "With Alabama's use of electrocution presently under review in federal evidentiary hearings, the continued place of electrocution in American society has once again been placed in doubt."[401] Continuing its discussion, the court emphasized its willingness to review the constitutionality of electrocution, declaring that, "Because such fundamental constitutional rights are at stake, this Court, upon a sufficient evidentiary showing, would not be unwilling to confront these difficult questions if necessary, despite our belief that the legislative and executive branches would be better positioned to assume continued leadership in

---

392. *Id*.
393. *Id*.
394. 273 Ga. 562, 544 S.E.2d 432 (2001).
395. 273 Ga. 544, 544 S.E.2d 136 (2001).
396. 272 Ga. 720, 533 S.E.2d 714 (2000).
397. 273 Ga. at 562, 544 S.E.2d at 432; 273 Ga. at 544, 544 S.E.2d at 136; 272 Ga. at 720, 533 S.E.2d at 714.
398. 273 Ga. 183, 538 S.E.2d 55 (2001).
399. *Id*. at 185, 538 S.E.2d at 58 (citing O.C.G.A. § 17-10-38 (1997 & Supp. 2001) (providing for execution by lethal injection); 2000 Ga. Laws 947 (preserving execution by electrocution for persons sentenced to death for crimes committed before May 1, 2000)).
400. *Id.* (citing Wilson v. State, 271 Ga. 811, 824-25, 525 S.E.2d 339, 351 (1999) (Sears, J., dissenting in part); DeYoung v. State, 268 Ga. 780, 791-92, 493 S.E.2d 157, 168 (1997) (Fletcher, P.J., concurring)).
401. *Id*. at 186, 538 S.E.2d at 59 (citing McNair v. Haley, 97 F. Supp. 2d 1270 (M.D. Ala. 2000) (ordering an evidentiary hearing on whether Alabama's use of electrocution is cruel and unusual punishment)).

this field."[402] In *Dawson v. State*,[403] the court finally declared execution by electrocution unconstitutional, stating,

> Based on this evidence of the electrocution process and comparing that process with lethal injection, a method of execution the Legislature has now made available in this State, we conclude that death by electrocution involves more than the "mere extinguishments of life," and inflicts purposeless physical violence and needless mutilation that makes no measurable contribution to accepted goals of punishment. Accordingly, we hold that death by electrocution, with its specter of excruciating pain and its certainty of cooked brains and blistered bodies, violates the prohibition against cruel and unusual punishment in Art. I, Sec. I, Par. XVII of the Georgia Constitution.[404]

VIII. UNIFIED APPEAL

According to the Unified Appeal Procedure, the Georgia Supreme Court is required to review each death penalty case.[405] The majority in *Colwell v. State*[406] stated, "'Notwithstanding the [appellant's] request, we must review a death penalty case under the Unified Appeal Procedure . . . and O.C.G.A. [section] 17-10-35.'"[407] In *Colwell* appellant requested a change of counsel. Colwell's affidavit made it clear he wanted to substitute counsel because the original counsel was not complying with his request to abandon the direct appeal of his death

---

402. *Id*. (citing DeYoung v. State, 268 Ga. 780, 792, 493 S.E.2d 157, 169 (1997)) ("'I urge the General Assembly to revisit the issue in light of modern knowledge and changing attitudes as reflected in other jurisdictions.'") (Fletcher, P.J., concurring); Provenzano v. Moore, 744 So. 2d 413, 447 n.56 (Pariente, J., dissenting)). On July 9, 2001, the Georgia Supreme Court addressed the issue of electrocution as a form of execution for death row inmates who had committed murders before May 1, 2000. The court consolidated *Moore v. Zant* (Case No. S01A1210) and *Dawson v. State* (Case No. S01A1041). The defense argued that electrocution constituted cruel and unusual punishment in the form of extreme pain and disfigurement, in violation of the evolving standards of decency. The State asserted that the prisoner is rendered unconscious after the first jolt and, thus, feels no pain. The State also attempted to minimize the evidence of disfigurement. On October 5, 2001, the Georgia Supreme Court declared execution by electrocution unconstitutional under the cruel and unusual provision of Article I, section 1, paragraph 17 of the Georgia Constitution. All appellants sentenced to death in Georgia are now subject to death by lethal injection. *See generally* Dawson v. State, 274 Ga. 327, 554 S.E.2d 137 (2001).

403. 274 Ga. 327, 554 S.E.2d 137 (2001).

404. *Id*. at 335, 554 S.E.2d at 142-43 (citations omitted).

405. Colwell v. State, 273 Ga. 338, 339, 543 S.E.2d 682, 682 (2001) (citing O.C.G.A. § 17-10-35 (1997)).

406. *Id.*

407. *Id.* at 339, 543 S.E.2d at 683 (quoting Patillo v. State, 258 Ga. 255, 255, 368 S.E.2d 493, 494 (1998)).

penalty case.[408] The Georgia Supreme Court admitted that if this were a non-death penalty case, Colwell could change counsel and drop his appeal.[409] However, in a death penalty case the appellant has no choice "because the statutory basis for appellate review (O.C.G.A. § 17-10-35) requires mandatory review."[410] The majority held, "Since a death penalty appellant may not withdraw his appeal, neither is his attorney permitted to perform such an act."[411]

The Georgia Supreme Court amended the rules of the Unified Appeal Procedure, with significant changes effective January 27, 2000.[412] The Unified Appeal Procedure mandates there be two defense attorneys in all death penalty cases, a lead counsel and co-counsel, often called "second chair."[413] The lead attorney must: (1) have a minimum experience consisting of one death penalty trial to verdict or three capital but non-death penalty trials to verdict; (2) be familiar with the Unified Appeal procedures; (3) be familiar with the kinds of expert testimony that are commonly part of death penalty trials; and (4) have attended at least ten hours of specialized training on death penalty defense preceding trial and an additional ten hours for each year during the life of the case.[414] The second chair must: (1) have three years of criminal trial experience; (2) have been lead or co-counsel in at least one non-death penalty murder trial or two felony jury trials; and (3) meet the same specialized training requirements as lead counsel.[415] If an attorney does not meet these standards but is otherwise competent, trial judges may petition the supreme court to make exceptions to these minimum requirements, provided the reasons are set forth on the record.[416] In addition, for the first time, the supreme court has included a twelve-page form required for the Judge's Report.[417] These amendments also update the law set forth in the Judge's Report.

---

408. *Id*. at 338, 543 S.E.2d at 682.

409. *Id.*

410. *Id*. at 339, 543 S.E.2d at 682 (citing Thomas v. State, 260 Ga. 262, 392 S.E.2d 520 (1990)).

411. *Id*., 543 S.E.2d at 683.

412. GA. CT. & BAR R., UNIFIED APP. (2002).

413. *Id*. at II(A)(1).

414. *Id*. at II(A)(1)(a)(2)-(5).

415. *Id*. at II(A)(1)(b)(1)-(3).

416. *Id*. at II(A)(3).

417. O.C.G.A. § 17-10-35(a) (2000) (requiring a trial judge's report "in the form of a standard questionnaire prepared and supplied by the Supreme Court").

IX. INEFFECTIVE ASSISTANCE OF COUNSEL

A. *Pretrial*

In *Fults v. State*,[418] appellant contended that his trial counsel, now deceased, rendered ineffective assistance by failing to fully investigate appellant's claim that there were others involved who were more culpable for the murder than himself. However, the investigator hired by defense counsel testified at the evidentiary hearing that appellant would not have allowed the theory of more culpable co-appellants to be presented at trial.[419] The court found that appellant failed to meet the *Strickland* test of showing deficient performance and prejudice due to counsel's ineffectiveness.[420] Though the court conceded that had the other co-appellants been investigated, appellant may have appeared less culpable, the court nevertheless found that defendant "failed to show that his trial counsel's conduct fell below professionally reasonable standards in failing to investigate Fults'[s] claims against his wishes and when the evidence belied those claims."[421] Moreover, the court was persuaded by the strong evidence of Fults's guilt in finding that "Fults has failed to show that his trial counsel's actions, even if assumed professionally unreasonable, resulted in prejudice sufficient to support his ineffective assistance claim."[422]

In *Durden v. State*,[423] the court rejected appellant's claim that her trial attorneys were unqualified to represent her in the case because the record failed "to substantiate any basis for arguing that trial counsel were ineffective due to their lack of qualification as criminal attorneys."[424] The court also held that trial counsel was qualified to represent appellant in a capital trial under the revised Unified Appeal Procedure Rule II(A), "notwithstanding that the special requirements appellant complains about were not in effect at the time of counsel's appointment" to the case.[425]

Appellant in *Fults* claimed that his trial counsel was ineffective by failing to question five prospective jurors during voir dire.[426] Citing

---

418. 274 Ga. 82, 548 S.E.2d 315 (2001).
419. *Id*. at 83-84, 548 S.E.2d at 319.
420. *Id*. (citing Strickland v. Washington, 466 U.S. 668, 687 (1983)).
421. *Id*. at 84, 548 S.E.2d at 319-20.
422. *Id*., 548 S.E.2d at 320.
423. 274 Ga. 868, 561 S.E.2d 91 (2002).
424. *Id.* at 869, 561 S.E.2d at 93.
425. *Id*.
426. 274 Ga. at 85, 548 S.E.2d at 320-21.

cases in which there exists a strong presumption of "'reasonable professional judgment,'"[427] the court found that because appellant failed to show actual prejudice due to counsel's deficient performance, appellant's claim failed.[428]

Appellant in *Fults* also contended that his trial counsel was ineffective because he persuaded Fults to plead guilty while the prosecutor continued to seek the death penalty.[429] The court denied this claim in deference to trial strategy of pleading in a capital case where "the evidence of guilt is overwhelming."[430]

B. Trial

The supreme court rejected appellant's contention in *Fults* that the trial counsel's failure to object to evidence implicating his guilt during sentencing rendered his counsel ineffective.[431] The court reasoned that "the circumstances of the offense are relevant both to guilt *and* to sentence."[432] Because of this, the court found that counsel's "[f]ailure to make a meritless objection cannot be evidence of ineffective assistance."[433]

In *Palmer v. State*,[434] the court did not find that trial counsel's question during cross-examination of a State's witness, withdrawn after an objection by the prosecutor, was ineffective.[435] The court affirmed the trial court's finding that appellant failed to make the requisite showing of deficient performance and undue prejudice based solely on the fact that trial counsel asked and then withdrew a question.[436] Appellant also claimed that his trial counsel was ineffective for failing to call three additional alibi witnesses.[437] The Georgia Supreme Court affirmed the trial court's ruling that not calling additional witnesses "whose vague testimony could not corroborate appellant's alibi" did not amount to ineffective assistance of counsel under the *Strickland* standard.[438]

---

427. *Id.* at 86, 548 S.E.2d at 320 (quoting *Strickland*, 466 U.S. at 690).
428. *Id*. (citations omitted).
429. *Id*. at 86, 548 S.E.2d at 321.
430. *Id*.
431. *Id*.
432. *Id*. at 87, 548 S.E.2d at 321 (citing Ford v. State, 257 Ga. 461, 463, 460 S.E.2d 258, 260 (1987)).
433. *Id*. (quoting Hayes v. State, 262 Ga. 881, 884-85, 426 S.E.2d 886, 888 (1993)).
434. 274 Ga. 796, 560 S.E.2d 11 (2002).
435. *Id.* at 797, 560 S.E.2d at 13-14.
436. *Id*. at 797-98, 560 S.E.2d at 13-14.
437. *Id*. at 798, 560 S.E.2d at 14.
438. *Id*. (citing Billups v. State, 272 Ga. 15, 16, 523 S.E.2d 873, 874 (1999)).

In *Durden*, without much elaboration, the Georgia Supreme Court also found that appellant failed to carry her burden of proving that her trial counsel's performance was deficient in investigating the effect of emotional factors of her culpability or that lead counsel lacked professionalism in the courtroom.[439]

C. Appeal

In *Head v. Ferrell*,[440] the Georgia Supreme Court reviewed the findings of the habeas court on the question of whether appellate counsel rendered ineffective assistance.[441] The court applied the *Strickland* standard, in which appellant had to show that his "lawyer rendered deficient performance and that actual prejudice resulted."[442] The Georgia Supreme Court reversed the habeas court's finding that the appellate attorney did not effectively present the claim of trial counsel's alleged ineffective assistance in the sentencing phase of appellant's trial.[443] The court outlined the extent to which appellate counsel had "'attack[ed] virtually every decision made by trial counsel,'"[444] finding that appellate counsel "attempted to argue [the ineffectiveness of trial counsel] claim on direct appeal to the extent possible."[445]

In reviewing the habeas court's decision, the Georgia Supreme Court ruled that trial counsel's presentation of character witnesses was not ineffective assistance because "[a]lthough character witnesses sometimes might not contribute significantly to a sentencing phase . . . [m]itigating evidence is *anything* that might persuade a jury to impose a sentence less than death."[446] The court held that "[t]o the extent that the habeas court held that character witnesses cannot offer mitigating testimony, it was in error."[447] The Georgia Supreme Court also reversed the habeas court's finding that appellate counsel rendered ineffective assistance in obtaining and presenting testimony about appellant's background at his motion for new trial hearing as part of her argument that trial counsel had been ineffective in preparing and presenting appellant's sentencing phase case.[448] The court stated that

---

439. 274 Ga. at 869-70, 561 S.E.2d at 93.
440. 274 Ga. 399, 554 S.E.2d 155 (2001).
441. *Id.* at 403, 554 S.E.2d at 161.
442. *Id.* (citing *Strickland*, 466 U.S. at 687).
443. *Id*.
444. *Id.* at 404, 554 S.E.2d at 161 (alteration in original) (quoting Ferrell v. State, 261 Ga. 115, 119, 401 S.E.2d 741, 746 (1991)).
445. *Id*. at 405, 554 S.E.2d at 162.
446. *Id*.
447. *Id*.
448. *Id*. at 405-06, 554 S.E.2d at 162-63.

the record failed "to reveal adequate support for the habeas court's conclusion."[449] The court further illustrated the similarity of the evidence presented at habeas and the evidence presented by the appellate attorney.[450]

The habeas court in *Ferrell* also concluded that appellate counsel rendered ineffective assistance in how she handled the argument that appellant's trial attorneys worked under a conflict of interest.[451] The Georgia Supreme Court reversed this finding, stating, "this Court concluded on direct appeal that there was no actual conflict of interest, and nothing presented in [appellant's] habeas proceeding would have in reasonable probability changed that conclusion."[452] Appellant had alleged that his trial attorneys labored under a conflict of interest as both of them were members of the same public defender's office that was representing appellant's uncles in a murder case. Several months before counsel had begun to represent appellant, one of appellant's attorneys had represented the uncles' case, and the other had filed discovery motions in the uncles' case.[453] The Georgia Supreme Court held that the appellate attorney "ably set forth the essential contours of the alleged conflict and supported her claim with documentary evidence showing the nature and timing of the final adjudication in the uncles' cases."[454]

Appellant also claimed that appellate counsel rendered ineffective assistance by failing to show that a prima facie case of racial discrimination had been available to trial counsel under *Batson v. Kentucky*.[455] The district attorney had struck African-American venire jurors and trial counsel had failed to object.[456] Rather than discussing the issue of appellate counsel's performance, the Georgia Supreme Court affirmed its prior decision on direct appeal that trial counsel's performance remained within reasonable professional conduct.[457] Trial counsel had explained in the motion for a new trial that he had not objected because he thought that African-Americans would identify with the victims, who

449. *Id*. at 405, 554 S.E.2d at 162.
450. *Id*. at 406, 554 S.E.2d at 162.
451. *Id.* at 408, 554 S.E.2d at 164.
452. *Id*.
453. *Id*.
454. *Id*.
455. 476 U.S. 79 (1986).
456. 274 Ga. at 409, 554 S.E.2d at 164.
457. *Id*.

were both African-Americans.[458] The court, therefore, deemed the *Batson* claim meritless.[459]

X. U.S. SUPREME COURT CASES

A. *Atkins v. Virginia*[460]

In 1989 only two states, Georgia (by statute enacted in 1988) and Maryland (by statute enacted in 1989), prohibited the execution of the mentally retarded.[461] In that year, the United States Supreme Court issued its opinion in *Penry v. Lynaugh*,[462] a death penalty case from Texas. In *Penry* the Supreme Court held that the execution of a mentally retarded person did not violate the Eighth Amendment's prohibition against "cruel and unusual punishments" because there was not a "national consensus" against the practice.[463]

Since 1989, sixteen more states have joined Georgia and Maryland and have banned the execution of mentally retarded persons.[464] On June 20, 2002, Justice Stevens, writing for the majority in *Atkins*, held that the execution of mentally retarded criminals is "cruel and unusual punishment" and is, therefore, prohibited by the Eighth Amendment to the Constitution of the United States.[465] In 2000 the Supreme Court of Virginia found that Daryl Atkins, a Virginia death row inmate with an IQ of fifty-nine and the reasoning capacity of a seven-year-old child could be executed by the State. The Virginia Supreme Court considered whether Daryl Atkins's sentence of death was excessive or disproportionate to the penalty imposed in similar cases. Atkins's attorneys contended that he should not be sentenced to death due to his mental retardation. The Virginia Supreme Court considered the United States Supreme Court's decision in *Penry* and refused to rule out the imposition of the death penalty on Atkins solely on the basis of mental age or the diagnosis of mental retardation. Once again relying on the decision in *Penry*, the Virginia Supreme Court found that imposing the death

---

458. *Id.*
459. *Id.*
460. 122 S. Ct. 2242 (2002).
461. *Id.* at 2249 (citing O.C.G.A. § 17-7-131(j) (Supp. 1998) and MD. ANN. CODE art. 27, § 412(f)(6) (1989)).
462. 492 U.S. 302 (1989).
463. *Id.* at 334.
464. *Atkins*, 122 S. Ct. at 2248.
465. *Id.* at 2252.

penalty in such a case did not violate the Eighth Amendment's prohibition against cruel and unusual punishment.[466]

In *Atkins* the majority opined that "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses, however, [the mentally retarded] do not act with the level of moral culpability that characterizes the most serious adult criminal conduct."[467] The majority explained the reversal of its decision in *Penry* by pointing to the number of states that had followed the lead of Georgia since 1988.[468] Justice Stevens noted that it was

> not so much the number of these States that is significant, but the consistency of the direction of change. Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.[469]

B. Ring v. Arizona[470]

In 1990, the United States Supreme Court issued an opinion in *Walton v. Arizona*,[471] holding that the Arizona scheme for sentencing in death penalty cases, which provided that a judge, not a jury, was the ultimate finder of fact with respect to the existence of aggravating circumstances, was constitutional.[472] However, in 2000 the Court held in *Apprendi v. New Jersey*[473] that a judge could not make findings that would increase a defendant's sentence beyond the maximum, as that was comparable to an additional conviction.[474] The Court in *Apprendi* held that such a decision must be submitted to a jury and requires proof beyond a reasonable doubt.[475]

On June 24, 2002, the United States Supreme Court in *Ring v. Arizona* revisited and reversed its 1990 decision in *Walton*.[476] Justice

---

466. *Id*. at 2245-46.
467. *Id*. at 2244.
468. *Id.* at 2248.
469. *Id*. at 2249 (citation omitted).
470. 122 S. Ct. 2428 (2002).
471. 497 U.S. 639 (1989).
472. *Id.* at 648.
473. 530 U.S. 466 (2000).
474. *Id.* at 498.
475. *Id.* at 489.
476. 122 S. Ct. at 2432, 2443 (citing *Walton*, 497 U.S. 639).

Ginsberg wrote for the majority, joined by Justices Stevens and Kennedy, while Justices Scalia, Thomas, and Breyer concurred.[477] Justice O'Connor and Chief Justice Rehnquist filed a dissenting opinion.[478]

The Court in *Ring* was called upon to reconcile its *Apprendi* decision with its decision in *Walton*.[479] Justice Ginsberg, writing for the majority, found that *Walton* and *Apprendi* were irreconcilable.[480] Justice Ginsberg wrote:

> [O]ur Sixth Amendment jurisprudence cannot be home to both [*Walton* and *Apprendi*]. Accordingly, we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," the Sixth Amendment requires that they be found by a jury.[481]

The Court noted that the Sixth Amendment right to a jury trial is not based upon a finding that juries provide "rationality, fairness, or efficiency of potential factfinders."[482] Indeed, the Court conceded that "the superiority of judicial factfinding in capital cases is far from evident, . . . [given that] the great majority of States responded to this Court's Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury."[483]

The 7-2 decision in *Ring* ended the practice of having a judge, rather than a jury, decide the issue of the sentence in a death penalty case. In its decision, the Court held that a death sentence for which the necessary aggravating circumstances are determined by a judge violates the defendant's Sixth Amendment constitutional right to a trial by jury.[484]

The impact of the decision in *Ring* is not yet known. However, the ruling could affect nearly eight hundred death penalty cases in nine states.[485] Judges have the sole sentencing discretion in Arizona, Idaho,

---

477. *Id.* at 2432.
478. *Id*.
479. *Id.* at 2428.
480. *Id*. at 2443.
481. *Id*. (quoting *Apprendi*, 530 U.S. at 494 n.19) (citations omitted).
482. *Id*. at 2442.
483. *Id*.
484. *Id*. at 2443.
485. Death Penalty Information Center, United States Supreme Court: *Ring v. Arizona*, *available at* http://www.deathpenaltyinfo.org (August 2, 2002).

and Montana.[486] A three-judge panel decides the sentence in Colorado and Nebraska.[487] In Alabama, Delaware, Florida, and Indiana, the jury renders an advisory verdict, but the judge makes the ultimate sentencing determinations.[488] There are over eight hundred death row inmates in these states.[489] Finally, as of July 1, 2002, the Indiana Legislature has provided that a jury's unanimous vote for life or death is binding.[490]

---

486. *See* ARIZ. REV. STAT. ANN. § 13-703(C) (West 2001); IDAHO CODE § 19-2515 (Michie Supp. 2001); MONT. CODE ANN. § 46-18-301 (1997).

487. *See* COLO. REV. STAT. § 16-11-103 (2001); NEB. REV. STAT. § 29-2520 (1995).

488. *See* ALA. CODE §§ 13A-5-46, 13A-5-47 (1994); DEL. CODE ANN., Title 11, § 4209 (1995); FLA. STAT. ANN. § 921.141 (2001); IND. CODE. ANN. § 35-50-2-9 (Michie Supp. 2001).

489. Death Penalty Information Center, *supra* note 485.

490. IND. CODE. ANN. § 35-50-2-9 (Supp. 2002).