# **Death Penalty Law**

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This Article surveys the death penalty decisions of the Georgia Supreme Court from June 1, 2002 through May 31, 2003. The cases discussed include those heard by the supreme court on interim appeal, on direct appeal, and on review of habeas corpus decisions. Focusing on the court's decisions that affect the trial and appeal of death penalty cases, this Article, with some exceptions, does not discuss holdings in capital cases that are common to all criminal appeals. Four recent decisions of the Supreme Court of the United States are included in this survey because of their salience to Georgia death penalty law.

## I. Pretrial Issues

This section covers issues involving indictment, grand juries, search and seizure, discovery, and change of venue.

#### A. Indictment

Appellant in *Sallie v. State*<sup>2</sup> was first indicted in 1990 by a Bacon County grand jury for murder and various other charges. Sallie was subsequently tried and convicted on all counts except armed robbery and theft by taking. The supreme court reversed appellant's convictions in

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<sup>1.</sup> For a survey of death penalty decisions handed down during the prior year, see Michael Mears, *Death Penalty Law*, 54 MERCER L. REV. 245 (2002).

<sup>2. 276</sup> Ga. 506, 578 S.E.2d 444 (2003).

1998 and returned his case to Bacon County.<sup>3</sup> At the State's request, appellant's indictment was nolle prossed, only to have a Bacon County grand jury reindict Sallie less than six months later on the same offenses (excluding theft by taking and armed robbery). Appellant filed a motion to quash the second indictment, arguing that the State was required to charge exceptions to the statute of limitations for all of the nonmurder charges due to the time lapsed since the commission of those crimes, but the trial court denied appellant's motion.<sup>4</sup> Stating that section 17-3-3 of the Official Code of Georgia Annotated ("O.C.G.A")<sup>5</sup> provides for a six-month extension when an indictment brought within the statute of limitations is later nolle prossed, *not* an exception to the statute of limitations that must be pleaded in the indictment,<sup>6</sup> the court held that "the State may re-indict a defendant within six months after the first indictment is nolle prossed without running afoul of the statute of limitation even if the initial statute of limitation period has run."<sup>7</sup>

At trial, appellant in Braley v. State<sup>8</sup> was found guilty of malice murder, felony murder, kidnapping with bodily injury, armed robbery, and aggravated battery, and was sentenced to death after a jury found beyond a reasonable doubt that the murder was committed while appellant was engaged in the commission of other statutory aggravators. Appealing this sentence, Braley argued that the trial court erred in denying each of his motions to quash various charges in his indictment. 9 While the issue of error surrounding two of the specified charges was declared moot, 10 the court found no error in the trial court's refusal to quash the remaining counts.<sup>11</sup> The court held that the count of kidnapping with bodily injury and the count of armed robbery each placed appellant on sufficient notice of the charges against him, 12 and that the Georgia statutes defining each of those crimes were not unconstitutionally vague. 13 The court also held that O.C.G.A. section 16-5-40<sup>14</sup> is not unconstitutional on the ground that it may serve as the

<sup>3.</sup> Id. at 513, 578 S.E.2d at 453.

<sup>4.</sup> Id. at 506-13, 578 S.E.2d at 444-53.

<sup>5.</sup> O.C.G.A. § 17-3-3 (1997).

<sup>6. 276</sup> Ga. at 513-14, 578 S.E.2d at 453.

<sup>7.</sup> Id. at 513, 578 S.E.2d at 453.

<sup>8. 276</sup> Ga. 47, 572 S.E.2d 583 (2002).

<sup>9.</sup> Id. at 47-49, 572 S.E.2d at 588-90.

<sup>10.</sup> Id.

<sup>11.</sup> *Id*.

<sup>12.</sup> Id. (citing Burgeson v. State, 267 Ga. 102, 103, 475 S.E.2d 580, 582 (1996)).

<sup>13.</sup> Id., 572 S.E.2d at 590.

<sup>14.</sup> O.C.G.A. § 16-5-40 (1999).

basis for a death sentence in cases in which the kidnapping results in the death of the victim. <sup>15</sup>

Similarly, the court in Sallie upheld the trial court's denial of appellant's motions to dismiss various statutory aggravating circumstances from his indictment.16 Finding no error in the trial court's refusal to dismiss the statutory aggravating circumstance based on the commission of a burglary, the court explained that Sallie's claim of authority to enter the family home of his estranged wife was not supported by law.<sup>17</sup> The court also upheld the trial court's determination that the count of the indictment alleging "an assault upon the person of [the victim] with a pistol, a deadly weapon, by shooting said [victim] with said pistol,"18 was sufficient to charge the elements of aggravated assault. 19 Sallie argued that the trial court erred in not dismissing the two statutory aggravating circumstances related to his commission of murder while engaged in the commission of kidnappings with bodily injury to two victims distinct from the murder victim, claiming that the kidnappings with bodily injury occurred several hours after the murder.<sup>20</sup> Finding no error on the part of the trial court, the court stated, "[t]he O.C.G.A. [section] 17-10-30(b)(2) aggravating circumstance does not require simultaneity of action between the murder and the other capital felony or aggravated battery."21 Noting that the murder and kidnappings occurred within a "relatively short period of time,"22 the court held that these acts "can be fairly viewed as one continuous course of criminal conduct"23 and stated that O.C.G.A. section 17-10-30(b)(2) does not require the victim of the murder and the kidnapping to be the same person.<sup>24</sup>

 $<sup>15. \ \ 276</sup>$  Ga. at 49,572 S.E.2d at 590 (citing Sears v. State, 270 Ga. 834,841,514 S.E.2d  $426,\,434$  (1999)).

<sup>16. 276</sup> Ga. at 514, 578 S.E.2d at 453-54.

<sup>17.</sup> Id.

<sup>18.</sup> Id. at 515, 578 S.E.2d at 454.

<sup>19.</sup> *Id.* (citing O.C.G.A. § 16-5-21(a) (2003); Smith v. Hardrick, 266 Ga. 54, 464 S.E.2d 198 (1995); Wallace v. State, 216 Ga. App. 718, 455 S.E.2d 615 (1995)).

<sup>20.</sup> Id

<sup>21.</sup> *Id.* (citing Romine v. State, 251 Ga. 208, 214, 305 S.E.2d 93, 99 (1983); Strickland v. State, 247 Ga. 219, 230-31, 275 S.E.2d 29, 40 (1981); Peek v. State, 239 Ga. 422, 431, 238 S.E.2d 12, 19-20 (1977)); *see* O.C.G.A. § 17-10-30(b)(2) (1997 & Supp. 2002).

Id.

<sup>23.</sup> Id. (citing Romine, 251 Ga. at 208, 305 S.E.2d at 93).

<sup>24.</sup> *Id.* (citing *Peek*, 239 Ga. at 431, 238 S.E.2d at 19-20; Tharpe v. State, 262 Ga. 110, 115, 416 S.E.2d 78, 82-83 (1992)).

## B. Grand Jury

In Smith v. State, 25 the defendant was charged with malice murder and other crimes.26 The supreme court granted defendant's application for interim review to address the trial court's ruling on defendant's Sixth Amendment fair cross-section challenges to the Hall County grand and traverse jury lists.<sup>27</sup> The trial court ruled against defendant on his challenge to the grand jury list and in favor of defendant on his challenge to the traverse jury list.<sup>28</sup> Applying the three-part test it established in Morrow v. State<sup>29</sup> for determining the existence of a prima facie Sixth Amendment fair cross-section violation, the court upheld the lower court's ruling on the grand jury list challenge, condoning the use of 1990 census numbers to create the 2000 grand jury list, and reversed its ruling on the traverse jury list challenge.<sup>30</sup> While the court held that defendant had satisfied his burden under the first prong of the *Morrow* test by establishing that Hispanics are a cognizable class for Sixth Amendment challenges, 31 the court also held that Smith had not met his burden on the second prong because Smith failed to show an actionable disparity between the percentage of Hispanics on the traverse jury list and the percentage of jury-eligible, not just resident, Hispanics in the county.<sup>32</sup> The court held that Smith established no "inherent exclusion" in Hall County's jury selection process, thereby failing the third prong of the *Morrow* test. 33 The jury commissioners had attempted sporadically to recruit eligible Hispanics, albeit unsuccessfully.34

<sup>25. 275</sup> Ga. 715, 571 S.E.2d 740 (2002).

<sup>26.</sup> Id. at 715, 571 S.E.2d at 742.

<sup>27.</sup> Id.

<sup>28.</sup> Id.

<sup>29. 272</sup> Ga. 691, 532 S.E.2d 78 (2000). The court in *Morrow* stated that To prevail on a Sixth Amendment jury pool composition challenge, Morrow must show: (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in jury pools is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

Id. at 692, 532 S.E.2d at 82 (citing Duren v. Missouri, 439 U.S. 357, 364 (1979); Bowen v. Kemp, 769 F.2d 672, 684 (11th Cir. 1985)).

<sup>30. 275</sup> Ga. at 718-19, 726, 571 S.E.2d at 744-45, 749.

<sup>31.</sup> Id. at 718, 571 S.E.2d at 744.

<sup>32.</sup> Id. at 723, 571 S.E.2d at 747.

<sup>33.</sup> Id. at 725, 571 S.E.2d at 748.

<sup>34.</sup> Id., 571 S.E.2d at 748-49.

Appellant in Ramirez v. State35 was indicted in DeKalb County on one count of malice murder, one count of felony murder, two counts of aggravated assault, two counts of aggravated battery, and one count of carrying a concealed weapon.<sup>36</sup> On interim review, the supreme court denied Ramirez's motion to quash his indictment based on underrepresentation of African Americans and Hispanics on the grand jury.<sup>37</sup> Citing its decision in Smith, 38 the court held that Ramirez's Fourteenth Amendment equal protection claim regarding the underrepresentation of African Americans failed because DeKalb County complied with the Unified Appeal Procedure and because Ramirez failed to show that the grand jury selection procedure was "susceptible of abuse or was not racially neutral."39 The court held that Ramirez established a prima facie case of a Sixth Amendment fair cross-section violation by showing an 11.9 percent underrepresentation of African Americans on the grand jury source list. 40 However, the court found that Ramirez's showing was successfully rebutted by the State. 41 Complying with the Unified Appeal Procedure by using the most recent census data to obtain "comprehensiveness and objectivity in the DeKalb County jury selection process" was a strong enough state interest to defeat Ramirez's claim of underrepresentation of African Americans.<sup>42</sup> Because the burden was on Ramirez to prove "actual under-representation of Hispanic persons,"43 the court held that Ramirez's showing of inadequate tracking of Hispanics by the county jury commissioners did not itself suffice to present a prima facie case of either an equal protection or fair crosssection violation.44

Ruling against the appellant's Sixth Amendment challenge, the supreme court in  $Lawler\ v.\ State^{45}$  held that Lawler failed to establish a fair cross-section violation regarding the Fulton County grand and traverse jury lists used in his case. <sup>46</sup> The court emphasized that there

<sup>35. 276</sup> Ga. 158, 575 S.E.2d 462 (2003).

<sup>36.</sup> Id. at 158, 575 S.E.2d at 464.

<sup>37.</sup> Id. at 163, 575 S.E.2d at 468.

<sup>38.</sup> Smith, 275 Ga. at 715, 571 S.E.2d at 740 (holding that the trial court did not err in finding no equal protection violation when a grand jury source list in a 2000 indictment was based on 1990 census data).

<sup>39. 276</sup> Ga. at 160-61, 575 S.E.2d at 466 (citing Castaneda v. Partida, 430 U.S. 482, 493 (1977)).

<sup>40.</sup> Id. at 162, 575 S.E.2d at 467.

<sup>41.</sup> *Id*.

<sup>42.</sup> *Id*.

<sup>43.</sup> Id.

<sup>44.</sup> Id.

<sup>45. 276</sup> Ga. 229, 576 S.E.2d 841 (2003).

<sup>46.</sup> Id. at 231, 576 S.E.2d at 845.

is no constitutional guarantee that an impaneled jury will be a representative cross-section of the community and that, rather, such an inquiry focuses on whether the procedures for compiling the jury lists are fair.<sup>47</sup>

The court in *Sallie* held that appellant failed to prove the systematic exclusion of disabled persons from the Bacon County grand jury. Stating that Sallie's use of anecdotal evidence to establish exclusion was insufficient, the court also held that Sallie failed to prove that the physically disabled are a cognizable group for Sixth Amendment analysis. The court found no legitimate equal protection claim because "[u]nlike race or gender, disability may legitimately affect a person's ability to serve as a juror." <sup>50</sup>

The court also dealt with the issue of grand juror qualification in *Sallie*. Appellant protested that some of the grand jurors who indicted him were aware of his previous trial and convictions. The supreme court noted that a person is not disqualified to serve on a grand jury because they have "heard or read about the case under investigation or ha[ve] even formed or expressed an opinion as to the guilt of the accused." The court held that any such possible error in Sallie's indictment was harmless as the "trial jury's verdict of guilt beyond a reasonable doubt demonstrates that there was probable cause to charge the defendant."

## C. Search and Seizure

In *Lawler* appellant sought to suppress evidence allegedly obtained through an illegal stop and multiple illegal searches.<sup>55</sup> The supreme court affirmed the trial court's denials of Lawler's suppression motions.<sup>56</sup> Dismissing appellant's claim of an illegal stop by police officers in a parking lot before the commission of the murder, the court found that the evidence showed that appellant was "neither stopped nor

<sup>47.</sup> *Id.* at 231-32, 576 S.E.2d at 845 (citing Torres v. State, 272 Ga. 389, 391, 529 S.E.2d 883, 885 (2000)).

<sup>48. 276</sup> Ga. at 511, 578 S.E.2d at 451 (citing *Smith*, 275 Ga. at 715, 571 S.E.2d at 740; *Morrow*, 272 Ga. at 691, 532 S.E.2d at 78).

<sup>49.</sup> Id.

<sup>50.</sup> *Id.* at 512, 578 S.E.2d at 451-52 (quoting United States v. Harris, 197 F.3d 870, 875 (7th Cir. 1999)).

<sup>51.</sup> Id. at 514, 578 S.E.2d at 453.

<sup>52.</sup> Id.

<sup>53.</sup> Id. (quoting Isaacs v. State, 259 Ga. 717, 719, 386 S.E.2d 316, 321 (1989)).

<sup>54.</sup> Id. (citations omitted).

<sup>55. 276</sup> Ga. at 232-33, 576 S.E.2d at 846.

<sup>56.</sup> Id. at 232, 576 S.E.2d at 846.

detained."<sup>57</sup> The court held that the warrantless searches of appellant's apartment and its surroundings conducted during and immediately after an armed standoff between Lawler and police at Lawler's home were justified based on the exigency of the circumstances.<sup>58</sup>

Despite Lawler's claim that a warrant issued for "guns, ammunition, clothing, shoes, and other related items to the crime of murder" was without sufficient particularity, the court held that the warrant was valid, and the evidence seized was admissible. Books and pamphlets on police and military subjects discovered during a warrant search of Lawler's apartment were held not to be improperly seized "private papers." The court further held that the admission of these documents at trial was not a violation of Lawler's free speech rights because the First Amendment does "not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." A search of Lawler's person at the police station, which included swabbing for blood or gunshot residue, was found to be a lawful search incident to Lawler's arrest. Ruling against Lawler's claim that the magistrate who issued the search warrants was not "neutral and detached," the court concluded that

the magistrate's limited social contacts with the affiants, his visit to [one of the victim police officers] after her injuries, and his attendance at [the other victim's] funeral, did not compromise the "severance and disengagement from activities of law enforcement" required of a magistrate in order to issue a valid search warrant. <sup>63</sup>

The court declined appellate review of Lawler's contention that the second search warrant in his case was invalid, stating that the evidence Lawler contended was seized pursuant to the second warrant was actually validly seized under the first warrant. A third search of Lawler's apartment was executed after Lawler's live-in girlfriend informed police of further hidden weapons. Before conducting this

<sup>57.</sup> Id. at 232-33, 576 S.E.2d at 846.

<sup>58.</sup> *Id.* at 233, 576 S.E.2d at 846 (citing Delay v. State, 258 Ga. 229, 230, 367 S.E.2d 806 (1988), quoting Mincey v. Arizona, 437 U.S. 385, 392-93 (1978)).

<sup>59.</sup> *Id.*, 576 S.E.2d at 846-47 (citing McBee v. State, 228 Ga. App. 16, 491 S.E.2d 97 (1997); Miller v. State, 219 Ga. App. 213, 464 S.E.2d 621 (1995)).

<sup>60.</sup> *Id.*, 576 S.E.2d at 847 (citing Sears v. State, 262 Ga. 805, 426 S.E.2d 553 (1993) (holding that "private papers" are those documents protected by a legal privilege)).

 $<sup>61.\</sup> Id.$  at 234, 576 S.E.2d at 847 (quoting Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993)).

<sup>62.</sup> *Id.* (citing Thomason v. State, 268 Ga. 298, 486 S.E.2d 861 (1997); *Strickland*, 247 Ga. at 219, 275 S.E.2d at 29).

 $<sup>63.\ \ \, \</sup>textit{Id.}$  (citing Raulerson v. State, 268 Ga. 623, 491 S.E.2d 791 (1997); King v. State, 263 Ga. 741, 438 S.E.2d 620 (1994)).

<sup>64.</sup> Id.

search, police obtained the girlfriend's consent and a new search warrant. The court dismissed appellant's objections to the admission of evidence found during this third search, holding that the search for and seizure of these weapons were legal under both a valid warrant and a valid consent. 66

Likewise, the court in *Sallie* held that the two warrants issued to search appellant's mobile home and automobile, respectively, were each supported by probable cause and were therefore valid.<sup>67</sup> Without elaboration, the court also held that the warrant to search the mobile home did not authorize a "general search," the police did not exceed the scope of the warrant in searching the mobile home, and thus, all of the evidence seized was admissible at trial.<sup>68</sup>

## D. Discovery

In *Braley* the appellant filed a motion for funds to obtain the services of a neuropsychologist. After the trial court's denial of this motion, appellant was convicted of malice murder and other charges, and the jury recommended a death sentence. <sup>69</sup> Noting that appellant was previously examined by a defense-selected, court-funded psychiatrist, the supreme court found no error in the trial court's denial of such funds because appellant was "unable to demonstrate that the services of a neuropsychologist were 'critical' to his defense."

# E. Change of Venue

In *Terrell v. State*,<sup>71</sup> the trial court determined that pretrial publicity prevented appellant from getting a fair trial in Newton County, where the murder occurred. Because the parties could not reach an agreement, the court selected Houston County as the transfer county. After a mistrial in Houston County, the court *sua sponte* transferred venue to

<sup>65.</sup> Id. at 234-35, 576 S.E.2d at 847.

<sup>66.</sup> *Id.* at 235, 576 S.E.2d at 847 (citing DeYoung v. State, 268 Ga. 780, 493 S.E.2d 157 (1997); Crowe v. State, 265 Ga. 582, 587, 458 S.E.2d 799 (1995)).

<sup>67. 276</sup> Ga. at 514, 578 S.E.2d at 453 (citing Lance v. State, 275 Ga. 11, 20-22, 560 S.E.2d 663, 675 (2002) (holding that each of the searches appellant protested were lawful because there was sufficient evidence for the judge to find probable cause and the searches were sufficiently limited in scope); *DeYoung*, 268 Ga. 780, 786-89, 493 S.E.2d 157, 165 (affirming the validity of four search warrants that appellant challenged by arguing lack of sufficient evidence of probable cause)).

<sup>68.</sup> Id. (citing Lance, 275 Ga. at 20-22, 560 S.E.2d at 663).

<sup>69. 276</sup> Ga. at 47, 50, 572 S.E.2d at 588-90.

<sup>70.</sup> *Id.* at 50, 572 S.E.2d at 590 (citing Roseboro v. State, 258 Ga. 39, 41, 365 S.E.2d 115, 117 (1988)).

<sup>71. 276</sup> Ga. 34, 572 S.E.2d 595 (2002).

Walton County on the grounds of convenience, similarity in the demographics of the two counties, and limited circulation of the primary Newton County newspaper in Walton County. In Walton County, appellant was convicted of malice murder and received a death sentence. On appeal the supreme court held that Terrell's allegation of prejudice, because of the four percent difference between the African American populations of Walton and Newton Counties was without merit. Also noting that voir dire demonstrated that no prospective jurors knew about Terrell's case, the court concluded that the trial court did not abuse its discretion in transferring the case to Walton County because there was no prejudice to appellant.

## II. JURY SELECTION

This section covers the permissible scope of examination, challenges for cause, and peremptory challenges during juror selection.

# A. Scope of Examination

In *Terrell v. State*,<sup>75</sup> appellant argued that the trial court erred in preventing him from asking certain voir dire questions to prospective jurors.<sup>76</sup> The supreme court found that some of the contested questions "improperly called for prejudgment of the case or asked prospective jurors what sentences were appropriate in hypothetical cases,"<sup>77</sup> while others were "irrelevant to a determination of the prospective jurors' impartiality."<sup>78</sup> Noting that the trial court has discretion in determining the scope of voir dire, the Georgia Supreme Court found that Terrell was permitted to ask sufficient questions to determine the fairness of prospective jurors, thereby finding no error.<sup>79</sup>

Citing again the trial court's discretion in determining voir dire's scope, the court in *Lawler v. State*<sup>80</sup> noted that "it is not error for the trial court to exclude voir dire questions that do not deal directly with the juror's responsibilities in the case." The court in *Lawler* held that

<sup>72.</sup> Id. at 34, 44, 572 S.E.2d at 598, 604.

<sup>73.</sup> *Id.* at 44, 572 S.E.2d at 604 (citing Gary v. State, 260 Ga. 38, 41, 389 S.E.2d 218, 221-22 (1990)).

<sup>74.</sup> Id. (citing Jenkins v. State, 269 Ga. 282, 285-86, 498 S.E.2d 502, 508-09 (1998)).

<sup>75. 276</sup> Ga. 34, 572 S.E.2d 595 (2002).

<sup>76.</sup> Id. at 37-38, 572 S.E.2d at 600.

<sup>77.</sup> Id. at 38, 572 S.E.2d at 600 (citations omitted).

<sup>78.</sup> Id.

<sup>79.</sup> Id. (citing Barnes v. State, 269 Ga. 345, 351-52, 496 S.E.2d 674, 683 (1998)).

<sup>80. 276</sup> Ga. 229, 576 S.E.2d 841 (2003).

<sup>81.</sup> Id. at 235, 576 S.E.2d at 848 (citations omitted).

the trial court committed no error in disallowing appellant to ask a prospective juror who worked in the healthcare industry: "As a medical professional, do you have an ethical objection to medical professionals participating in executions?" 82

Similarly, in *Spickler v. State*<sup>83</sup> the court found no error in the trial court's denial of appellant's attempt to question prospective jurors about their views of the parole board, the meaning of parole, distinctions between the two nondeath sentencing options, and the length of time a person sentenced to life in prison may actually serve.<sup>84</sup> Citing the parameters of acceptable voir dire questioning about nondeath sentencing options established in *Zellmer v. State*,<sup>85</sup> the court found the questions in the instant case exceeded the scope of inquiry permitted.<sup>86</sup>

The court in *Sallie v. State*<sup>87</sup> commented that "[q]uestions of a technical legal nature and questions that call for prejudgement are improper in a voir dire examination," and found that the trial court did not improperly restrict appellant's voir dire questions about technical and legal issues. In *Braley v. State*, however, appellant objected to voir dire questioning that "accurately described the function of statutory aggravating circumstances and encouraged the prospective jurors to look at [appellant] as they considered whether they could confirm their selection of a death sentence." The court found that the trial court did not err in overruling appellant's objections, stating that there was no abuse of the trial court's discretion in controlling the scope of voir dire.

# B. Challenges for Cause

Appellant in *Sallie* argued error in the trial court's refusal to excuse two prospective jurors for cause because of the jurors' bias in favor of the

<sup>82.</sup> Id.

<sup>83. 276</sup> Ga. 164, 575 S.E.2d 482 (2003).

<sup>84.</sup> Id. at 165, 575 S.E.2d at 485.

<sup>85. 272</sup> Ga. 735, 534 S.E.2d 802 (2000) (holding that parties are statutorily entitled, under O.C.G.A. § 15-12-133, to question jurors about their inclinations toward parole that may bias their ability to perform their official duties, but that examination regarding parole should be limited to a juror's ability to consider both a life sentence with the possibility of parole and a life sentence without the possibility of parole).

<sup>86. 276</sup> Ga. at 165, 575 S.E.2d at 485.

<sup>87. 276</sup> Ga. 506, 578 S.E.2d 444 (2003).

<sup>88.</sup> Id. at 510, 578 S.E.2d at 450 (citations omitted).

<sup>89.</sup> Id.

<sup>90. 276</sup> Ga. 47, 572 S.E.2d 583 (2002).

<sup>91.</sup> Id. at 52, 572 S.E.2d at 591-92 (citations omitted).

<sup>92.</sup> Id. (citing Barnes, 269 Ga. at 351-52, 496 S.E.2d at 674).

death penalty.<sup>93</sup> Stating that "[w]hether to strike a juror for cause is within the discretion of the trial court and the trial court's rulings are proper absent some manifest abuse of discretion,"<sup>94</sup> the supreme court examined the two jurors' voir dire responses as a whole, and found no abuse of the trial court's discretion in denying appellant's motions to excuse either juror for cause.<sup>95</sup> Appellant also argued that it was error for the trial court to excuse four other prospective jurors for cause.<sup>96</sup> Of these four individuals, one juror stated that his religion did not permit him to sit in judgment of others; two jurors indicated they could never vote for the death penalty; and the fourth juror had mental health problems.<sup>97</sup> The court's review of the record found no error in the trial court's determination that these four jurors were not qualified.<sup>98</sup>

In Arevalo v. State, <sup>99</sup> appellant challenged the trial court's excusal for cause of two prospective jurors who equivocated about their ability to vote for a death sentence and a third juror who indicated an inability to put aside his personal beliefs in order to follow the court's instructions. <sup>100</sup> Appellant also challenged the trial court's failure to excuse six jurors who "initially expressed their personal beliefs in support of the death penalty" or who indicated they would vote for death in the case of a guilty verdict. <sup>101</sup> The supreme court stated, "[t]here is no requirement that a prospective juror's qualification or disqualification appear with unmistakable clarity." <sup>102</sup> Noting the deference that must be paid to such trial court findings, the court found no abuse of discretion in the trial court's determinations regarding any of the nine jurors in question. <sup>103</sup>

The court again cited its duty to defer to the trial court's determinations of juror qualification or disqualification in *Braley*, finding no error in the trial court's excusal of five prospective jurors due to their "inability or unwillingness to consider a death sentence." <sup>104</sup>

Appellant in *Spickler* alleged that the trial court erred in declining to strike for cause two jurors: one whose wife had recently witnessed a

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93. 276 Ga. at 508, 578 S.E.2d at 449.
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<sup>94.</sup> Id. (quoting Greene v. State, 268 Ga. 47, 50, 485 S.E.2d 741, 744 (1997)).

<sup>95.</sup> *Id*.

<sup>96.</sup> Id. at 510, 578 S.E.2d at 450.

<sup>97.</sup> *Id.*, 578 S.E.2d at 450-51.

<sup>98.</sup> Id. at 510-11, 578 S.E.2d at 451.

<sup>99. 275</sup> Ga. 392, 567 S.E.2d 303 (2002).

<sup>100.</sup> Id. at 393-94, 567 S.E.2d at 306.

<sup>101.</sup> *Id.* at 394, 567 S.E.2d at 306.

<sup>102.</sup> Id.

<sup>103.</sup> Id. at 394-95, 567 S.E.2d at 306-07.

<sup>104. 276</sup> Ga. at 50-51, 572 S.E.2d at 591.

bank robbery and one who expressed doubt about the presumption of innocence. Noting the two jurors' statements indicating their ability to put aside their emotions and initial doubt, respectively, the court stated that neither of the jurors held a "fixed and definite opinion of appellant's guilt or innocence that would have prevented them from adjudicating appellant's case based solely upon the evidence and the trial court's jury charge." The court found no error by the trial court in declining to strike these jurors for cause. 107

The court in Lawler also found no error in the trial court's denial of Lawler's motions to excuse thirteen jurors for cause. 108 First clarifying that Lawler did not move to excuse for cause one of these thirteen jurors, the court held that there was no error by the trial court in not excusing the juror sua sponte. 109 The court also held that two other jurors from this group of thirteen were excused for medical reasons before jury selection began, rendering Lawler's argument with respect to these two jurors moot. 110 Stating that the responses of the remaining ten challenged jurors to voir dire questions "manifested that their views on capital punishment would not 'prevent or substantially impair the performance of [their] duties as [jurors] in accordance with [their] instructions and [their] oath[s],""111 the court held that the trial court did not err in declining to disqualify the ten jurors. 112 While certain jurors had been exposed to limited pretrial news reports, the court held that these jurors, who made statements indicating their ability to set aside this previous exposure and base their verdicts on evidence presented in the courtroom, were not disqualified. 113 The court also found no error in the denial of Lawler's motions to excuse three jurors for hardship reasons, mistakenly checking boxes on the juror questionnaire, and personal views on alcohol. 114

In *Hinely v. State*, 115 appellant argued that three jurors should have been excused because of their views on the death penalty. 116 The

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105. 276 Ga. at 165-66, 575 S.E.2d at 485.
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<sup>106.</sup> Id. at 166, 575 S.E.2d at 485.

<sup>107.</sup> Id.

<sup>108. 276</sup> Ga. at 235, 576 S.E.2d at 848.

<sup>109.</sup> Id. (citing Mize v. State, 269 Ga. 646, 501 S.E.2d 219 (1998)).

<sup>110.</sup> Id.

<sup>111.</sup> Id. (quoting Greene, 268 Ga. at 48, 485 S.E.2d at 743 (1997), Wainwright v. Witt, 469 U.S. 412, 424 (1985)).

<sup>112.</sup> Id.

<sup>113.</sup> Id. (citing Cromartie v. State, 270 Ga. 780, 514 S.E.2d 205 (1999)).

<sup>114.</sup> Id.

<sup>115. 275</sup> Ga. 777, 573 S.E.2d 66 (2002).

<sup>116.</sup> Id. at 783, 573 S.E.2d at 73.

supreme court held this irrelevant as a ground for reversal because Hinely received a sentence of life in prison without parole. The general constitutionality of qualifying jurors because of their views about the death penalty, however, was confirmed by the court in both *Arevalo* and *Braley*. Sentence of the court in both *Arevalo* and *Braley*.

Dealing with juror dismissal, the court in *Lawler* found no error in the trial court's dismissal of a prospective juror for tardiness. <sup>120</sup> After waiting hours for the juror in question to appear, the trial court dismissed the juror over appellant's objection and began jury selection. <sup>121</sup> Citing *Herring v. State* <sup>122</sup> and the inconvenience caused by the juror's tardiness, the court found that the trial court acted reasonably and without error. <sup>123</sup>

## C. Peremptory Challenges

Appellant in *Sallie* claimed that the State employed racial and gender discrimination in exercising its peremptory strikes. The supreme court found that the reasons offered for the State's strikes—that all but one of the jurors whom were struck were reluctant to vote for death and that the remaining struck juror ministered to inmates—were supported by the voir dire record and were gender and race neutral. The court held that the State had sufficiently rebutted a "prima facie case of discrimination" under *J.E.B. v. Alabama* and *Batson v. Kentucky*. Les

Likewise, the court in *Spickler* rejected appellant's *Batson* challenge to the State's striking of three prospective African American jurors. Finding no error, the court stated that appellant failed to show

<sup>117.</sup> *Id.* (citing Beasley v. State, 269 Ga. 620, 625, 502 S.E.2d 235, 240 (1998); Turner v. State. 268 Ga. 213, 217, 486 S.E.2d 839, 843 (1997)).

<sup>118. 275</sup> Ga. at 395, 576 S.E.2d at 307 (citing DeYoung v. State, 268 Ga. 780, 790, 493 S.E.2d 157, 167 (1997)).

<sup>119. 276</sup> Ga. at 52, 572 S.E.2d at 592 (citing *DeYoung*, 268 Ga. at 790, 493 S.E.2d at 167).

<sup>120. 276</sup> Ga. at 236, 576 S.E.2d at 848.

<sup>121.</sup> Id.

<sup>122. 224</sup> Ga. App. 809, 481 S.E.2d 842 (1997) (holding that the trial court did not abuse its discretion in removing a juror who was late for jury duty and replacing him with an alternate juror).

<sup>123. 276</sup> Ga. at 236, 576 S.E.2d at 848.

<sup>124. 276</sup> Ga. at 511, 578 S.E.2d at 451.

<sup>125.</sup> Id. (citing Jenkins v. State, 269 Ga. 282, 498 S.E.2d 502 (1998)).

<sup>126.</sup> Id.

<sup>127. 511</sup> U.S. 127 (1984).

<sup>128. 476</sup> U.S. 79 (1986).

<sup>129. 276</sup> Ga. at 166, 575 S.E.2d at 485.

purposeful racial discrimination in the exercise of the strikes and that the State provided race-neutral justifications for the strikes. <sup>130</sup>

#### III. GUILT AND INNOCENCE

This section discusses custodial statements, victim impact evidence, evidence of prior difficulties, hearsay, and demonstrative evidence; sufficiency of evidence; cross-examination; jury charges; merger of offenses; and mistrial.

## A. Admissibility

1. Appellant's Custodial Statements. Appealing his convictions of malice murder, kidnapping with bodily injury, and burglary, appellant in *White v. State*<sup>131</sup> alleged error in the trial court's admission of his two custodial statements. The trial court determined the first statement, made by appellant in a police vehicle at the scene of the crime, was inadmissible under *Jackson v. Denno*, and the supreme court affirmed. Evaluating the admissibility of appellant's second custodial statement, the court noted that White, a high school graduate, was advised of his rights and signed a waiver form. The court concluded that the second statement was given absent any hope of benefit and was therefore freely and voluntarily made and admissible. 136

In *Braley v. State*, <sup>137</sup> the trial court admitted appellant's statement made at the time of his arrest in which he stated, "[Y]ou've got me, take me in." The court found no abuse of the trial court's discretion in finding the statement "more probative than unduly prejudicial," and therefore admissible. <sup>139</sup>

<sup>130.</sup> Id. (citing Williams v. State, 271 Ga. 323, 324, 519 S.E.2d 232, 233 (1999); Thomas v. State, 274 Ga. 156, 161, 549 S.E.2d 359, 367 (2001)).

<sup>131. 275</sup> Ga. 678, 571 S.E.2d 786 (2002).

<sup>132.</sup> Id. at 679, 571 S.E.2d at 787.

<sup>133. 378</sup> U.S. 368 (1964).

<sup>134. 275</sup> Ga. at 679-80, 571 S.E.2d at 788.

<sup>135.</sup> Id. at 680, 571 S.E.2d at 788.

<sup>136.</sup> Id.

<sup>137. 276</sup> Ga. 47, 572 S.E.2d 583 (2002).

<sup>138.</sup> Id. at 52, 572 S.E.2d at 592.

<sup>139.</sup> *Id.* (citing Pickren v. State, 272 Ga. 421, 425, 530 S.E.2d 464, 468 (2000); Carroll v. State, 261 Ga. 553, 554, 408 S.E.2d 412, 413 (1991)).

- **2. Victim Impact Evidence.** In *Sallie v. State*, <sup>140</sup> appellant argued that testimony by victims describing how the victims freed themselves and sought help while fearing the return of appellant was victim impact evidence and impermissible at the guilt-innocence phase of trial. <sup>141</sup> The court found the testimony relevant and admissible, <sup>142</sup> stating that "[a]cts and circumstances forming a part or continuation of the main transaction are admissible as res gestae."
- **3. Prior Difficulties.** Appellant in *Sallie* argued error in the admission of evidence of prior difficulties between appellant and the murder victim, as well as between appellant and the kidnapping victim (the murder victim's daughter). The court found that this evidence was admissible "to show [appellant's] bent of mind and motive," the State was not required to provide pretrial notice of this evidence, and the jury was instructed properly on the limited use of this evidence.
- **4. Hearsay.** Prior to his murder, the murder victim in *Sallie* discussed with a third party the pending divorce between his daughter and appellant and stated, "[t]here's going to be a killing before this is over." Appellant sought to admit this statement at trial, but the trial court excluded it. The supreme court noted the statement's ambiguity as to who would be killed and emphasized that the evidence showed no struggle between appellant and the victim. Citing

<sup>140. 276</sup> Ga. 506, 578 S.E.2d 444 (2003).

<sup>141.</sup> Id. at 512-13, 578 S.E.2d at 452.

<sup>142.</sup> Id. at 513, 578 S.E.2d at 452.

<sup>143.</sup> *Id.* (quoting Johnson v. State, 264 Ga. 456, 458, 448 S.E.2d 177, 178 (1994); Shouse v. State, 231 Ga. 716, 719, 203 S.E.2d 537, 540 (1974)).

<sup>144.</sup> Id.

<sup>145.</sup> Id.

<sup>146.</sup> *Id.* (citing Wall v. State, 269 Ga. 506, 500 S.E.2d 904 (1998) (holding that evidence of past difficulties between defendant and victim is admissible without a pretrial hearing when it provides insight into motive and when the trial court instructs the jury on the limited use it may make of such evidence)).

<sup>147.</sup> Id. at 516, 578 S.E.2d at 455.

<sup>148.</sup> Id.

<sup>149.</sup> Id.

 ${\it Massey}\ v.\ {\it State},^{\rm 150}$  the court found no error in excluding the statement.  $^{\rm 151}$ 

During the guilt phase of the Arevalo v. State 152 trial, the State introduced a letter allegedly written by appellant's brother, David Arevalo, to appellant while both were inmates in the county jail. The letter included specifics about the crime and the individuals involved in it. Appellant objected to the admission of the letter on multiple grounds at trial and on appeal. 153 Though Justice Thompson, joined in his dissent by Justices Fletcher and Sears, concluded that the State's showing of the letter's authenticity was insufficient to render it admissible, 154 the supreme court affirmed the trial court's finding of a prima facie showing of the letter's authenticity. 155 Upholding the trial court's admission of the letter despite appellant's objection that the letter amounted to hearsay, the court reasoned that because the two Arevalo brothers were engaged in an ongoing conspiracy when the letter was written, the letter fell under the co-conspirator exception to the hearsay rule. 156 Chief Justice Fletcher, joined in his dissent by Justice Sears, argued that the hearsay exception did not apply to the letter because the brothers had already admitted to their involvement in the armed robbery to law enforcement officials, and therefore, the conspiracy had ended before the letter was written.<sup>157</sup> Fletcher challenged the assumption that the brothers were conspiring to conceal their involvement in the murders at the time of the letter's writing because under Georgia criminal law, the Arevalos had already implicated themselves in the murders by admitting their involvement in the surrounding armed

<sup>150. 272</sup> Ga. 50, 525 S.E.2d 694 (2000) (holding that the hearsay bar against admission of threats made by the murder victim against, but unknown to, the perpetrator is only excepted in cases of inconsistencies in evidence as to who started the conflict that resulted in death, to substantiate other communicated threats, and establish the stance of the victim).

<sup>151. 276</sup> Ga. at 516, 578 S.E.2d at 455.

<sup>152. 275</sup> Ga. 392, 567 S.E.2d 303 (2002).

<sup>153.</sup> Id. at 395, 567 S.E.2d at 307.

<sup>154.</sup> *Id.* at 403, 567 S.E.2d at 312 (Thompson, J., and Sears, J., dissenting). In his dissent, arguing that the letter was erroneously admitted and calling for a reversal of the appellant's convictions and sentences, Thompson found the letter unsatisfactorily authenticated because (1) the state relied solely on an investigator employed by the district attorney's office to authenticate the letter, and (2) David Arevalo's verbal admission that he wrote the letter was itself hearsay and inadmissible. *Id.* at 402-03, 567 S.E.2d at 311-12.

<sup>155.</sup> Id. at 396, 567 S.E.2d at 307.

<sup>156.</sup> Id. at 397, 567 S.E.2d at 308 (citing Rawlings v. State, 163 Ga. 406, 421, 136 S.E. 448, 454-55 (1926)).

<sup>157.</sup> Id. at 400-01, 567 S.E.2d at 310-11 (Fletcher, C.J., and Sears, J., dissenting).

robbery.<sup>158</sup> Fletcher also argued in his dissent that the State had not demonstrated sufficient indicia of reliability to have the letter admitted because David was engaged in plea negotiations at the time of the letter's writing.<sup>159</sup> However, the court held that the trial court correctly found sufficient indicia of reliability, as David had nothing to gain in his negotiations with the prosecution.<sup>160</sup>

**5. Demonstrative Evidence.** Appellant in *Sallie* argued error in the trial court's admission of photographs of the murder victim at the crime scene and prior to autopsy. Stating that the photos "depicted the location of the body [at the crime scene] and the nature and extent of the six bullet wounds," the supreme court found that the photographs were relevant and admissible. 163

## B. Sufficiency of Evidence

In *Arevalo* the supreme court concluded that there was sufficient evidence to support a conviction. <sup>164</sup> In reaching this conclusion, the court cited the following: (1) the crimes occurred at a restaurant from which appellant had recently been discharged; (2) appellant's brother deliberately left the restaurant's back door open to facilitate the armed robbery during which the murders occurred; and (3) appellant, though initially denying involvement in the crimes, admitted limited participation in the armed robbery but denied that he was the triggerman or that the shootings were planned. <sup>165</sup>

Appellant in *Lawler v. State*<sup>166</sup> was convicted of malice murder, aggravated battery on a peace officer, and other crimes. The jury recommended a death sentence for the murder of one police officer and the nonfatal shooting of another police officer, which occurred after the officers escorted Lawler's inebriated girlfriend home in 1997. Four neighbors testified to seeing parts of the shooting at Lawler's apartment

<sup>158.</sup> *Id.* Fletcher's dissent further attacks the majority's stance of a second concealment conspiracy by arguing that the only evidence of such a conspiracy is the letter itself. *Id.* at 401, 567 S.E.2d at 311.

<sup>159.</sup> Id. at 401, 567 S.E.2d at 311.

<sup>160.</sup> Id. at 398, 567 S.E.2d at 309.

<sup>161. 276</sup> Ga. at 517, 578 S.E.2d at 455.

<sup>162.</sup> Id.

<sup>163.</sup> *Id.* (citing Jackson v. State, 270 Ga. 494, 512 S.E.2d 241 (1999); Jenkins v. State, 269 Ga. 282, 293, 498 S.E.2d 502, 514 (1998)).

<sup>164. 275</sup> Ga. at 393, 567 S.E.2d at 305-06 (citing Jackson v. Virginia, 443 U.S. 307 (1979)).

<sup>165.</sup> Id. at 392-93, 567 S.E.2d at 305.

<sup>166. 276</sup> Ga. 229, 576 S.E.2d 841 (2003).

and shell casings were found in and outside Lawler's apartment. Furthermore, other law enforcement officers found the victims' bodies in front of Lawler's apartment, and the victims' pistols were still snapped in their holsters. This evidence, as well as the murder weapon, ammunition, and other firearms found in appellant's apartment, combined with the testimony of appellant's co-worker regarding Lawler's animus for law enforcement, was deemed sufficient by the supreme court for a rational factfinder to find Lawler guilty beyond a reasonable doubt of malice murder, felony murder, and the other charges related to the incident. Moreover, the court held that the evidence was sufficient to authorize a jury to find beyond a reasonable doubt the existence of statutory aggravating circumstances to support a death sentence. 169

In *Terrell v. State*,<sup>170</sup> appellant was convicted in the shooting and beating death of his mother's elderly employer. Prior to the murder, Terrell had admitted to forging the victim's checks after having been discovered by the victim. Evidence at the crime scene indicated that the victim was shot in a manner consistent with appellant's congenital wrist defect. Terrell's cousin confessed to their mutual involvement in the murder and gave details that corroborated the crime scene evidence. Witnesses testified to seeing individuals matching Terrell's description in the vicinity of the victim's home on the morning of the murder, and appellant contradicted himself when making his second statement to police.<sup>171</sup> The court held that this evidence was sufficient to find Terrell guilty of malice murder and forgery and to authorize a jury to find beyond a reasonable doubt the existence of statutory aggravating circumstances to support a death sentence.<sup>172</sup>

The court again found sufficient evidence to support a conviction in *Spickler v. State*,<sup>173</sup> in which appellant was convicted of murder and armed robbery.<sup>174</sup> The evidence introduced at trial included a showing that appellant met and socialized with the victim months before the crime and that appellant and his accomplice were out with the victim the night of the murder, which was the same evening that appellant and his accomplice were guests in the victim's home. Appellant and his accomplice made purchases with the victim's credit cards after fleeing

<sup>167.</sup> Id. at 229-31, 576 S.E.2d at 844-45.

<sup>168.</sup> Id. at 231, 576 S.E.2d at 845.

<sup>169.</sup> Id.

<sup>170. 276</sup> Ga. 34, 572 S.E.2d 595 (2002).

<sup>171.</sup> Id. at 34-37, 572 S.E.2d at 598-99.

<sup>172.</sup> Id. at 37, 572 S.E.2d at 599.

<sup>173. 276</sup> Ga. 164, 575 S.E.2d 482 (2003).

<sup>174.</sup> Id. at 164-65, 575 S.E.2d at 484-85.

the state, and the victim's personal property was found in appellant's car. At trial, appellant admitted to killing the victim, claiming that he did so because of the victim's unwanted sexual advances. Calling the jury the "arbiter of credibility," the court found that the jury was not required to believe appellant's claim of provocation or denial of premeditation. The court stated that the jury can find criminal intent "upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted."

In *Hinely v. State*, <sup>179</sup> appellant argued that the evidence was insufficient to find him guilty beyond a reasonable doubt, and more specifically, that no evidence existed to corroborate the inculpatory testimony of his accomplice. <sup>180</sup> Stating that "[t]he corroborating evidence connecting a defendant to a crime may consist entirely of circumstantial evidence" and that "even slight evidence of corroboration connecting an accused to a crime is legally sufficient," <sup>182</sup> the court held that the accomplice's testimony was corroborated. <sup>183</sup> Pointing to evidence that the body was found in a manner consistent with the accomplice's testimony, that the murder weapon was identified as a knife borrowed by Hinely from another witness, and that other witnesses had seen Hinely and the accomplice driving together near the victim's house on the day of the crime, among other evidence, the court found sufficient evidence to enable a rational trier of fact to find Hinely guilty of felony murder. <sup>184</sup>

The court found sufficient evidence to authorize appellant's conviction on all charges in *Braley*. The court highlighted evidence that appellant made repeated attempts to obtain money from automated teller machines using the murder victim's bank cards and that upon approach by arresting officers, appellant said, "You've got me, take me in," and "Everything you're looking for is in the car." The court also noted the consent search of Braley's car that revealed hair and blood on

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175. Id.
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<sup>176.</sup> Id.

<sup>177.</sup> Id. (citation omitted).

<sup>178.</sup> Id. (quoting O.C.G.A. § 16-2-6 (1999)).

<sup>179. 275</sup> Ga. 777, 573 S.E.2d 66 (2002).

<sup>180.</sup> *Id.* at 779, 573 S.E.2d at 70.

<sup>181.</sup> Id.

<sup>182.</sup> *Id.* (citing Klinect v. State, 269 Ga. 570, 572, 501 S.E.2d 810 (1998) (brackets in original)).

<sup>183.</sup> Id.

<sup>184.</sup> Id. at 779-80, 573 S.E.2d at 70-71.

<sup>185. 276</sup> Ga. at 47-49, 572 S.E.2d 588-89.

<sup>186.</sup> Id. at 48, 572 S.E.2d at 589.

the murder weapons consistent with that of the victim, Braley's detailed confession, and Braley's admission to officers that the weapons had been used in the "murder of that insurance lady." <sup>187</sup>

#### C. Cross-Examination

Appellant in *Terrell* argued error by the trial court in restricting his cross-examination of a state witness who testified about inculpatory statements made by appellant. 188 Under cross-examination, the witness claimed an aversion to participating in murder but also admitted to a past felony murder conviction and other felony convictions without attempting to explain any of these convictions. When appellant's counsel attempted to question the witness about the details of the felony murder, the trial court sustained the State's objection that these details were not relevant. 189 The supreme court noted that while proof of a conviction of a crime of moral turpitude may be used to impeach a witness, "the details of that crime are not relevant unless the witness attempts to rehabilitate himself by explaining the circumstance of his conviction."190 While appellant argued that the details of the crime were relevant to disprove the witness's claimed aversion to murder, the court held that the witness's aversion or non-aversion to murder was not relevant to appellant's guilt or innocence. 191 The court noted that the only way in which the truthfulness of the witness's stated aversion would be relevant was as a basis for determining the general credibility of the witness's testimony. 192 Looking at the details of the witness's felony murder conviction, the court found nothing in his conviction record that impeached the witness's stated aversion to murder, rendering the details of the felony murder irrelevant to the instant trial. 193 Noting the trial court's broad discretion in determining the scope of cross-examination, the court found no error in limiting appellant's cross-examination. 194

The court again found no error in the limitations on cross-examination imposed by the trial court in *Sallie*. Appellant sought to cross-examine one of the kidnapping victims about an audio tape and notes

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187. Id.
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<sup>188. 276</sup> Ga. at 42-43, 572 S.E.2d at 603.

<sup>189.</sup> Id. at 43, 572 S.E.2d at 603.

<sup>190.</sup> Id. (citing Vincent v. State, 264 Ga. 234, 235, 442 S.E.2d 748, 750 (1994)).

<sup>191.</sup> Id., 572 S.E.2d at 603-04.

<sup>192.</sup> Id., 572 S.E.2d at 604.

<sup>193.</sup> Id.

<sup>194.</sup> Id.

<sup>195. 276</sup> Ga. at 515, 578 S.E.2d at 454.

appellant made while the victim was being held against her will that "could be construed as regretful for the violent actions he had taken." While the trial court allowed appellant to question the witness with respect to the substance of the statements on the tape and in the notes, appellant was not permitted to elicit that the statements were documented. Noting that appellant refused his opportunity to admit the tape and notes into evidence during cross-examination, the court found no error in the restriction on cross-examination because appellant was "only prevented from eliciting that [the statements] had been memorialized." Had been memorialized." 198

## D. Closing Arguments

In *Arevalo* the appellant complained about the prosecutor's closing argument, which referred to defense counsel's objections during trial to the introduction of a letter allegedly written by appellant's brother. <sup>199</sup> The court stated that counsel has "ample latitude to argue what has transpired in a case from its inception to its conclusion, and the conduct of the party or his counsel . . . ."<sup>200</sup> Noting that because defense counsel's numerous objections were part of the trial, and as such, something that the State could comment on, <sup>201</sup> the court found no error. <sup>202</sup>

Appellant in *Spickler* also raised complaints about the State's closing arguments at his jury trial.<sup>203</sup> The court stated that because appellant testified about his past conviction of a crime of moral turpitude during direct examination, the prosecutor was permitted to use the past conviction to undermine appellant's credibility even without admitting a certified copy of the conviction into evidence.<sup>204</sup> During closing arguments, the prosecutor asked the jury to infer that the difference between appellant's testimony in court and his statement to police at the time of his arrest was due to appellant's attempt to secure a jury charge on the lesser crime of voluntary manslaughter.<sup>205</sup> The court found nothing improper in the prosecutor's argument because this was a

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196. Id.
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<sup>197.</sup> Id.

<sup>198.</sup> *Id.* at 515-16, 578 S.E.2d at 454-55.

<sup>199. 275</sup> Ga. at 398, 567 S.E.2d at 309.

<sup>200.</sup> Id. (quoting Ferrell v. State, 149 Ga. App. 405, 409, 254 S.E.2d 404, 408 (1979)).

<sup>201.</sup> Id. (citing Loomis v. State, 78 Ga. App. 153, 181, 51 S.E.2d 13, 31 (1948)).

<sup>202.</sup> Id.

<sup>203. 276</sup> Ga. at 167, 575 S.E.2d at 486.

<sup>204.</sup> Id.

<sup>205.</sup> Id. at 167-68, 575 S.E.2d at 486.

"reasonable inference drawn from the evidence at trial." Similarly, the court rejected appellant's contention that the State expressed a personal opinion regarding appellant's truthfulness during closing arguments, stating that upon review of the transcript, the prosecutor was simply commenting on evidence. 207

## E. Jury Charges

The court in *Sallie* found no error in the jury charge given at the guilt-innocence phase of Sallie's trial.<sup>208</sup> Noting that the jury was properly charged on both intent and burden of proof for each element of the charged offenses, the court found no error in the trial court's refusal of appellant's requested charge that "resembled the *Allen* charge given to deadlocked juries."<sup>209</sup> In response to appellant's challenge to the adequacy of the jury's charge on kidnapping with bodily injury, the court concluded that the charge, "taken as a whole,"<sup>210</sup> sufficiently charged the jury on the elements of the alleged offense, as well as on the definition of "bodily injury."<sup>211</sup> Similarly, the court found no error in the trial court's charge to the jury that it must "find each element of the crimes charged in the indictment beyond a reasonable doubt in order to render a guilty verdict."<sup>212</sup>

Appealing his conviction of malice murder, an alternative count of felony murder, kidnapping with bodily injury, armed robbery, and aggravated battery, appellant in *Braley* argued that the trial court erred in the jury charges. Claiming that the evidence showed that the transportation of the victim occurred after her death, appellant argued error in the trial court's refusal to charge the jury on false imprisonment as a lesser included offense of kidnapping with bodily injury. The court found no reversible error because of the conclusion that "[i]n light of the overwhelming evidence that the victim was alive when dragged," the trial court's failure to give the requested charge probably did not contribute to the jury's verdict. Appellant also

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206. Id. at 168, 575 S.E.2d at 486-87.
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<sup>207.</sup> Id., 575 S.E.2d at 487.

<sup>208. 276</sup> Ga. at 512, 578 S.E.2d at 452.

<sup>209.</sup> Id.

<sup>210.</sup> Id.

<sup>211.</sup> Id. (citing Green v. State, 193 Ga. App. 894, 389 S.E.2d 358 (1989); Roberts v. State, 158 Ga. App. 309, 279 S.E.2d 753 (1981)).

<sup>212.</sup> Id

<sup>213. 276</sup> Ga. at 53-54, 572 S.E.2d at 592-93.

<sup>214.</sup> Id. at 53, 572 S.E.2d at 592.

<sup>215.</sup> Id.

<sup>216.</sup> Id. (citing Edwards v. State, 264 Ga. 131, 133, 442 S.E.2d 444, 445-46 (1994)).

alleged error in that the jury charge allowed the jury to convict him upon a finding that he committed armed robbery with a firearm or a knife whereas the indictment charged him with the same crime committed with a firearm and a knife. While stating that "[t]rial courts should tailor their charges to match the allegation of indictments . . . [to direct] the jury to consider only whether the crimes were committed in the manner alleged in the indictment, the court continued:

[W]here, as here, the indictment places a defendant on notice that the State will attempt to prove that he committed a crime in more than one manner, the jury is authorized to convict the defendant of that crime upon proof that it was committed in any of the several manners alleged.<sup>219</sup>

The court found no error, concluding that the charge on armed robbery "could not have misled the jury into convicting [a]ppellant for committing that crime in any way not alleged in the indictment." Appellant's allegation of error on the trial court's felony murder charge was declared moot because of appellant's conviction for malice murder. In addition, the court would not permit appellant to complain on appeal about the trial court's charge on kidnapping with bodily injury because appellant previously requested that specific instruction. 222

In the guilt-innocence phase of appellant's trial in Terrell, the jury was charged on use of a deadly weapon, but the charge was invalidated shortly thereafter in  $Harris\ v.\ State.^{224}$  Though recognizing that the recent holding in Harris applies to Terrell, the court found no reversible error in the use of this charge in appellant's trial.  $^{225}$ 

<sup>217.</sup> Id.

<sup>218.</sup> Id. at 53, 572 S.E.2d at 592-93 (citation omitted).

<sup>219.</sup> *Id.*, 572 S.E.2d at 593 (citing Cronan v. State, 236 Ga. App. 374, 377-78, 511 S.E.2d 899, 902-03 (1999)).

<sup>220.</sup> Id. (citation omitted).

<sup>221.</sup> Id. at 53-54, 572 S.E.2d at 593.

<sup>222.</sup> Id. at 53, 572 S.E.2d at 592.

<sup>223. 276</sup> Ga. at 37, 572 S.E.2d at 599-600.

 $<sup>224.\;\;273</sup>$  Ga. 608, 610, 543 S.E.2d 716, 717 (2001) (holding that the trial court's jury charge:

If a person of sound mind and discretion intentionally and without justification uses a deadly weapon or instrumentality in the manner in which the weapon or instrumentality is ordinarily used and thereby causes the death of a human being, you many infer the intent to kill,

is error even if accompanied by an instruction that the jury has the discretion to make the inference).

<sup>225. 276</sup> Ga. at 37, 572 S.E.2d at 600.

Explaining that the erroneous charge dealt with a defense of justification, whereas appellant's defense was that of innocence, the court noted "the overwhelming evidence of malice" in the case and found no ground for reversing appellant's conviction based on the jury charge. <sup>227</sup>

## F. Merger of Offenses

In *Braley* the evidence indicated that appellant "threw the victim to the ground, inflicted an ultimately fatal wound to her throat, and continued attacking her with the knife until she weakened or became unconscious." Given these facts, the court found that appellant's conviction for aggravated battery for allegedly causing the victim's disfigurement by cutting her throat, merged with the malice murder conviction, and the court vacated the conviction and sentence was entered upon the aggravated battery verdict. <sup>229</sup>

## G. Mistrial

Appellant in *Spickler* argued that two of the State's courtroom demonstrations warranted a mistrial.<sup>230</sup> In one demonstration, the medical examiner used a model skull and a portion of a mattress to demonstrate how the victim's skull moved into the mattress when bludgeoned. Appellant objected, but did not move for a mistrial.<sup>231</sup> Deeming the demonstration relevant as a fair illustration of the force of the attack, the court found that this demonstration did not warrant a *sua sponte* declaration of mistrial.<sup>232</sup> In the second contested demonstration, the prosecutor hit a block of wood with a hammer, producing a loud noise unlikely to have been made during the killing, while questioning appellant as to how hard he struck the victim. The trial court sustained appellant's objection to the demonstration and stopped it; however, appellant's motion for mistrial was denied.<sup>233</sup> The supreme court held that this demonstration, which only occurred once before being stopped by the court, was "improper," but "not so prejudicial

<sup>226.</sup> Id.

<sup>227.</sup> Id.

<sup>228.</sup> Id. at 52, 572 S.E.2d at 592.

<sup>229.</sup> *Id.* at 52-53, 572 S.E.2d at 592 (citing O.C.G.A. § 16-1-7(a)(1); Fitzpatrick v. State, 268 Ga. 423, 423-24, 489 S.E.2d 840, 841 (1997); Malcolm v. State, 263 Ga. 369, 374, 434 S.E.2d 479, 482-84 (1993)).

<sup>230. 276</sup> Ga. at 167, 575 S.E.2d at 486.

<sup>231.</sup> Id.

<sup>232.</sup> Id.

<sup>233.</sup> Id.

to appellant's fair trial rights to warrant the extreme remedy of granting a mistrial."  $^{234}$ 

#### IV. SENTENCING

This section covers pleas, admissible bad character evidence and victim impact evidence, closing arguments, jury charges, jury instructions, judge's comments, statutory aggravators, and double jeopardy.

#### A. Pleas

In Wright v. State, 235 appellant pleaded guilty to murder, robbery, and concealment of the victim's body. After he was sentenced, appellant filed a pro se motion to have the guilty plea withdrawn, but the trial court denied this motion.<sup>236</sup> The supreme court found no procedural indiscretions in the trial court's acceptance of appellant's plea, noting that the trial court complied with the requirements of the Uniform Superior Court Rules.<sup>237</sup> Appellant argued that he was misled by original counsel as to the evidence that would be used against him at Specifically, appellant claimed that his attorney incorrectly informed him that his accomplice had pleaded guilty to assisting in the disposal of the victim's body and would testify against him at trial.<sup>238</sup> The record indicated that appellant was informed prior to his plea hearing that the accomplice was granted immunity and was going to testify.<sup>239</sup> Based on this information, the court determined that whether appellant was misinformed with respect to whether the accomplice pleaded guilty or received immunity was irrelevant because appellant would have faced the accomplice's testimony at trial.<sup>240</sup> Because this misinformation, even if transmitted, would have no influence on appellant's decision to plead guilty, the court found that appellant failed to show that manifest injustice would occur if a withdrawal was not permitted, as required in post-sentencing plea withdrawals.241

After being convicted on two counts of felony murder, appellant in *Hinely v. State*<sup>242</sup> accepted a sentence of life without the possibility of

<sup>234.</sup> Id.

<sup>235. 275</sup> Ga. 497, 570 S.E.2d 280 (2002).

<sup>236.</sup> Id. at 497, 570 S.E.2d at 280.

<sup>237.</sup> Id. at 497-98, 570 S.E.2d at 281 (citing UNIF. SUPER. Ct. R. §§ 33.9, 33.8).

<sup>238.</sup> Id. at 498, 570 S.E.2d at 281.

<sup>239.</sup> *Id*.

<sup>240.</sup> Id.

<sup>241.</sup> Id.

<sup>242. 275</sup> Ga. 777, 573 S.E.2d 66 (2002).

parole.<sup>243</sup> Though at the time of the plea appellant stated that his plea was freely and voluntarily given, on appeal appellant argued that counsel's lack of preparation for the sentencing phase of trial effectively rendered his plea coerced.<sup>244</sup> Finding no error, the court cited its own determination that appellant's counsel was not inadequately prepared for the sentencing phase and further stated that "the prospect of a greater sentence is not coercion that prevents the decision [to plead] from being free and voluntary."<sup>245</sup>

## B. Admission of Evidence

- 1. Bad Character Evidence. Appellant in *Braley v. State*<sup>246</sup> argued that the State improperly introduced the issue of bad character into the sentencing phase of his trial.<sup>247</sup> The supreme court found no error in the State's elicitation of testimony that appellant had stolen the weapon used in the murder, stating that "reliable evidence of bad character and of past crimes is admissible in the sentencing phase of a death penalty trial."<sup>248</sup>
- **2. Victim Impact Evidence.** In *Arevalo v. State*, <sup>249</sup> appellant alleged error in the trial court's admission of victim-impact evidence at the sentencing phase of his trial, arguing that all such evidence is unconstitutional and prohibited. <sup>250</sup> The court affirmed the constitutionality of such evidence, stating, "proper victim-impact evidence in the sentencing phase of a death penalty trial is constitutional and admissible."

The court again affirmed the general constitutionality of victim-impact evidence at the sentencing phase in Braley. Without elaboration, the court found that the trial court correctly followed the recommended procedure for pretrial review of such evidence. <sup>253</sup>

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243. Id. at 783, 573 S.E.2d at 73.
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 $<sup>244. \</sup>quad Id.$ 

<sup>245.</sup> Id. (citing Shakur v. State, 239 Ga. 548, 549-50, 238 S.E.2d 85, 87 (1977)).

<sup>246. 276</sup> Ga. 47, 572 S.E.2d 583 (2002).

<sup>247.</sup> Id. at 54, 572 S.E.2d at 593.

<sup>248.</sup> Id. (citing Gulley v. State, 271 Ga. 337, 345, 519 S.E.2d 655, 663 (1999)).

<sup>249. 275</sup> Ga. 392, 567 S.E.2d 303 (2002).

<sup>250.</sup> Id. at 399, 567 S.E.2d at 309.

<sup>251.</sup> *Id.* (citing Turner v. State, 268 Ga. 213, 214-16, 486 S.E.2d 839, 842 (1997); Livingston v. State, 264 Ga. 402, 444 S.E.2d 748 (1994)).

<sup>252. 276</sup> Ga. at 54, 572 S.E.2d at 593 (citing  $Livingston,\,264$  Ga. at 402-05, 444 S.E.2d at 748).

<sup>253.</sup> Id. (citing Turner, 268 Ga. at 214-15, 486 S.E.2d at 839).

In Lawler v. State, <sup>254</sup> the court explained <sup>255</sup> that the trial court's handling of victim-impact evidence was within the standards outlined in Turner v. State. <sup>256</sup> Noting that this procedure allowed appellant multiple opportunities to challenge the testimony eventually presented to the jury, the court found that this evidence was not improper or unduly prejudicial. <sup>257</sup> While recognizing that the record revealed that some witnesses and jurors cried during the victim-impact testimony, the court found no "outbursts or displays of emotion that would unduly prejudice the defendant." Finding no error in the trial court's denial of appellant's objection to this testimony, the court stated: "The testimony to be primarily guarded against in death penalty trials involves the issue of arbitrary factors in the decision to impose a death sentence, . . . not the emotion caused by the defendant's actions and the ensuing loss." <sup>259</sup>

## C. Closing Arguments

Appellant in *Braley* complained of the prosecutor's closing arguments in which the prosecutor expressed his personal opinion and discussed defense counsel's arguments made in unrelated cases, thereby comparing the instant case to others. After reviewing the record, the court concluded that the statements were not improper. Appellant also complained about other elements of the State's closing argument that were not objected to at trial. Noting that the proper standard of review for reversal of such statements is a finding that the statements were not only improper but also had a reasonable probability of impacting the jury's choice in imposing a death sentence, the court found that the prosecutor's argument with respect to appellant's future dangerousness was not improper. The prosecutor's request that the

<sup>254. 276</sup> Ga. 229, 576 S.E.2d 841 (2003).

<sup>255.</sup> Id. at 232, 576 S.E.2d at 846.

<sup>256. 268</sup> Ga. 213, 486 S.E.2d 839 (1997).

<sup>257.</sup> *Id.* (citing *Turner*, 268 Ga. at 215-16, 486 S.E.2d at 839; Pickren v. State, 269 Ga. 453, 500 S.E.2d 566 (1998); Jones v. State, 267 Ga. 592, 481 S.E.2d 821 (1997)).

<sup>258.</sup> Id. (citing Jones, 267 Ga. at 595-96, 481 S.E.2d at 821).

<sup>259.</sup> *Id.* (citing *Jones*, 267 Ga. at 595-96, 481 S.E.2d at 821; *Livingston*, 264 Ga. at 402, 444 S.E.2d at 748; O.C.G.A. § 17-10-35).

<sup>260. 276</sup> Ga. at 54, 572 S.E.2d at 593.

<sup>261.</sup> *Id.* (contrasting its decisions in Wyatt v. State, 267 Ga. 860, 863-64, 485 S.E.2d 470, 473-74 (1997) (holding that prosecutors should not present their personal opinion) and Booker v. State, 242 Ga. App. 80, 84, 528 S.E.2d 849, 852 (2000) (holding that comparisons between the instant case and others is an improper injection of matters not in evidence)).

<sup>262.</sup> Id.

<sup>263.</sup> Id. (citing Gissendaner v. State, 272 Ga. 704, 712, 532 S.E.2d 677, 688 (2000)).

<sup>264.</sup> Id. (citing Pye v. State, 269 Ga. 779, 788, 505 S.E.2d 4, 13-14 (1998)).

jury sit in silence for five minutes to illustrate the length of time the victim remained conscious after her attack was permissible because it gave the jury a "better grasp of what occurred during this period of time." However, the court found that the prosecutor's request that the jury "imagine what it was feeling like for [the victim]" was not permissible as "it is well settled that it is improper to ask the jury to imagine themselves in the victim's place." This error did not require a new trial, however, because the court found that this impermissible argument did not have a reasonable probability of changing the jury's sentencing choice. <sup>267</sup>

## D. Jury Charge

In Sallie v. State, <sup>268</sup> no reversible error was found in the jury instructions given during the penalty phase of appellant's trial. <sup>269</sup> The court held that when the jury has been charged that its verdict with respect to the sentence had to be unanimous, there is no further requirement that the jury be charged that a finding of statutory aggravating circumstance be unanimous. <sup>270</sup> Similarly, the court found that because the jury was properly charged that it could grant a life sentence for any reason or no reason, the trial court did not err in not charging the jury that non-statutory aggravating circumstances may only be considered when proven beyond a reasonable doubt and that mitigating circumstances do not need to be found unanimously. <sup>271</sup>

Appellant in Sallie argued error in the jury instructions given during the penalty phase. In response to the jury question: "If a prisoner receives a sentence of life without parole, are there any circumstances that a prisoner can ever be released from prison?," the trial court instructed the jury to refer to the portion of the written jury charge available to them in the jury room that defined life imprisonment without parole. The court found no error in this instruction.

<sup>265.</sup> Id. at 54-55, 572 S.E.2d at 593 (quoting State v. Jones, 487 S.E.2d 714, 720 (N.C. 1997)).

 $<sup>266.\</sup> Id.$  at 55, 572 S.E.2d at 593-94 (quoting Pace v. State, 271 Ga. 829, 844, 524 S.E.2d 490, 506 (1999)).

<sup>267.</sup> Id., 572 S.E.2d at 594 (citing Pace, 271 Ga. at 844, 524 S.E.2d at 490).

<sup>268. 276</sup> Ga. 506, 578 S.E.2d 444 (2003).

<sup>269.</sup> Id. at 512, 578 S.E.2d at 452.

<sup>270.</sup> Id. (citing Wilson v. State, 271 Ga. 811, 525 S.E.2d 339 (1999)).

<sup>271.</sup> Id. (citing Lucas v. State, 274 Ga. 640, 555 S.E.2d 440 (2001); Lance v. State, 275 Ga. 11, 25, 560 S.E.2d 663, 678 (2002)).

<sup>272.</sup> Id. at 511, 578 S.E.2d at 451.

<sup>273.</sup> Id

<sup>274.</sup> Id. (citing McClain v. State, 267 Ga. 378, 477 S.E.2d 814 (1996)).

## E. Judge's Comment

In *Braley* appellant complained about the trial judge's comment made to jurors when the jurors were given a written copy of the sentencing phase charges. Evaluating appellant's claim of error, the court reviewed the judge's comment and the charge together as a whole. The court found no error because the comment "would have been understood... to stress that the document was not evidence," and would not have misled the jurors into disregarding the parts of the charge "defining the role of mitigating evidence."

# F. Statutory Aggravators

Citing Apprendi v. New Jersey, 278 appellant in Terrell v. State 279 argued that his constitutional rights were violated because his indictment did not include the statutory aggravators used to support his death sentence.<sup>280</sup> Reasoning that the United States Supreme Court's focus in Apprendi is to ensure that every fact key to the authorization of a death sentence is found beyond a reasonable doubt by a jury, the court concluded that the Court's holding in Apprendi did not specify that notice of each such fact be conveyed to the defendant via the indictment rather than some other means.<sup>281</sup> Because appellant was put on notice of both the State's intent to seek the death penalty and the statutory aggravators the State would use to support its case for a death sentence through the State's renewed notice of intent to seek the death penalty, the court concluded that appellant's constitutional right to notice was met.<sup>282</sup> The court dismissed the argument that the holding in Apprendi requires a grand jury to consider the statutory aggravators in a particular case, stating that the Court in Apprendi did not inquire into whether the federal constitution requires a state grand jury to consider

Under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact . . . that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. The Fourteenth Amendment commands the same answer in [cases] involving a state statute.

## Id. at 476.

<sup>275. 276</sup> Ga. at 55, 572 S.E.2d at 594.

<sup>276.</sup> Id. (citing Palmer v. State, 271 Ga. 234, 238, 517 S.E.2d 502, 506 (1999)).

<sup>277.</sup> Id.

<sup>278. 530</sup> U.S. 466 (2000).

<sup>279. 276</sup> Ga. 34, 572 S.E.2d 595 (2002).

<sup>280.</sup> Id. at 40, 572 S.E.2d at 602.

<sup>281.</sup> Id. at 41, 572 S.E.2d at 602.

<sup>282.</sup> Id. at 41-42, 572 S.E.2d at 602-03.

such statutory aggravating factors.<sup>283</sup> Because "[n]othing in *Apprendi* . . . renders unconstitutional Georgia's system for bringing death penalty prosecutions to trial,"<sup>284</sup> the court maintained that appellant's indictment by a grand jury for malice murder permitted the State to seek any penalty authorized by statute for that crime, including death.<sup>285</sup>

While the majority in *Terrell* held that "the State [is] not under a constitutional obligation to place the statutory aggravators in the indictment" after *Apprendi*, Justice Benham, in his special concurrence, "t[ook] issue" with this conclusion. Justice Benham found that "the absence of statutory aggravators from the indictment was error." but that the error in the instant case was harmless. 289

## G. Double Jeopardy

Appellant in *Terrell* challenged his death sentence on double jeopardy grounds, arguing that because a jury in a previous trial for the same crime deadlocked over his guilt or innocence, this previous jury had, by definition, failed to find the statutory aggravators which were used in the instant trial to support his current death sentence. The court rejected appellant's contention that double jeopardy prevents subsequent juries from finding statutory aggravators that a previous jury did not find, stating that "[d]ouble jeopardy does not prevent a retrial when a previous jury was hopelessly deadlocked over the defendant's guilt." The court went on to specify that *Miller v. State* was not applicable to the instant case because the jury in appellant's first trial never reached the penalty phase and thus was never called on to determine appellant's sentence. 293

<sup>283.</sup> *Id.* at 42, 572 S.E.2d at 603 (citing Ring v. Arizona, 536 U.S. 584 (2002); *Apprendi*, 530 U.S. at 477 n.3)).

<sup>284.</sup> Id.

<sup>285.</sup> Id.

<sup>286.</sup> Id.

<sup>287.</sup> Id. at 47, 572 S.E.2d at 606 (Benham, J., concurring specially).

<sup>288.</sup> Id.

<sup>289.</sup> Id.

<sup>290.</sup> Id. at 38, 572 S.E.2d at 600.

<sup>291.</sup> Id. at 39, 572 S.E.2d at 601 (citing Griffin v. State, 264 Ga. 232, 233, 443 S.E.2d 612, 612 (1994)).

<sup>292. 237</sup> Ga. 557, 229 S.E.2d 376 (1976) (holding that a jury's inability to agree upon a particular sentence after conviction does not amount to a finding of a statutory aggravating circumstance, limiting the judge's sentencing options to life imprisonment). 293. 276 Ga. at 39, 572 S.E.2d at 601.

#### V. Preservation of Errors

This section discusses failure to object, timeliness of objection, and procedural default.

## A. Failure to Object

The court in *Braley v. State*<sup>294</sup> held that appellant waived his right to complain about various issues on appeal by not objecting at trial.<sup>295</sup> Citing *Earnest v. State*,<sup>296</sup> the court found appellant's lack of objection to each of the following matters prevented appellate review: the presence of court personnel in the courtroom during ex parte hearings,<sup>297</sup> the trial court's *sua sponte* excusal of two prospective jurors,<sup>298</sup> the limitations placed on voir dire,<sup>299</sup> the potential tainting of a panel of prospective jurors by one juror's comment on the commuting of death sentences,<sup>300</sup> the trial court's comment to prospective jurors that the law required their placement in panels for voir dire,<sup>301</sup> the prosecutor's comments to appellant's mother at the beginning of her cross-examination,<sup>302</sup> and the trial court's decision not to allow appellant's counsel to undertake a second redirect examination of a witness.<sup>303</sup>

## B. Timeliness of Objection

Appellant in *Spickler v. State*<sup>304</sup> argued error in the trial court's denial of his motion for a mistrial. Claiming that the testimony of a state witness was "nonresponsive to the question and prejudicial," appellant did not object or raise the mistrial motion until after the witness in question and another witness finished their testimony and

<sup>294. 276</sup> Ga. 47, 572 S.E.2d 583 (2002).

<sup>295.</sup> Id. at 50, 51, 52, 54, 572 S.E.2d at 590-94.

<sup>296. 262</sup> Ga. 494, 422 S.E.2d 188 (1992). The court stated: "Errors not raised in the trial court will not be heard on appeal." Id. at 495, 422 S.E.2d 188 (citing Boutwell v. State, 256 Ga. 63, 65-66, 344 S.E.2d 222, 225 (1986)).

<sup>297. 276</sup> Ga. at 50, 572 S.E.2d at 590.

<sup>298.</sup> Id. at 51-52, 572 S.E.2d at 591.

<sup>299.</sup> Id. at 52, 572 S.E.2d at 591.

<sup>300.</sup> Id., 572 S.E.2d at 592.

<sup>301.</sup> Id.

<sup>302.</sup> Id. at 55, 572 S.E.2d at 594.

<sup>303.</sup> Id.

<sup>304. 276</sup> Ga. 164, 575 S.E.2d 482 (2003).

<sup>305.</sup> Id. at 166, 575 S.E.2d at 486.

<sup>306.</sup> Id.

were excused.<sup>307</sup> Because the court found that appellant's objection was *not* a "contemporaneous objection made on the record at the earliest possible time,"<sup>308</sup> it held that the issue was not preserved for appellate review.<sup>309</sup>

## C. Procedural Default

After the supreme court upheld his death sentence in 1997 in Thomason v. State, 310 Thomason petitioned for a writ of habeas corpus on multiple grounds. The petition was granted on the ground that Thomason had not been afforded effective assistance of counsel during the sentencing phase of his bench trial. 311 In Head v. Thomason, 312 the warden appealed the habeas court's order granting a new sentencing trial, and Thomason cross-appealed the habeas court's rejection of his other claims of constitutional error. Among the claims in the crossappeal, Thomason argued that his written and oral waiver of a jury trial was not knowing, intelligent, and voluntary. 313 Noting that this claim would normally be barred by procedural default because it was not raised on direct appeal, the court stated that if Thomason proved his counsel's failure to raise this issue on direct appeal was an act of ineffective assistance, it "would serve both as cause to set aside the procedural bar and as an independent claim."314 After examining the record and concluding that Thomason's underlying claim of an involuntary waiver was without merit, 315 the court found that counsel did not render ineffective assistance in not raising such a meritless claim on direct appeal.316 As such, there was "no cause to set aside the procedural bar to the underlying claim."317

Many of the remaining issues brought by Thomason in his cross-appeal were deemed barred by procedural default.<sup>318</sup> Citing *Head v. Ferrell*.<sup>319</sup> the court found insufficient showing of "cause and prejudice"

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307. Id. 308. Id. at 166-67, 575 S.E.2d at 486. 309. Id. at 167, 575 S.E.2d at 486. 310. 268 Ga. 298, 486 S.E.2d 861 (1997). 311. Head v. Thomason, 276 Ga. 434, 434-35, 578 S.E.2d 426, 428 (2003). 312. 276 Ga. 434, 578 S.E.2d 426 (2003). 313. Id. at 440, 578 S.E.2d at 432. 314. Id. (citing Head v. Ferrell, 274 Ga. 399, 401-02, 554 S.E.2d 155, 160 (2001)). 315. Id. 316. Id. 317. Id. 318. Id. at 440-42, 578 S.E.2d at 432-33.
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<sup>319. 276</sup> Ga. at 401, 554 S.E.2d at 160. Claims other than those regarding sentencing "that are raised for the first time in habeas corpus proceedings that could have been raised

to set aside the procedural bar on each of the following issues: alleged suppression of evidence by the State, 320 a claim regarding the Unified Appeal Procedure, 221 a claim regarding cumulative error, 222 a claim of trial while incompetent, 223 a claim regarding Thomason being called as a witness at his competency trial, 224 a claim regarding Thomason's absence during parts of his trial, 25 and allegations of misconduct by competency trial jurors. 26

#### VI. DIRECT APPEAL

This section discusses challenges to Georgia's death penalty statute, the supreme court's proportionality review, and death sentences influenced by passion or prejudice.

## A. Georgia's Death Penalty Statute

The supreme court ruled against appellants' challenges to Georgia's death penalty statutes in both *Braley v. State*<sup>327</sup> and *Arevalo v. State*, simply stating in each case, "Georgia's death penalty statutes are not unconstitutional."<sup>329</sup>

## B. Proportionality Review

In *Terrell v. State*, <sup>330</sup> appellant argued that a prior jury's deadlock during the guilt phase of an earlier trial rendered his current death sentence for the same crime disproportionate. <sup>331</sup> The court stated that appellant's argument "reads more into [Georgia's comparative sentencing review statute] than exists," and appellant's reading of O.C.G.A section 17-10-35(c)(2)<sup>332</sup> would incorrectly render it a "comparative trial

at trial or on direct appeal are barred by procedural default unless the petitioner can meet the 'cause and prejudice' test." *Id.* 

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320. 276 Ga. at 441, 578 S.E.2d at 432.
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323. Id.

324. Id.

325. Id.

326. Id. at 442, 578 S.E.2d at 433.

327. 276 Ga. 47, 572 S.E.2d 583 (2002).

328. 275 Ga. 392, 567 S.E.2d 303 (2002).

329. Id. at 399, 567 S.E.2d at 309 (citing Brannan v. State, 275 Ga. 70, 86, 561 S.E.2d 414, 429 (2002); Gissendaner v. State, 272 Ga. 704, 716, 532 S.E.2d 677, 690 (2002)); Braley, 276 Ga. at 56, 572 S.E.2d at 604.

<sup>321.</sup> Id., 578 S.E.2d at 433.

<sup>322.</sup> Id.

<sup>330. 276</sup> Ga. 34, 572 S.E.2d 595 (2002).

<sup>331.</sup> Id. at 40, 572 S.E.2d at 601.

<sup>332.</sup> O.C.G.A. § 17-10-35(c)(2) (1997).

review."<sup>333</sup> The court held that because the first jury never dealt with the question of appellant's sentence, the jury's actions were not relevant in the determination of the proportionality of appellant's current sentence. <sup>334</sup>

In determining whether appellant's death sentence was disproportionate in *Sallie v. State*, <sup>335</sup> the court enumerated the aggravating circumstances surrounding the murder, including the evidence of planning, forced entry, and kidnapping. <sup>336</sup> Referencing cases in which victims were murdered during the commission of a burglary or a kidnapping with bodily injury, the court held that these "similar cases" supported a death penalty in *Sallie*, rendering his death sentence proportionate. <sup>337</sup>

The same method for determining the proportionality of the death sentence was used by the court in Arevalo,  $^{338}$  Braley,  $^{339}$  and Lawler v. State. The court in Arevalo stated that the outcome of multiple cases concerning circumstances and aggravating factors similar to those in Arevalo supported the imposition of the death sentence on appellant. In Braley the court pointed to other cases with circumstances similar to those in Braley, including cases in which victims were murdered during the commission of an armed robbery, and concluded that these cases demonstrated that a death sentence was not disproportionate. Listing the aggravating factors relating to the murder of the police officer in Lawler, the court compared the instant case to other cases in which a police officer was killed, concluding, "Lawler's sentence is . . . not excessive or disproportionate to the penalty imposed in similar cases, considering both the crimes and the defendant."

## C. Sentence Influenced by Passion or Prejudice

Under O.C.G.A. section 17-10-35(c)(1), the supreme court is required to review whether a death sentence was imposed "under the influence of passion, prejudice, or any other arbitrary factor." Without elaboration, the court found that the death sentences imposed in *Arevalo*,

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333. 276 Ga. at 40, 572 S.E.2d at 602.

334. Id.

335. 276 Ga. 506, 578 S.E.2d 444 (2003).

336. Id. at 517, 578 S.E.2d at 455.

337. Id.

338. 275 Ga. at 399, 567 S.E.2d at 309.

339. 275 Ga. at 56, 572 S.E.2d at 595.

340. 276 Ga. 229, 236, 576 S.E.2d at 595.

341. 275 Ga. at 399, 567 S.E.2d at 309 (citing O.C.G.A. § 17-10-35(c)(3)).

342. 275 Ga. at 56, 572 S.E.2d at 595 (citing O.C.G.A. § 17-10-35(c)(3)).

343. 276 Ga. at 236, 576 S.E.2d at 849 (citing O.C.G.A. § 17-10-35(c)(3)).

344. O.C.G.A. § 17-10-35(c)(1).
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*Braley, Terrell, Lawler*, and *Sallie* were each free from the influence of these prohibited factors, simply stating: "[the death sentence in this case] was not imposed under the influence of passion, prejudice, or any other arbitrary factor." <sup>345</sup>

#### VII. MENTAL RETARDATION

In Rogers v. State, 346 the supreme court affirmed appellant's conviction and death sentence on direct appeal prior to the court's ruling in Fleming v. Zant. 347 In 1994 following Fleming, Rogers filed a petition of habeas corpus seeking a jury trial on the issue of his mental retardation. The evidence presented by appellant led the habeas court to conclude that a genuine issue of fact existed with respect to appellant's mental retardation, and the habeas court granted a writ to conduct a jury trial on that very issue.348 Just before the start of his Fleming trial, appellant wrote to the judge, asking him to dismiss the mental retardation trial.<sup>349</sup> After appellant stated that he was not mentally retarded at a hearing on his dismissal request, the trial court found that appellant had "knowingly and voluntarily waive[d] his right to a jury trial on this issue of mental retardation."350 One month later, with new counsel, appellant filed a motion to withdraw his waiver of jury trial.351 Prior to the court's ruling on this motion, appellant again wrote to the judge asking that the mental retardation trial be dismissed.<sup>352</sup> The trial court denied the motion and held that appellant waived a jury trial on the issue of mental retardation.<sup>353</sup> On an out-oftime appeal, appellant challenged the trial court's second finding of a waiver of his right to a mental retardation trial.<sup>354</sup> The supreme court reversed the trial court's determination, stating: "Once a petitioner carries his burden of proof in the habeas corpus court of creating a genuine issue regarding his mental retardation, the issue must be thoroughly reviewed and passed upon. At such point in the proceedings,

<sup>345.</sup> Arevalo, 275 Ga. at 399, 567 S.E.2d at 309; Braley, 276 Ga. at 56, 572 S.E.2d at 594; Terrell, 276 Ga. at 45, 572 S.E.2d at 605; Lawler, 276 Ga. at 236, 576 S.E.2d at 848; Sallie, 276 Ga. at 517, 578 S.E.2d at 455 (each citing O.C.G.A. § 17-10-35(c)(1)).

<sup>346. 276</sup> Ga. 67, 575 S.E.2d 879 (2003).

<sup>347. 259</sup> Ga. 687, 386 S.E.2d 339 (1989). See Rogers v. State, 256 Ga. 139, 344 S.E.2d 644 (1986).

<sup>348. 276</sup> Ga. at 68, 575 S.E.2d at 881.

<sup>349.</sup> Id.

<sup>350.</sup> Id. (brackets in original).

<sup>351.</sup> *Id*.

<sup>352.</sup> Id.

<sup>353.</sup> Id.

<sup>354.</sup> Id.

the issue is no longer subject to waiver by a petitioner."<sup>355</sup> Once an appellant has presented sufficient evidence of mental retardation for a habeas corpus court to conclude there is an issue for a jury, "it is the duty of the trial court to conduct a jury trial on the issue of mental retardation pursuant to the procedures established in *Fleming*."<sup>356</sup>

#### VIII. UNIFIED APPEAL

This section deals with the constitutionality of and compliance with the Unified Appeal Procedure.

## A. Constitutionality

In Ramirez v. State,<sup>357</sup> appellant complained of the use of 1990 census data to fix the percentage of black persons in appellant's 2000 grand jury source list.<sup>358</sup> Because the actions complained of complied with the Unified Appeal Procedure Rule II(C)(6), the supreme court addressed the propriety of the mandate of Rule II(C)(6) that the most recent decennial census data be used in compiling grand and traverse jury pools.<sup>359</sup> The court affirmed its recent decision in Smith v. State<sup>360</sup> and upheld the constitutionality of this section of the Unified Appeal Procedure, citing the jury commission's need to have "a valid population benchmark" in making determinations of underrepresentation of minorities in jury pools.<sup>361</sup>

The general constitutionality of the entire Unified Appeal Procedure was affirmed by the court in  $Arevalo\ v.\ State^{362}$  and  $Braley\ v.\ State.^{363}$ 

<sup>355.</sup> Id. at 69, 575 S.E.2d at 882 (citing O.C.G.A. § 17-7-131(a)).

<sup>356.</sup> Id. at 70, 575 S.E.2d at 882.

<sup>357. 276</sup> Ga. 158, 575 S.E.2d 462 (2003).

<sup>358.</sup> Id. at 160, 575 S.E.2d at 465.

<sup>359.</sup> Id., 575 S.E.2d at 465-66.

<sup>360. 275</sup> Ga. 715, 571 S.E.2d 740 (2002) (holding that the trial court did not err in finding no equal representation violation where a grand jury source list for a 2000 indictment was based upon 1990 census data).

 $<sup>361. \ \ 276</sup>$  Ga. at 160, 575 S.E.2d at 466 (quoting Smith, 275 Ga. at 719, 571 S.E.2d at 745).

 $<sup>362.\;\;275</sup>$  Ga. 392,399,567 S.E.2d 303,309 (2002) (citing Jackson v. State, 270 Ga. 494,498-99,512 S.E.2d 241,246 (1999)).

 $<sup>363.\ \ 276\</sup> Ga.\ 47,\ 49-50,\ 572\ S.E.2d\ 583,\ 590\ (2002)$  (citing  $Jackson,\ 270\ Ga.$  at  $498-99,\ 512\ S.E.2d$  at 246).

## B. Compliance

In *Hinely v. State*, <sup>364</sup> appellant argued that his representation by a single attorney at various points prior to trial was a violation of the requirement of Unified Appeal Procedure Rule II(A)(1) that any defendant facing death be represented by two attorneys. <sup>365</sup> Setting aside the issue of whether this complaint was moot because appellant did not receive a death sentence, the court found that appellant failed to show "any specific harm from the violation," <sup>366</sup> and that without such specificity, the court could not determine whether the absence of the second attorney was harmful. <sup>367</sup>

Appellant in *Ramirez* complained that the trial court failed to meet its responsibilities under the Unified Appeal Procedure because the jury commissioner could not testify to the actual percentage of persons on the grand and traverse jury source lists who were Hispanic, a group already found by the court to be a Sixth Amendment cognizable group. The court held that in cases in which the grand and traverse jury source lists are prepared by jury commissioners in the absence of data sufficient to allow direct comparisons of percentages of minority groups, and when the defendant has not produced such data himself through admissible evidence, the trial court fulfills its duties under the Unified Appeal Procedure in concluding that there is no significant underrepresentation, in the absence of evidence otherwise.

## IX. JURISDICTION

At issue in *Head v. Thomason*<sup>370</sup> was whether Thomason's notice of cross-appeal, filed seventeen days after service by mail of the warden's notice of appeal, was timely.<sup>371</sup> Dismissing Justice Thompson's dissenting argument that O.C.G.A. section 9-11-6(e)<sup>372</sup> does not control cross-appeals,<sup>373</sup> the court's majority stated that because the Appellate

<sup>364. 275</sup> Ga. 777, 573 S.E.2d 66 (2002).

<sup>365.</sup> Id. at 783, 573 S.E.2d at 72.

<sup>366.</sup> Id.

<sup>367.</sup> *Id.*, 573 S.E.2d at 72-73 (citing Thomason v. State, 268 Ga. 298, 307, 486 S.E.2d 861, 870 (1997)).

<sup>368. 276</sup> Ga. at 163, 575 S.E.2d at 467.

<sup>369.</sup> Id., 575 S.E.2d at 467-68.

<sup>370. 276</sup> Ga. 434, 578 S.E.2d 426 (2003).

<sup>371.</sup> Id. at 438, 578 S.E.2d at 430-31.

<sup>372.</sup> O.C.G.A. § 9-11-6(e) (1993).

<sup>373. 276</sup> Ga. at 447-49, 578 S.E.2d at 437-38 (Thompson, J., dissenting; Sears, J., dissenting in part).

Practice Act<sup>374</sup> does not provide for computing time limits, this code section can be appropriately supplemented by O.C.G.A. section 9-11-6.<sup>375</sup> As Thomason's notice of cross-appeal was sent within the fifteenday period provided for by O.C.G.A. section 5-6-38(a) *plus* the three-day extension provided for under O.C.G.A. section 9-11-6(e), the court held that Thomason's cross-appeal was in fact timely.<sup>376</sup>

## X. Ineffective Assistance of Counsel

This section discusses ineffective assistance of counsel due to conflict of interest, as well as ineffective assistance of counsel at various stages of a death penalty trial.

## A. Conflict of Interest

The court rejected appellant's argument in *Wright v. State*<sup>377</sup> that one of his two attorneys rendered ineffective assistance of counsel due to a conflict of interest.<sup>378</sup> In explaining its determination, the court noted that appellant's argument was based on the comments of a fellow inmate represented by the attorney in question, and it cited appellant's acknowledgement that both the challenged and the competent attorney provided the same advice.<sup>379</sup>

## B. Pretrial

Appellant in *Hinely v. State*<sup>380</sup> alleged ineffective assistance of counsel on the ground that his trial counsel did not properly communicate a pretrial plea offer to him.<sup>381</sup> At an independent hearing, appellant testified that he received the plea offer and rejected it, and at the hearing to address the plea, the court recessed to allow appellant to speak with his attorneys about the offer before he rejected the plea.<sup>382</sup> Citing these facts, the court found no evidence that appellant would have accepted the offer had it been communicated differently and determined

<sup>374.</sup> O.C.G.A. §§ 5-6-30 to -51 (1995).

<sup>375. 276</sup> Ga. at 438, 578 S.E.2d at 431 (citing S. Guar. Ins. Co. of Georgia v. Goddard, 190 Ga. App. 97, 98, 378 S.E.2d 130, 131 (1989); Nat'l Consultants, Inc. v. Burt, 186 Ga. App. 27, 366 S.E.2d 344 (1998)).

<sup>376.</sup> Id. at 438-39, 578 S.E.2d at 431.

<sup>377. 275</sup> Ga. 497, 570 S.E.2d 280 (2002).

<sup>378.</sup> Id. at 498, 570 S.E.2d at 281-82.

<sup>379.</sup> Id.

<sup>380. 275</sup> Ga. 777, 573 S.E.2d 66 (2002).

<sup>381.</sup> Id. at 780, 573 S.E.2d at 71.

<sup>382.</sup> Id.

that appellant "fail[ed] to show any prejudice from the alleged error." 383

The court also rejected Thomason's claim in *Head v. Thomason*<sup>384</sup> that he was afforded ineffective assistance of counsel during the plea bargaining process. Because it found that counsel had "actively pursued opportunities" to seek a plea in spite of Thomason's "inconsistent reporting of the facts to counsel and his unwillingness to accept a sentence of life without parole," Thomason's claim of ineffectiveness was defeated. Because it found that counsel had "actively pursued opportunities" to seek a plea in spite of Thomason's "inconsistent reporting of the facts to counsel and his unwillingness to accept a sentence of life without parole, "Because it found that counsel had "actively pursued opportunities" to seek a plea in spite of Thomason's "inconsistent reporting of the facts to counsel and his unwillingness to accept a sentence of life without parole, "Because it found that counsel had "actively pursued opportunities" to seek a plea in spite of Thomason's "inconsistent reporting of the facts to counsel and his unwillingness to accept a sentence of life without parole, "Because it found that counsel had "actively pursued opportunities" to seek a plea in spite of Thomason's "inconsistent reporting of the facts to counsel and his unwillingness to accept a sentence of life without parole, "Because it found that counsel had "actively pursued opportunities" to seek a plea in spite of Thomason's "inconsistent reporting of the facts to counsel and his unwillingness to accept a sentence of life without parole, "Because it found that the sentence of life without parole," Thomason's claim of ineffectiveness was defeated.

#### C. Trial

In *Thomason* the court affirmed the habeas court's rejection of Thomason's claim of ineffective assistance of counsel for advising him to waive a jury trial. 388 Even though an incorrect assumption about the judge's predisposition toward imposing the death penalty figured into counsel's suggestion, the court stated that because counsel had multiple reasons for giving the advice, the recommendation was a "strategic decision" and not ineffectiveness. 389

Appellant in *Hinely* argued that his counsel was inadequately prepared for the guilt-innocence phase of his trial. Because appellant made no showing that an examination by a psychiatrist or psychologist would have produced evidence with the potential to alter the result of his trial, the court found against his claim that counsel rendered ineffective assistance in not making use of court-approved funds for such an expert. Likewise, the court rejected appellant's claims that counsel "did not fully pursue various pretrial motions and failed to discuss the Unified Appeal Procedure with him" because appellant did not make a showing of negative effects on his trial outcome. Appellant's contention that counsel was ineffective in not impeaching a witness based on a past conviction was similarly dismissed by the court. First noting the presence of circumstances that would

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383. Id. at 780-81, 573 S.E.2d at 71.
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<sup>384. 276</sup> Ga. 434, 578 S.E.2d 426 (2003).

<sup>385.</sup> Id. at 440, 578 S.E.2d at 432.

<sup>386.</sup> Id. at 439-40, 578 S.E.2d at 432.

<sup>387.</sup> *Id*.

<sup>388.</sup> Id. at 439, 578 S.E.2d at 431-32.

<sup>389.</sup> Id., 578 S.E.2d at 431.

<sup>390. 275</sup> Ga. at 781, 573 S.E.2d at 71.

<sup>391.</sup> *Id*.

<sup>392.</sup> Id.

<sup>393.</sup> Id.

<sup>394.</sup> Id., 573 S.E.2d at 71-72.

have procedurally barred counsel from performing such an impeachment, the court explained that because the witness's own testimony made the jury "fully aware of [the witness's] disreputable character,"395 appellant's claim was defeated as "no reasonable probability exists that, but for this error on trial counsel's part, the result of the proceeding would have been any different."396 During the direct testimony of appellant's stepfather, the witness referred to appellant's previous incarceration. Appellant's counsel declined the court's offer of a curative instruction, reasoning that such a course might draw undue attention to the comment, and on appeal appellant argued that this was ineffective assistance. 397 The court rejected appellant's claim, stating that counsel's decision could have been one of "reasonable trial strategy." 398 Further, the court added that any deficiency in counsel's lack of request for a mistrial was without effect, explaining that because the trial court determined that the witness's comment was nonresponsive, no mistrial would have been granted.399

## D. Jury Instructions

In *Hinely* the appellant also argued that his counsel rendered ineffective assistance by making insufficient requests with respect to jury instructions. Noting that "no such issue was placed before the jury, nor is there any evidence that it could have been," the court rejected appellant's complaint that counsel failed to request jury instructions on the law concerning impeachment by conviction of a crime of moral turpitude. The court also rejected appellant's complaint that counsel did not request an instruction on the legal principle that evidence put forth by an accomplice must be corroborated to support conviction, explaining that because of the sizeable amount of evidence corroborating the witness testimony in question, there was no reasonable probability that the lack of such an instruction affected the trial's outcome.

<sup>395.</sup> Id. (citing Ross v. State, 231 Ga. App. 793, 798, 499 S.E.2d 642, 647 (1998)).

<sup>396.</sup> Id.

<sup>397.</sup> Id. at 781-82, 573 S.E.2d at 72.

<sup>398.</sup> Id. at 782, 573 S.E.2d at 72.

<sup>399.</sup> Id.

<sup>400.</sup> Id.

<sup>401.</sup> *Id*.

<sup>402.</sup> Id.

<sup>403.</sup> Id.

#### E. Sentencing

The court in *Thomason* found that appellant was afforded ineffective assistance of counsel during the sentencing phase of his trial. <sup>404</sup> Pointing to counsel's erroneous assumption about the factfinder's predisposition toward the death penalty and the presumed lack of preparation for the sentencing phase that flowed from that assumption, the court noted counsel's failure to present readily available mitigating evidence and counsel's failure to call mitigating experts. <sup>405</sup> Reviewing these facts, the court found a "reasonable probability" that the presentation of the missing mitigation evidence would have changed the outcome of Thomason's sentencing phase, and the court affirmed the habeas court's grant of a new sentencing trial. <sup>406</sup>

In *Hinely* the court held no such reasonable probability and rejected appellant's claim of ineffective assistance. Though counsel testified that he was not prepared for mitigation, the court found that appellant failed to show that "had counsel prepared further for the sentencing phase of the trial, any additional mitigation evidence would have been disclosed that might have altered the outcome of his trial."

## XI. UNITED STATES SUPREME COURT CASES

## A. Sattazahn v. Pennsylvania

In 1991 a jury convicted David Allen Sattazahn of first-degree murder and other charges. When the jury deadlocked with regard to Sattazahn's sentence, the judge, following Pennsylvania state law, discharged the jury and sentenced Sattazahn to life imprisonment. The Pennsylvania Superior Court reversed the conviction and sentence because of improper jury instructions, and upon retrial, Sattazahn was again convicted but sentenced to death. On direct appeal, the Pennsylvania Supreme Court affirmed the verdict and the death sentence, rejecting petitioner's argument that the Double Jeopardy Clause and the Due Process Clause barred Pennsylvania from seeking the death penalty at Sattazahn's second trial. 410

<sup>404. 276</sup> Ga. at 437-38, 578 S.E.2d at 430.

<sup>405.</sup> Id.

<sup>406.</sup> Id. at 438, 578 S.E.2d at 430.

<sup>407. 275</sup> Ga. at 782-83, 573 S.E.2d at 72.

<sup>408.</sup> Id. (citing Smith v. Francis, 253 Ga. 782, 783, 325 S.E.2d 362, 363 (1985)).

<sup>409.</sup> Sattazahn v. Pennsylvania, 537 U.S. 101 (2003).

<sup>410.</sup> Id. at 103-04.

The United States Supreme Court granted certiorari in 2002, and in an opinion written by Justice Scalia, the majority affirmed the decision of the Pennsylvania Supreme Court. 411 Stating that "an 'acquittal' at a trial-like sentencing phase, rather than the mere imposition of a life sentence, is required to give rise to double-jeopardy protections."412 the Court found that the judge's entry of a life sentence was not an Because the judge had no discretion and was simply complying with Pennsylvania state law, the Court held that the "judgment [was] not based on findings which resolve[d] some factual matter"414 and that "it [was] not sufficient to establish legal entitlement to a life sentence."415 Such a legal entitlement to a life sentence is only established through sufficient factual findings, such as the State failing to prove beyond a reasonable doubt aggravating circumstances necessary to impose death. 416 As Sattazahn's original sentence was not an "acquittal" under this standard, the Court's majority found that the default judgment did not trigger a Fifth Amendment double jeopardy bar to a death sentence upon retrial. 417

The Court's majority similarly rejected Sattazahn's Fourteenth Amendment claim that his capital resentencing violated his due process rights by depriving him of the life and liberty interests he had secured through his original statutorily mandated life sentence. Because "[Sattazahn]'s due-process claim [was] nothing more than his double-jeopardy claim in different clothing," the majority found no due process violation.

In her dissent, Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, argued that the analysis of the petitioner's double jeopardy claim turns on "whether a final judgment so entered qualifie[d] as a jeopardy-terminating event," not whether there was an "acquittal." Pointing to the Court's reasoning in *United States v. Scott*, 423

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411. Id. at 116.
412. Id. at 107 (citing Bullington v. Missouri, 451 U.S. 430, 446 (1981)).
413. Id. at 109.
414. Id.
415. Id.
416. Id.
417. Id. at 109-10.
418. Id. at 115.
419. Id.
420. Id.
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422. Id. at 118 (Ginsburg, J., dissenting).
423. 437 U.S. 82 (1978). In Scott, the court stated:
[The] defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of
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Justice Ginsburg argued that a "trial-terminating judgment for life, not prompted by a procedural move on the defendant's part, creates a legal entitlement protected by the Double Jeopardy Clause."424 from any extension of Scott's logic to the instant case, the dissent found that "the perils against which the Double Jeopardy Clause seeks to protect are plainly implicated by the prospect of a second capital sentencing proceeding."425 By subjecting Sattazahn to another death trial, Sattazahn would be forced to live in a "continuing state of anxiety and insecurity."426 Explaining that the majority's decision wrongly forces a defendant in Sattazahn's position to "relinquish either her right to file a potentially meritorious appeal, or her state-granted entitlement to avoid the death penalty,"427 and that the potential for a death sentence upon retrial heightened Sattazahn's double jeopardy interest, the dissent "would hold that jeopardy terminated as to Sattazahn's sentence after the judge entered a final judgment for life."428

#### B. Miller-El v. Cockrell

In petitioner's 1986 capital murder trial, the Dallas County assistant district attorneys used peremptory strikes to exclude ten of the eleven eligible African-American potential jurors. The trial judge denied petitioner's motion to strike the jury, and petitioner was subsequently found guilty of murder and sentenced to death. On appeal, petitioner claimed that these jury selection procedures violated the Equal Protection Clause and the United States Supreme Court's holding in Batson v. Kentucky. The United States District Court for the Northern District of Texas found that petitioner had not established a

which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant . . . . [T]he Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice.

Id. at 98-99.

424. 537 U.S. at 123 (Ginsburg, J., dissenting).

425. Id

426. Id. (quoting Green v. U.S., 355 U.S. 184, 187 (1957).

427.

428. Id. at 127.

429. Miller-El v. Cockrell, 537 U.S. 322 (2003).

430. 476 U.S. 79 (1986) (establishing a three-part process for determining whether a prosecutor's use of peremptory challenges violates the Equal Protection Clause: (1) The defendant must make a prima facie showing that the peremptory challenge was based on race; (2) The prosecutor must offer a race-neutral reason for each such strike; and (3) The court must consider all of this evidence to decipher whether the defendant has shown purposeful discrimination).

constitutional violation warranting habeas relief, and the United States Court of Appeals for the Fifth Circuit denied petitioner a certificate of appealability (C.O.A.) from the district court's decision. 431 On review of this denial, the United States Supreme Court held that the court of appeals erred and that the C.O.A. should have been issued. 432

Reviewing the record, the Court found that the district court "did not give full consideration to the substantial evidence petitioner put forth in support of the prima facie case [of racially discriminatory policies]"433 and placed too demanding a standard on petitioner by incorrectly requiring a showing that the state court decision was "objectively unreasonable by clear and convincing evidence."434 The Court further held that the court of appeals did not have jurisdiction to "resolve the merits of petitioner's constitutional claims"435 as it attempted to do. 436 Rather, because the question before the court of appeals was "the debatability of the underlying constitutional claim, not the resolution of that debate,"437 the court of appeals was only to inquire whether "a substantial showing of the denial of a constitutional right"438 was proven in order to grant a C.O.A.439

In support of his Batson claim to the state and federal courts that denied him relief, petitioner presented evidence of "a pattern and practice of race discrimination"440 by the district attorney's office and evidence of prosecutorial conduct that included a disproportionate peremptory strike rate on African American jurors, racially disparate modes of jury examination, and use of jury shuffling in response to the racial seating pattern in particular jury panels.441 Citing the strength of this evidence, the Court found that the trial court did not adequately scrutinize the credibility of the prosecutor's race-neutral reasons in resolving petitioner's Batson challenge. 442 The Court emphasized that petitioner's historical evidence of racial discrimination by the district attorney's office was relevant to the Batson inquiry because it "casts doubt on the legitimacy of the motives underlying the State's actions in

<sup>431. 537</sup> U.S. 326-27

<sup>432.</sup> Id.

<sup>433.</sup> Id. at 341.

<sup>434.</sup> *Id*.

<sup>435.</sup> Id. at 342.

<sup>436.</sup> Id.

<sup>437.</sup> Id.

<sup>438.</sup> Id.

<sup>439.</sup> Id.

<sup>440.</sup> Id. at 331.

<sup>441.</sup> Id. at 331-35.

<sup>442.</sup> Id. at 341.

petitioner's case"<sup>443</sup> and speaks to the issue of purposeful discrimination. Finding that petitioner clearly met the standard of the C.O.A. inquiry by showing that the district court's determination was debatable, the Court reversed the judgment of the Fifth Circuit. Figure 1.

#### C. Sell v. United States

Petitioner in  $Sell^{446}$  was forced to take antipsychotic medication at a medical center for federal prisoners to render him competent to stand trial on fraud and attempted murder charges. The United States Supreme Court granted certiorari to determine whether the Eighth Circuit erred in rejecting Sell's argument that the involuntary administration of antipsychotic drugs to render him competent for trial on nonviolent charges was a violation of his Fifth Amendment guarantee of liberty. In addressing whether the forced administration of medication solely to render Sell competent to stand trial was a violation of his Fifth Amendment rights, the Court relied on Washington v. Harper and Riggins v. Nevada and concluded that:

[T]he Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.<sup>451</sup>

Operating under the assumption that Sell was not dangerous, the Court applied this newly articulated standard and found that the court of appeals erred in allowing the forced administration of antipsychotic medication solely to render Sell competent to stand trial. Previous adjudication of Sell's forced medication focused on questions of Sell's dangerousness, so the court did not address "trial-related side effects and risks," such as "[w]hether a particular drug will tend to sedate a

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443. Id. at 347.
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<sup>444.</sup> *Id*.

<sup>445.</sup> Id. at 348.

<sup>446.</sup> Sell v. United States, 123 S. Ct. 2174 (2003).

<sup>447.</sup> Id. at 2179-80.

<sup>448.</sup> Id. at 2181.

<sup>449. 494</sup> U.S. 210 (1990).

<sup>450. 504</sup> U.S. 127 (1992).

<sup>451. 123</sup> S. Ct. at 2184.

<sup>452.</sup> Id. at 2187.

<sup>453.</sup> *Id*.

defendant, interfere with communication with counsel, prevent rapid reaction to trial developments, or diminish the ability to express emotions."<sup>454</sup> Without information on these issues, which are central to determining the acceptability of medication to restore competence, the Court could not determine whether Sell's fair trial rights were undermined. Without such answers and because of the Court's finding of a moderated governmental interest in prosecuting Sell due to his already lengthy confinement, the Court vacated the judgment of the Eighth Circuit and remanded the case.

## D. Wiggins v. Smith

Petitioner in Wiggins<sup>457</sup> was convicted of murder and sentenced to death in Maryland in 1989. Though Wiggins's two public defenders did some limited investigation into his background and were aware of some of the severe abuse Wiggins suffered as a youth, defense counsel did not present any of this mitigation evidence during the sentencing phase of Wiggins's trial. Defense counsel instead continued to focus on disproving Wiggins's direct responsibility for the murder in question. Wiggins challenged the adequacy of his representation at sentencing, and after receiving no relief in Maryland's state courts, Wiggins filed a petition for federal writ of habeas corpus in 2001. Whereas the Maryland Court of Appeals found defense counsel's decision to focus on retrying the factual elements of the case instead of presenting mitigating evidence one of reasonable strategy, the United States District Court for the District of Maryland rejected this argument and granted Wiggins relief. 458 The Fourth Circuit reversed the district court's decision, finding that the limited investigation conducted by defense counsel into Wiggins's difficult history was sufficient to render their approach at the sentencing phase of the trial an "informed strategic choice." The United States Supreme Court granted certiorari in 2002 and subsequently reversed the decision of the Fourth Circuit and remanded petitioner's case. 460

Citing the standard for determinations of ineffective assistance of counsel articulated by the Court in *Strickland v. Washington*, 461

<sup>454.</sup> Id.

<sup>455.</sup> Id.

<sup>456.</sup> Id.

<sup>457.</sup> Wiggins v. Smith, 123 S. Ct. 2527 (2003).

<sup>458.</sup> Id. at 2532-34.

<sup>459.</sup> Id. at 2534 (quoting Wiggins v. Corcoran, 288 F.3d 629, 641 (4th Cir. 2002)).

<sup>460.</sup> Id. at 2544.

<sup>461.~466~</sup>U.S.~668~(1984). To prove ineffective assistance, a petitioner must first show that counsel's performance was deficient by demonstrating that the representation "fell below an objective standard of reasonableness," and then must show that this deficiency

Justice O'Connor, writing for the majority, emphasized that the Court's inquiry into petitioner's Sixth Amendment claim would *not* revolve around whether counsel should have presented mitigating evidence. Rather, the Court's determination was driven by "whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins's background *was itself reasonable*, 463 using a standard of "reasonableness under prevailing professional norms."

Not only did counsel's decision not to investigate Wiggin's social history beyond two brief written reports fall below the standard practice in Maryland capital cases and the standards articulated by the American Bar Association, the majority found that "the scope of their investigation was also unreasonable in light of what counsel actually discovered in the [social services] records."465 In reviewing the rest of the trial record, the Court concluded that the limited investigation "was the result of inattention, not reasoned strategic judgment,"466 and found that defense counsel's investigation did not meet the performance standards of Strickland. The Court further found that the mitigating evidence defense counsel failed to uncover and present to the jury "'might well have influenced the jury's appraisal' of Wiggins'[s] moral culpabili-Because of the Court's finding of prejudice as a result of counsel's deficient performance, the majority held that Wiggins's defense counsel had in fact rendered ineffective assistance in violation of the Sixth Amendment. 469

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prejudiced the defense. Id. at 687-88.
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<sup>462. 123</sup> S. Ct. at 2541.

<sup>463.</sup> Id. at 2536.

<sup>464.</sup> Id. (quoting Strickland, 466 U.S. at 688).

<sup>465.</sup> Id. at 2536-37.

<sup>466.</sup> Id. at 2541-42.

<sup>467.</sup> Id.

 $<sup>468. \</sup>quad \textit{Id.} \ \, \text{at 2544 (quoting Williams v. Taylor, 529 U.S. 362, 398 (2000))}.$ 

<sup>469.</sup> Id.