

Death Penalty Law

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This Article surveys the death penalty decisions of the Georgia Supreme Court from June 1, 2003, through May 31, 2004.¹ 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 United States Supreme Court decisions are included in this survey because of their salience to Georgia death penalty law.

I. PRETRIAL ISSUES

This section covers issues involving grand juries, discovery, custodial statements, and speedy trial.

A. Grand Jury

In *Sealey v. State*,² appellant contended that his indictment was invalid because the jury commissioners, in an attempt to comply with section 15-12-40(a)(1) of the Official Code of Georgia Annotated ("O.C.G.A."),³ excluded some prospective grand jurors because they did not have a high school education.⁴ Testimony established, however, that

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1. For a survey of death penalty decisions handed down during the prior year, see Michael Mears and Holly Geerdes, *Death Penalty Law*, 55 MERCER L. REV. 175 (2003).

2. 277 Ga. 617, 593 S.E.2d 335 (2004).

3. O.C.G.A. § 15-12-40(a)(1) (Supp. 2004) ("[T]he board of jury commissioners shall compile, maintain, and revise . . . a grand jury list of the most experienced, intelligent, and upright citizens of the county to serve as grand jurors").

4. *Sealey*, 277 Ga. at 618-19, 593 S.E.2d at 337-38.

the commissioners had required “a third grade education or something” and that each disqualified juror was replaced by a person of the same race and gender.⁵ Under these facts the court held that challenges to the array based on statutory procedures, rather than constitutional requirements, cannot be sustained because statutory procedures are “merely directory.”⁶

Additionally, Sealey claimed that Hispanics were under-represented on the source lists from which his petit and grand jury arrays were drawn.⁷ The Georgia Supreme Court rejected this contention because Sealey did not present evidence showing actual under-representation, the degree of under-representation, or that Hispanics constitute a cognizable group within the county.⁸ Further, no error arose out of the jury commissioners’ use of the most recently available census information to create the source lists.⁹

B. Discovery

Appellant in *Tubbs v. State*¹⁰ was indicted for two counts of malice murder and four counts of felony murder. The alleged murders, involving two victims, occurred between 9:00 and 9:30 p.m. in Midway, Georgia, on May 12, 1998. Appellant gave written notice of his intent to offer an alibi defense in response to the State’s demand pursuant to O.C.G.A. section 17-16-5(a).¹¹ Tubbs listed two witnesses with whom he was traveling in Louisiana at the time of the murders. During opening statement, defense counsel referred to other witnesses who could place Tubbs in Louisiana during the month of May and within hours of the crime but not at the exact time the crimes occurred. The State argued that these witnesses should have been listed as alibi witnesses. On the State’s motion, the trial court granted a continuance and subsequently declared a mistrial *sua sponte*.¹² On appeal the court held that the trial court did not err in finding that defendant’s alibi notice did not comply with O.C.G.A. section 17-16-5(a).¹³ The court concluded that all witnesses who would make it impossible for defendant

5. *Id.*

6. *Id.* at 619, 593 S.E.2d at 338 (quoting *Frazier v. State*, 257 Ga. 690, 691, 362 S.E.2d 351, 355 (1987); *Dillard v. State*, 177 Ga. App. 805, 807, 341 S.E.2d 310, 313 (1986)).

7. *Id.*

8. *Id.* (citing *Ramirez v. State*, 276 Ga. 158, 159-62, 575 S.E.2d 462, 465-67 (2003)).

9. *Id.*

10. 276 Ga. 751, 583 S.E.2d 853 (2003).

11. O.C.G.A. § 17-16-5(a) (2004).

12. *Tubbs*, 276 Ga. at 751-52, 583 S.E.2d at 855.

13. *Id.* at 753, 583 S.E.2d at 856.

to be at the crime scene at the time of the crime must be listed as alibi witnesses.¹⁴

The court also held that the trial court did not abuse its discretion in granting a mistrial *sua sponte*.¹⁵ The court stated that a showing of bad faith and prejudice is only necessary to justify the exclusion of alibi evidence under O.C.G.A. section 17-16-6;¹⁶ such a showing is not necessary to justify a mistrial.¹⁷ When defense counsel fails to give a required notice or make a preliminary showing before mentioning evidence in opening statement, the trial court does not abuse its discretion in granting a mistrial.¹⁸

In *Head v. Stripling*,¹⁹ the court affirmed the habeas court's finding that the suppression of Stripling's parole file, which contained exculpatory evidence supporting his mental retardation claim, constituted a *Brady*²⁰ violation.²¹ At trial defense counsel attempted to obtain a copy of the parole file. The trial court reviewed the file *in camera* pursuant to *Pope v. State*²² but did not release the files because it found that the evidence it contained, while relevant, was cumulative to the testimony of the defense expert who testified at the competency hearing. It was not until Stripling's habeas counsel secured the file that it was discovered to contain information relevant to Stripling's mental retardation claim, which was not available elsewhere.²³

The court rejected Stripling's claim that failure to release the file was error during his direct appeal.²⁴ The court, however, ruled that because Stripling had claimed error under *Pope* and did not, and could not have, claimed error under *Brady*, his current claim was not procedurally barred from habeas review.²⁵ The court concluded that the attorney general's office, which possessed the file before trial, became part of the prosecution team through its involvement in litigation over

14. *Id.* at 752-53, 583 S.E.2d at 856.

15. *Id.* at 755-56, 583 S.E.2d at 858.

16. *Id.* at 753, 583 S.E.2d at 856; O.C.G.A. § 17-16-6 (2004).

17. *Tubbs*, 276 Ga. at 753, 583 S.E.2d at 856.

18. *Id.* at 755-56, 583 S.E.2d at 858 (citing *Laster v. State*, 268 Ga. 172, 175, 486 S.E.2d 153, 156 (2003)).

19. 277 Ga. 403, 590 S.E.2d 122 (2003).

20. *See Brady v. Maryland*, 373 U.S. 83 (1983).

21. *Stripling*, 277 Ga. at 403, 590 S.E.2d at 124.

22. 256 Ga. 195, 345 S.E.2d 831 (1986) (holding that defendant's need to uncover and present mitigating evidence trumps policy reasons for preserving the secrecy of parole files).

23. *Stripling*, 277 Ga. at 404-06, 590 S.E.2d at 124-25.

24. *Id.* at 405, 590 S.E.2d at 125.

25. *Id.* at 406, 590 S.E.2d at 126.

the defense's efforts to obtain the file.²⁶ Therefore, the State possessed evidence favorable to Stripling's defense. Stripling did not possess the evidence contained in the file and was unable to obtain it despite his diligent efforts to do so. Also, the State's proper motive in suppressing the file, O.C.G.A. section 42-9-53,²⁷ was irrelevant. Lastly, the evidence contained in the file was material: the evidence, which was generated by state officials, characterized Stripling as mentally retarded and refuted prosecution evidence.²⁸ The court directed that a bifurcated jury re-trial occur with mental retardation to be determined in the first phase and sentencing in the second phase of the trial.²⁹

C. Speedy Trial

In *Williams v. State*,³⁰ the Georgia Supreme Court remanded the trial court's denial of appellant's constitutional speedy trial claim with regard to a burglary charge and two felony murder charges predicated on the burglary.³¹ The trial court referred to Williams's 1998 indictment for the burglary rather than a 1997 indictment that charged him with committing the same crime.³²

The court affirmed the trial court's dismissal of appellant's constitutional speedy trial claim with regard to other charges alleged in the 1998 indictment.³³ The primary reasons for delay were the defense's lack of preparation and extensive medical treatments that Williams required for a mass in his brain.³⁴ The court also weighed his previous failure to assert his right to a speedy trial against him.³⁵ The court declared, however, that the trial court was in error to the extent that it weighed heavily Williams's failure to make a particularized showing of the oppressiveness of his pre-trial incarceration and decreased ability to present a defense, because of the extreme delay in bringing his case to trial.³⁶

26. *Id.* at 408, 590 S.E.2d at 127.

27. O.C.G.A. § 42-9-53 (1997) (making parole files confidential).

28. *Stripling*, 277 Ga. at 407-09, 590 S.E.2d at 126-27.

29. *Id.* at 409, 590 S.E.2d at 127.

30. 277 Ga. 598, 592 S.E.2d 848 (2004).

31. *Id.* at 598, 592 S.E.2d at 849.

32. *Id.* at 601-02, 592 S.E.2d at 851-52.

33. *Id.* at 599-600, 592 S.E.2d at 850-51.

34. *Id.* at 599, 592 S.E.2d at 850.

35. *Id.*

36. *Id.* at 600-01, 592 S.E.2d at 851.

II. JURY SELECTION

This section covers the permissible scope of examination and the improper excusal of jurors.

In *Sealey v. State*,³⁷ the Georgia Supreme Court held that it was not an abuse of discretion for the trial court to limit questions regarding jurors' knowledge of legal terminology that, according to the court, seemed "to seek a prejudgment of the case."³⁸ Nor did the trial court abuse its discretion in disallowing questions unrelated to possible juror bias regarding the manner in which jurors would conduct themselves during deliberation.³⁹ The court also held that Sealey abandoned his claim that he was denied a qualified jury panel when he failed to name the jurors at issue or to provide citation to the record.⁴⁰ Additionally, the trial court did not err in excusing several jurors for reasons of personal hardship.⁴¹ The court explained that trial courts, in addition to their statutory duty to dismiss jurors in certain circumstances, also possess a discretionary ability to dismiss jurors for reasons of personal hardship.⁴²

III. GUILT AND INNOCENCE

This section discusses custodial statements, sufficiency of the evidence of guilt, improper communications between judge and jury, the admissibility of polygraph evidence, and closing argument.

A. Custodial Statements

Appellant in *McDougal v. State*⁴³ voluntarily accompanied detectives to a police station where the detectives interviewed him in connection with an armed robbery and murder. McDougal did not match an initial description of the murder suspect in the case. A handgun, said to be his and matching the caliber of the murder weapon, was found in a dumpster within feet of his work station. McDougal was not handcuffed, searched, or advised of his *Miranda*⁴⁴ rights. On arrival at the police station, he was led through two sets of locked doors and was questioned

37. 277 Ga. 617, 593 S.E.2d 335 (2004).

38. *Id.* at 619, 593 S.E.2d at 338.

39. *Id.* at 620, 593 S.E.2d at 338.

40. *Id.*

41. *Id.*, 593 S.E.2d at 338-39.

42. *Id.* (citations omitted).

43. 277 Ga. 493, 591 S.E.2d 788 (2004).

44. *Id.* at 493-94, 591 S.E.2d at 790-91 (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)).

in a secure interview room. He attempted to avoid answering a question regarding the gun by repeating his prior statement that he was a convicted felon. Detectives repeatedly informed McDougal that they had enough information to arrest him for possession of a firearm but did not tell him whether or not they intended to do so. Further, one of the detectives told him that he would not be released in time for an appointment.⁴⁵

The court rejected the State's contention that McDougal was not in custody at the time of this initial questioning because at that point he was not suspected of having committed the murder.⁴⁶ The court determined "the subjective intentions of the interrogators are irrelevant to a determination of whether a suspect is in custody."⁴⁷ The court also determined the fact that McDougal was repeatedly told that he was not under arrest was inconclusive because the detectives' words and actions indicated that he was in custody.⁴⁸ The court held that the statement that McDougal made prior to being issued *Miranda* warnings must be excluded at trial because a reasonable person in his situation would have believed himself to be in custody.⁴⁹

When police eventually read *Miranda* warnings to McDougal and asked him to sign a waiver, he stated that he wanted to call his wife so she could contact his lawyer, but he was not allowed to do so.⁵⁰ The court held that his subsequent statements were inadmissible because his request for an attorney was "clear and unambiguous."⁵¹

Additionally, the court held that McDougal did not re-initiate interrogation when he requested to speak with detectives approximately ninety minutes after he was placed in a holding cell.⁵² Detectives began interrogating him before he had a chance to say anything and he did not volunteer any information during the course of the interview.⁵³ The court held that statements made during this second interview were inadmissible because there was no indication that McDougal had waived his previously invoked right to counsel at any time.⁵⁴

45. *Id.* at 497-98, 591 S.E.2d at 793.

46. *Id.* at 498, 591 S.E.2d at 793.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 499, 591 S.E.2d at 793-94 (citing *Taylor v. State*, 274 Ga. 269, 271-72, 553 S.E.2d 598, 601-02 (2001); *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981)).

52. *Id.* at 499-500, 591 S.E.2d at 794-95.

53. *Id.*

54. *Id.* at 500, 591 S.E.2d at 795.

Ten days later, McDougal requested to speak with detectives again. Detectives immediately asked why he wanted to see them, and McDougal made statements placing his co-defendant at the crime scene.⁵⁵ The court held that there was no interrogation.⁵⁶ McDougal knowingly and intelligently waived his right to counsel and the incriminating statements he made at that time were admissible.⁵⁷

B. Sufficiency

Appellant in *Lewis v. State*⁵⁸ was found guilty of malice murder, felony murder, aggravated battery, burglary, and possession of a knife during the commission of a felony.⁵⁹ At the time of the murder, Lewis had a history of harassment and domestic violence, including threatening to murder his wife while in the presence of a police officer. On the night of the murder, Lewis broke into his wife's apartment through the kitchen window. Her daughter, a minor, saw him holding a knife and pinning his estranged wife down in her bedroom. The victim suffered forty-two injuries including multiple stab and cut wounds. A bloody knife was found at the scene and another knife was found in Lewis's sleeve when police arrested him. Lewis stated that he knew police would catch him. Bloodstains on Lewis's clothing revealed DNA that matched his estranged wife's DNA profile.⁶⁰ The court held that the evidence was sufficient to find Lewis guilty of all counts beyond a reasonable doubt.⁶¹

Appellant in *Sealey v. State*⁶² was found guilty of the malice murders of a husband and wife and seventeen related charges.⁶³ Sealey drove to the victims' home in the company of two other men, both of whom testified at trial, and the victims' granddaughter. One of Sealey's male companions testified that he exited a bathroom to see Sealey's male victim lying in a pool of blood and Sealey wielding a handgun while restraining his female victim. Sealey then bound and tortured the female victim with a fireplace poker in an effort to learn where she kept her money. Finally, Sealey killed both victims by striking them in the head with an axe. He threatened to kill the driver of the car, who had

55. *Id.* at 501, 591 S.E.2d at 795.

56. *Id.*

57. *Id.*

58. 277 Ga. 534, 592 S.E.2d 405 (2004).

59. *Id.* at 534, 592 S.E.2d at 405-06.

60. *Id.* at 535-36, 592 S.E.2d at 406-07.

61. *Id.* at 536, 592 S.E.2d at 407 (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)).

62. 277 Ga. 617, 593 S.E.2d 335 (2004).

63. *Id.* at 617, 593 S.E.2d at 335.

remained outside during the murders, if he reported ever seeing Sealey. Jewelry, a handgun belonging to the victims, and protein residue consistent with blood were found in Sealey's motel room.⁶⁴ The court held that the evidence presented was sufficient to authorize rational jurors to conclude that Sealey was guilty on all counts.⁶⁵

C. Improper Communication between Judge and Jury

In *Lewis* appellant claimed that an improper communication or communications occurred between the trial judge and the jury during deliberations. Two jurors testified at Lewis's motion for new trial hearing that one and, perhaps, two notes were sent out of the jury room during deliberations and that written responses were received. No notes were contained in the trial record. One juror testified that one note might have dealt with a request that physical evidence be sent in; that she believed that the note or notes were sent out during the penalty phase; and that she could not remember the questions asked or whether there were one or two notes. The second juror remembered a note requesting a break and another requesting the definition of "malice," though she was unsure of when the malice note was sent.⁶⁶

The trial judge testified that she might have received a note requesting a break, but none dealing with the substance of the case, and that if she had received a note asking for the definition of malice, she would have convened a hearing. The bailiff testified that he did not remember any notes. The jury foreman testified that he communicated with the judge three times: to ask for lunch; to request that the physical evidence be brought in so deliberations could begin; and to inform the judge that the jury reached a verdict. He further testified that he was confused about malice, but that no note was sent, and that the only written communication was the lunch list.⁶⁷

The court held that the motion-for-new-trial court had not erred in finding that no improper communication occurred, and that its findings were supported by the evidence.⁶⁸ The court further held that it was not improper to re-open the evidence to hear additional testimony⁶⁹ and that the motion-for-new-trial court did not err in crediting the testimony

64. *Id.* at 617-18, 593 S.E.2d at 337.

65. *Id.* (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)).

66. *Lewis*, 277 Ga. at 538, 592 S.E.2d at 408.

67. *Id.* at 538-39, 592 S.E.2d at 408-09.

68. *Id.* at 539, 592 S.E.2d at 409 (citing *Peralta v. State*, 276 Ga. 218, 219-20, 576 S.E.2d 853, 854-55 (2003)).

69. *Id.* (citing *Carruth v. State*, 267 Ga. 221, 476 S.E.2d 739 (1996); *Carter v. State*, 263 Ga. 401, 402, 453 S.E.2d 42, 43 (1993)).

of the trial judge, bailiff, and foreman over what it considered to be the confused recollection of the two jurors.⁷⁰

D. Admissibility of Polygraph Evidence

In *Sealey* the court held that the trial court did not err in excluding polygraph evidence related to an examination of a witness.⁷¹ Appellant had no stipulation with the State regarding the admissibility of the results of the witness's polygraph examination. The fact that the witness had entered into a stipulation regarding the admissibility of the results of a polygraph test in any proceeding against her was irrelevant to defendant's case.⁷²

E. Closing Argument

Appellant in *Hendricks v. State*⁷³ was convicted of malice murder, possession of a firearm during the commission of a felony, and conspiracy to commit trafficking in cocaine.⁷⁴ The court held that the State's circumstantial evidence was sufficient to authorize the jury to find Hendricks guilty, even though Hendricks's version of events was hypothetically possible.⁷⁵

[Q]uestions as to the reasonableness of hypotheses are generally to be decided by the jury, and where the jury is authorized to find that the evidence, though circumstantial, was sufficient to exclude every reasonable hypothesis save that of guilt, that finding will not be disturbed unless the verdict of guilty is insupportable as a matter of law.⁷⁶

The trial judge erred, however, in limiting Hendricks's closing statement to one hour.⁷⁷ O.C.G.A. section 17-8-73⁷⁸ limits counsel to two hours for closing argument in capital felony cases. The court stated that "[t]he trial court has no discretion to impose any further limit on the time for closing argument, and failure to afford the parties the full time is, as a

70. *Id.* (citing *Peralta*, 276 Ga. at 219-20, 576 S.E.2d at 854-55).

71. *Sealey*, 277 Ga. at 620, 593 S.E.2d at 339.

72. *Id.* (citing *Rucker v. State*, 272 Ga. 750, 751-52, 534 S.E.2d 71, 73-74 (2000); *Walker v. State*, 264 Ga. 79, 80, 440 S.E.2d 637, 638-39 (1994)).

73. 277 Ga. 61, 586 S.E.2d 317 (2003).

74. *Id.* at 61, 586 S.E.2d at 317.

75. *Id.* at 62, 586 S.E.2d at 319.

76. *Id.* (citing *Foster v. State*, 273 Ga. 34, 537 S.E.2d 659 (2000)).

77. *Id.* at 63, 586 S.E.2d at 320.

78. O.C.G.A. § 17-8-73 (2004).

matter of law, error.”⁷⁹ The court, nevertheless, determined that Hendricks’s right to make a closing statement was not completely abridged.⁸⁰ The court, however, reversed appellant’s convictions and remanded for a new trial because the case against Hendricks was dependent on circumstantial evidence.⁸¹

IV. SENTENCING

This section covers statutory aggravating circumstances and closing argument.

A. Statutory Aggravators

In *Lewis v. State*,⁸² the court held that the evidence was sufficient to authorize the jury to find three statutory aggravating circumstances pursuant to O.C.G.A. section 17-10-30(b)(2) and (b)(7):⁸³ (1) the murder was committed while Lewis was engaged in the commission of an aggravated battery; (2) the murder was committed in the commission of a burglary; and (3) the murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, and an aggravated battery to the victim before death.⁸⁴ Lewis broke into his victim’s home, inflicted forty-two injuries including the stab or cut wounds that killed her, and murdered his victim while her children were present in the apartment.⁸⁵

The court also held that the jury in *Sealey v. State*⁸⁶ was authorized to find the presence of statutory aggravating circumstances.⁸⁷ The jury recommended a death sentence based on the statutory aggravating circumstances that both murders involved torture, depravity of mind, and aggravated battery under O.C.G.A. section 17-10-30(b)(7);⁸⁸ both were committed for the purpose of receiving money or any other thing of monetary value pursuant to O.C.G.A. section 17-10-30(b)(4);⁸⁹ that

79. *Hendricks*, 277 Ga. at 63, 586 S.E.2d at 320 (quoting *Chapman v. State*, 273 Ga. 865, 869, 548 S.E.2d 278, 282 (2001)).

80. *Id.*

81. *Id.* at 63-64, 586 S.E.2d at 320-21 (citing *Laster v. State*, 276 Ga. 645, 581 S.E.2d 522 (2003)).

82. 277 Ga. 534, 592 S.E.2d 405 (2004).

83. O.C.G.A. §§ 17-10-30(b)(2), (7) (2004).

84. *Lewis*, 277 Ga. at 536, 592 S.E.2d at 406-07 (citing O.C.G.A. § 17-10-35(c)(2); *Jackson v. Virginia*, 443 U.S. 307 (1979)).

85. *Id.* at 535, 592 S.E.2d at 406-07.

86. 277 Ga. 617, 593 S.E.2d 335 (2004).

87. *Id.* at 621, 593 S.E.2d at 339.

88. O.C.G.A. § 17-10-30(b)(7).

89. *Id.* § 17-10-30(b)(4).

the murder of the male victim was committed in the course of armed robbery and aggravated battery under O.C.G.A. section 17-10-30(b)(2);⁹⁰ and pursuant to O.C.G.A. section 17-10-30(b)(2),⁹¹ the murder of the female victim had been committed in the course of armed robbery, aggravated battery, and kidnapping.⁹²

B. Closing Argument

In *Lewis* appellant claimed that the trial court erred in not granting a mistrial after the prosecutor made references to the Bible during closing argument. The prosecutor noted that many of the jurors were Christians and cited the books of Romans and Matthew in an attempt, he said, to help the jury understand the concepts of deterrence and retribution. Defense counsel objected and moved for a mistrial on the ground that the prosecutor was attempting to inject Biblical law into the case. The trial judge sustained the objection in part, instructed the jury to disregard the remarks, told them that he would give them the law to apply, and asked any juror who did not understand or was unwilling to follow the instruction to raise his hand.⁹³ After the close of Lewis's trial, the court held that a similar remark by the same prosecutor in *Carruthers v. State*⁹⁴ was reversible error.⁹⁵ In that case, however, the trial judge did not give a curative instruction.⁹⁶ In *Lewis* the court held that the "extensive curative instructions" issued were sufficient to cure the harm caused by the prosecutor's remarks, and that the trial court did not err in refusing to grant a mistrial.⁹⁷

V. PRESERVATION OF ERRORS

In *Head v. Hill*,⁹⁸ the court held that the habeas court properly found claims previously rejected on direct appeal to be barred by *res judicata*.⁹⁹ The court stated, "[a]ny issue raised and ruled upon in the petitioner's direct appeal may not be reasserted in habeas corpus proceedings"¹⁰⁰ None of the claims that Hill raised for the first

90. *Id.* § 17-10-30(b)(2).

91. *Id.*; *Sealey*, 277 Ga. at 617, 593 S.E.2d at 335.

92. *Sealey*, 277 Ga. at 617, 593 S.E.2d at 336-37.

93. *Lewis*, 277 Ga. at 536-37, 592 S.E.2d at 407.

94. 272 Ga. 306, 528 S.E.2d 217 (2000).

95. *Lewis*, 277 Ga. at 537, 592 S.E.2d at 407-08.

96. *Id.*, 592 S.E.2d at 408.

97. *Id.* at 537-38, 592 S.E.2d at 408 (citing *Mobley v. State*, 265 Ga. 292, 300, 455 S.E.2d 61, 70 (1995); *Hill v. State*, 263 Ga. 37, 43-44, 427 S.E.2d 770, 776 (1993)).

98. 277 Ga. 255, 587 S.E.2d 613 (2003).

99. *Id.* at 263, 587 S.E.2d at 623.

100. *Id.* (quoting *Gaither v. Gibby*, 267 Ga. 96, 97, 475 S.E.2d 603, 604 (1996)).

time in habeas corpus proceedings met the “cause and prejudice” test for overcoming procedural default.¹⁰¹

Though claims regarding sentencing phase jury charges are not subject to procedural default,¹⁰² the court summarily rejected appellants’ contention in *Hill* that the jury was misled with regard to the crime upon which it was to determine sentence.¹⁰³ Likewise, the court rejected the claim that the jury was “misled regarding the [O.C.G.A. section] 17-10-30(b)(2) aggravating circumstance by the trial court’s instruction as it would have been understood” in light of the verdict form and the written instructions.¹⁰⁴

VI. DIRECT APPEAL

The court held that the death sentence imposed in *Lewis v. State*¹⁰⁵ was neither excessive nor disproportionate.¹⁰⁶ The court in *Lewis* cited the following facts in support of its determination: (1) Lewis harassed his estranged wife; (2) he broke into her apartment; and (3) he stabbed and slashed her over forty times while her children were present.¹⁰⁷

In *Sealey v. State*,¹⁰⁸ the court also held that, considering defendant and the crimes, the death sentence was appropriate.¹⁰⁹ The court characterized the facts of the case as “clearly egregious.”¹¹⁰

VII. MENTAL RETARDATION

Appellant in *Morrison v. State*¹¹¹ pleaded guilty to rape, armed robbery, and murder in 1987. He was sentenced to death and his convictions and sentences were affirmed on direct appeal.¹¹² During habeas corpus litigation, Morrison claimed that he was mentally retarded and the habeas court remanded for a trial to determine the issue. Following his *Fleming v. Zant*¹¹³ trial, appellant claimed that

101. *Id.* at 264-65, 587 S.E.2d at 623-24 (citations omitted).

102. *Id.* at 265, 587 S.E.2d at 624-25 (citing *Tucker v. Kemp*, 256 Ga. 571, 573-74, 351 S.E.2d 196, 198-99 (1987); *Stynchcombe v. Floyd*, 252 Ga. 113, 114-15, 311 S.E.2d 828, 831-32 (1984)).

103. *Id.* at 266, 587 S.E.2d at 624.

104. *Id.*

105. 277 Ga. 534, 592 S.E.2d 405 (2004).

106. *Id.* at 539, 592 S.E.2d at 409 (citing O.C.G.A. § 17-10-35(c)(1) (2004)).

107. *Id.*

108. 277 Ga. 617, 593 S.E.2d 335 (2004).

109. *Id.* at 621, 593 S.E.2d at 339 (citing O.C.G.A. § 17-10-35(c)(1)).

110. *Id.*

111. 276 Ga. 829, 583 S.E.2d 873 (2003).

112. *Id.* at 829, 583 S.E.2d at 875.

113. 259 Ga. 687, 691, 386 S.E.2d 339, 342-43 (1989).

the trial court erred in admitting evidence related to both the underlying crimes and a prior murder he committed in South Carolina.¹¹⁴ According to the court, the evidence showed that Morrison gained the trust of two different couples, committed the murders at advantageous times, committed robbery to finance his escapes, navigated highways without a map, and sought to evade detection.¹¹⁵ The court held that the evidence was admissible because it was relevant to his mental abilities.¹¹⁶ It showed “an ability to plan, think, and adapt” that, according to the court, was inconsistent with a claim of mental retardation.¹¹⁷

The court also held that Morrison’s confession to the Georgia crimes was relevant to his intellectual abilities.¹¹⁸ The confession showed that he could read and write, attended school through the ninth grade, understood his rights, could explain himself, and used language consistent with average intelligence. Morrison also claimed that the trial court erred in allowing a police officer to read the confession into evidence.¹¹⁹ The court held that appellant waived his objection because he had requested that the officer do it rather than a prosecutor.¹²⁰

The court further held that crime scene photographs were properly admitted because they supported the State’s version of the scene and showed defendant’s resourcefulness.¹²¹ They showed the restraints that Morrison attempted to use on his Georgia victim and the fact that he had ransacked the house looking for valuables.¹²²

The court noted that the trial court provided limiting instructions to the jury.¹²³ Both before the introduction of the evidence and in its final charge, the trial court charged the jury that the evidence of Morrison’s crimes was only to be considered for the purpose of determining whether he was mentally retarded.¹²⁴

The court also rejected Morrison’s claim that the trial court erred in refusing to give a jury instruction to the effect that Morrison would receive a life sentence if found to be mentally retarded.¹²⁵ According

114. *Morrison*, 276 Ga. at 831, 583 S.E.2d at 876.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 832, 583 S.E.2d at 876-77.

119. *Id.*

120. *Id.* (citations omitted).

121. *Id.*, 583 S.E.2d at 877.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 833, 583 S.E.2d at 877.

to the court, the trial court's instruction was nearly identical to the one required by O.C.G.A. section 17-7-131(b)(3)(c).¹²⁶ The court stated that the reason for the charge is to inform a jury that immediate release of the defendant does not result from a finding of mental retardation.¹²⁷ The court reasoned that the requested charge would turn the trial into a second sentencing trial.¹²⁸

The habeas court in *Head v. Stripling*¹²⁹ reviewed the trial evidence on mental retardation and some additional evidence. The habeas court determined that Stripling was mentally retarded beyond a reasonable doubt.¹³⁰ The habeas court vacated Stripling's death sentence as a "miscarriage of justice,"¹³¹ an exception to procedural default where mental retardation was not raised at trial, and remanded for the imposition of a non-capital sentence.¹³² The court reversed that portion of the habeas court's order.¹³³ According to the court, "miscarriage of justice" is an exception to procedural default that is justified by Georgia's constitutional prohibition on the execution of mentally retarded defendants.¹³⁴ It does not, however, allow the habeas court to revisit jury verdicts on mental retardation.¹³⁵

The court also reversed the portion of the habeas court's order that found O.C.G.A. section 17-7-131¹³⁶ unconstitutional in that it requires a defendant to prove alleged mental retardation beyond a reasonable doubt.¹³⁷

Lastly, Stripling's habeas court determined, pursuant to *State v. Patillo*,¹³⁸ that the prosecutor improperly informed the jury that a finding of mental retardation would result in a life sentence.¹³⁹ The

126. *Id.*; O.C.G.A. § 17-7-131(b)(3)(C) (2004) ("I charge you that should you find the defendant guilty but mentally retarded, the defendant will be given over to the Department of Corrections or the Department of Human Resources, as the mental condition of the defendant may warrant").

127. *Morrison*, 276 Ga. at 833, 583 S.E.2d at 877 (citing *Patillo v. State*, 262 Ga. 259, 260, 417 S.E.2d 139, 140-41 (1992)).

128. *Id.* at 834, 583 S.E.2d at 877-78.

129. 277 Ga. 403, 590 S.E.2d 122 (2003).

130. *Id.* at 409, 590 S.E.2d at 127.

131. *Id.* at 409-10, 590 S.E.2d at 127-28.

132. *Id.* at 409, 590 S.E.2d at 127-28.

133. *Id.* at 410, 590 S.E.2d at 128.

134. *Id.* at 409-10, 590 S.E.2d at 128.

135. *Id.* at 410, 590 S.E.2d at 128.

136. O.C.G.A. § 17-7-131 (2002).

137. *Stripling*, 277 Ga. at 410, 590 S.E.2d at 128 (citing *Head v. Hill*, 277 Ga. 255, 587 S.E.2d 613 (2003)).

138. 262 Ga. 259, 417 S.E.2d 139 (1992).

139. *Stripling*, 277 Ga. at 410-11, 590 S.E.2d at 128.

court held that *Patillo* announced a new procedural rule, rather than a rule of substantive law as the habeas court determined, and therefore, should not be applied retroactively because Stripling's case was no longer "in the pipeline" at the time it was announced.¹⁴⁰

The court in *Head v. Hill*¹⁴¹ held that *Ring v. Arizona*¹⁴² does not have retroactive effect in a habeas proceeding.¹⁴³ The court stated that *Ring* announced a new rule of criminal law, but one that does not fall within either exception to non-retroactivity.¹⁴⁴ The rule does not change substantive criminal law.¹⁴⁵ Nor is it a watershed procedural rule as "[t]he fundamental fairness and accuracy of determining mental retardation would not be increased by having a jury rather than a trial judge make the determination."¹⁴⁶ Furthermore, the court refused to hold that *Ring* ever requires that a jury determine mental retardation, regardless of the procedural posture of the case.¹⁴⁷ The court reasoned "the absence of mental retardation is not the functional equivalent of an element of an offense such that determining its absence or presence requires a jury trial under *Ring*."¹⁴⁸ The court also noted that Hill could have requested a jury finding on mental retardation at his original trial but failed to do so.¹⁴⁹

Additionally, the court held that the habeas court erred in applying the preponderance of the evidence standard to Hill's claim rather than the beyond a reasonable doubt standard.¹⁵⁰ The habeas court determined that application of the beyond a reasonable doubt standard was unconstitutional because the ban on the execution of mentally retarded persons, established by *Atkins v. Virginia*,¹⁵¹ could not be enforced with sufficient due process protections under the beyond a reasonable doubt standard.¹⁵²

The court noted that Georgia had banned the execution of the mentally retarded prior to *Atkins*, and that it had previously determined

140. *Id.*, 590 S.E.2d at 128-29.

141. 277 Ga. 255, 587 S.E.2d 613 (2003).

142. 536 U.S. 584 (2002).

143. *Hill*, 277 Ga. at 257, 587 S.E.2d at 619.

144. *Id.* at 257-58, 587 S.E.2d at 619.

145. *Id.*

146. *Id.* at 258, 587 S.E.2d at 619 (citations omitted).

147. *Id.*

148. *Id.*, 587 S.E.2d at 620 (emphasis added).

149. *Id.* at 259, 587 S.E.2d at 620 (citing O.C.G.A. § 17-7-131(c)(3)(j)).

150. *Id.* at 262-63, 587 S.E.2d at 622.

151. 536 U.S. 304 (2002) (holding that the Constitution bans the execution of the mentally retarded).

152. *Hill*, 277 Ga. at 260, 587 S.E.2d at 620-21.

that the beyond a reasonable doubt standard was acceptable under federal constitutional law.¹⁵³ The court re-examined the constitutionality of applying the beyond a reasonable doubt standard to claims of mental retardation because *Atkins* exempted an entire class from execution, which is comparable to placing certain conduct beyond the power of the state to punish.¹⁵⁴

According to the court, the new federal right to exemption must have retroactive effect to the extent that it exceeds any preexisting comparable state right.¹⁵⁵ The court reasoned that *Atkins* leaves enforcement to the states and does not instruct states to apply a particular standard of proof.¹⁵⁶ The court stated that a claim of mental retardation is comparable to a claim of insanity at the time of the crime because both relieve the defendant of part of the penalty to which he would otherwise be subject.¹⁵⁷ Furthermore, in *Leland v. Oregon*,¹⁵⁸ the United States Supreme Court approved the application of the “beyond a reasonable doubt” standard to claims of insanity.¹⁵⁹ The Georgia Supreme Court concluded, as it had in *Mosher v. State*,¹⁶⁰ that “beyond a reasonable doubt” may be applied to mental retardation claims.¹⁶¹

The court also distinguished the fundamental right not to stand trial by reason of incompetence from the “procedural burden” of proving mental retardation, as it had in *Mosher*.¹⁶² According to the court, the special risks faced by the mentally retarded are “counterbalanced” by Georgia’s procedures for determining competency under the preponderance of the evidence standard and mental retardation under the beyond a reasonable doubt standard.¹⁶³

The court concluded that the higher standard helps to enforce the Georgia General Assembly’s definition of mental retardation, and that it is constitutionally permissible under *Atkins* to limit the exemption to those whose impairments are severe enough to be proven beyond a reasonable doubt.¹⁶⁴ The court also noted that Hill would have had to

153. *Id.*, 587 S.E.2d at 621 (citing *Mosher v. State*, 268 Ga. 555, 491 S.E.2d 348 (1997)).

154. *Id.* (citations omitted).

155. *Id.* (citations omitted).

156. *Id.* (citations omitted).

157. *Id.* at 261, 587 S.E.2d at 621 (citing *Mosher*, 268 Ga. at 555, 491 S.E.2d at 348).

158. 343 U.S. 790 (1952).

159. *Id.* at 797.

160. 268 Ga. 555, 491 S.E.2d 348 (1997).

161. *Hill*, 277 Ga. at 261, 587 S.E.2d at 621.

162. *Id.*, 587 S.E.2d at 621-22; *Mosher*, 268 Ga. at 555, 491 S.E.2d at 348.

163. *Hill*, 277 Ga. at 262, 587 S.E.2d at 622 (citing O.C.G.A. §§ 17-7-130, 17-7-131(c)(3)(j) (2004); *Partridge v. State*, 256 Ga. 602, 351 S.E.2d 635 (1987)).

164. *Id.*

prove his mental retardation beyond a reasonable doubt at trial and believed there was no reason why he should have to prove his habeas corpus claim under the lighter burden of the preponderance of evidence standard under the miscarriage of justice exception.¹⁶⁵

VIII. UNITED STATES SUPREME COURT CASES

A. *Nelson v. Campbell*

In *Nelson v. Campbell*,¹⁶⁶ the Court held that 42 U.S.C. § 1983 (“§ 1983”)¹⁶⁷ is an appropriate vehicle for an Eighth Amendment¹⁶⁸ claim seeking a temporary stay and permanent injunctive relief.¹⁶⁹ Nelson filed his civil rights action three days before his scheduled execution by lethal injection. He alleged that the use of a “cut-down” procedure¹⁷⁰ to access his veins would violate the Eighth Amendment. Nelson’s counsel requested a copy of the Alabama protocol for gaining access to veins and was refused by the warden and the Alabama Department of Corrections Legal Department.¹⁷¹ Nelson appended an affidavit to his complaint from a board certified anesthesiologist “attesting that the cut-down is a dangerous and antiquated medical procedure to be performed only by a trained physician in a clinical environment with the patient under deep sedation.”¹⁷² Nelson sought a permanent injunction barring the use of the cut-down procedure, a temporary stay of execution, a copy of the Alabama protocol, and other relief. The district court dismissed Nelson’s complaint for lack of jurisdiction because it found his claim to be equivalent to a second or successive habeas application and the Eleventh Circuit Court of Appeals affirmed.¹⁷³

The Court did not resolve the general question of how method of execution claims should be treated, and therefore, characterized its

165. *Id.* (citations omitted).

166. 124 S. Ct. 2117 (2004).

167. 42 U.S.C. § 1983 (2004):

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

168. U.S. CONST. amend. VI.

169. *Nelson*, 124 S. Ct. at 2117.

170. *Id.* at 2120.

171. *Id.* at 2119.

172. *Id.* at 2120-22.

173. *Id.* at 2122.

holding as “extremely limited.”¹⁷⁴ The court treated Nelson’s claim as if brought by an inmate challenging the use of the cut-down procedure as part of ordinary medical treatment.¹⁷⁵ The Court rejected the State’s argument that a challenge to the means of gaining access to a prisoner’s veins was tantamount to a challenge to lethal injection itself, which, it argued, sounds in habeas:

Even were we to accept as given respondents’ premise that a challenge to lethal injection sounds in habeas, the conclusion does not follow. That venous access is a necessary prerequisite does not imply that a particular means of gaining such access is likewise necessary. Indeed, the gravamen of petitioner’s entire claim is that use of the cut-down would be *gratuitous*. Merely labeling something as part of an execution procedure is insufficient to insulate it from a § 1983 attack.¹⁷⁶

The Court reasoned that the procedure was not statutorily mandated and that Nelson was careful to assert that the procedure itself, and the warden’s refusal to provide the cut-down protocol, were unnecessary.¹⁷⁷ He also alleged alternatives that would have allowed the execution to proceed as scheduled.¹⁷⁸

The Court focused on the fact that Nelson’s challenge would not necessarily prevent Alabama from executing him.¹⁷⁹ The Court reasoned that this approach was consistent with civil rights damages actions and that it would prevent § 1983 from being used to circumvent procedural limitations imposed by the habeas statute.¹⁸⁰ The Court also noted that simply stating a cognizable claim does not automatically give rise to a stay as a matter of right.¹⁸¹ The Court reasoned “there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.”¹⁸² Finally, the Court noted that a § 1983 claim carries its own substantive and procedural thresholds.¹⁸³ The Court reversed the Eleventh Circuit’s judgment and remanded for further proceedings.¹⁸⁴

174. *Id.* at 2122-26.

175. *Id.* at 2123.

176. *Id.* (emphasis in original).

177. *Id.* at 2123-24.

178. *Id.*

179. *Id.* at 2124-25.

180. *Id.*

181. *Id.* at 2125-26.

182. *Id.*

183. *Id.* at 2126 (citations omitted).

184. *Id.*

B. Banks v. Dretke

In 1980 a Texas jury convicted Delma Banks, Jr. of capital murder and the trial judge sentenced him to death.¹⁸⁵ Prior to trial the State had notified Banks's defense counsel that it would voluntarily provide all discovery material to which the defense was entitled. At trial, however, the prosecution withheld evidence that would have allowed Banks to impeach two of the prosecution's key witnesses. Charles Cook, a witness during the guilt phase of Banks's trial, stated three times under cross-examination that his testimony was not rehearsed. Robert Farr testified during both phases and was later shown to be a paid police informant who was involved in Banks's arrest. Farr testified that he did not speak to police until days before the trial. The prosecution allowed both witnesses to make these false statements at trial without making any attempt to correct them.¹⁸⁶

In 1992 Banks filed his third state post-conviction motion. He alleged in the motion that the State withheld evidence that Farr was a police informant and that his arrest was "a set-up."¹⁸⁷ Banks attached an unsigned affidavit from Farr's sister-in-law, who was Banks's girlfriend, which asserted that Farr escaped prosecution for purchasing illegal drugs because of his connections to law enforcement. Banks also alleged that the prosecution withheld evidence relating to Cook's credibility. In its reply the State represented that it had not withheld any evidence and that no deal was made with Cook in exchange for his testimony, but made no specific assertions with regard to Farr. The state post-conviction court rejected Banks's claims because it determined that Cook had no agreement with the State, but it made no determination with regard to Farr.¹⁸⁸

In 1996 Banks filed his federal petition for a writ of habeas corpus. Among other violations of his federal constitutional rights, Banks alleged that according to *Brady v. Maryland*,¹⁸⁹ the prosecution failed to turn over exculpatory evidence. The suppressed evidence was eventually revealed through discovery, which disclosed the transcript of the extensive tutoring that Cook received and an evidentiary hearing where

185. *Banks v. Dretke*, 124 S. Ct. 1256 (2004).

186. *Id.* at 1263-66.

187. *Id.* at 1267.

188. *Id.* at 1267-68.

189. 373 U.S. 83, 87 (1963). "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.*

a deputy sheriff acknowledged that Farr was paid for his involvement in Banks's case.¹⁹⁰

The district court issued a writ of habeas corpus with respect to Banks's sentence but not his conviction. It concluded that Banks had not properly pleaded a *Brady* claim with respect to the Cook transcript because he had not moved to amend or supplement his petition to include the discovered transcript as a basis for relief. Banks was denied a certificate of appealability on the question of whether a *Brady* claim was made by implied consent under Federal Rule of Civil Procedure 15(b) by the district court.¹⁹¹

The Fifth Circuit Court of Appeals also denied a certificate of appealability with regard to Banks's *Brady* claim relating to Cook. It also reversed the district court's grant of relief because it concluded that Banks did not exercise due diligence in pursuing his state court application with regard to Farr.¹⁹² The United States Supreme Court then granted Banks's petition for certiorari.¹⁹³

The Court first determined that Banks exhausted the available state court remedies with regard to his *Brady* claim against Farr, which was necessary because Banks's claims arose before the Antiterrorism and Effective Death Penalty Act of 1996¹⁹⁴ ("AEDPA").¹⁹⁵ The Court then held that Banks had cause for failing to investigate Farr's role as an informant in state post-conviction proceedings because the State continued to hide the fact that Farr was an informant and it continued to make misleading statements that it complied with its *Brady* obligations.¹⁹⁶

Under the sentencing scheme in Texas at the time Banks was tried, the jury determined his sentence by determining three "special issues."¹⁹⁷ The jury unanimously answered yes to all three questions, thereby obliging the trial judge to sentence Banks to death.¹⁹⁸ According to the Court, the crucial question put to the jury was whether Banks would be likely to commit violent acts in the future.¹⁹⁹ Because of Farr's role in establishing Banks's propensity to commit future crimes (Banks had no prior criminal record), and the fact that the jury was

190. *Banks*, 124 S. Ct. at 1268-70.

191. *Id.*

192. *Id.* at 1270-71.

193. *Id.* at 1271.

194. 110 Stat. § 1214 (1996).

195. *Banks*, 124 S. Ct. at 1271.

196. *Id.* at 1276.

197. *Id.* at 1265.

198. *Id.*

199. *Id.*

unaware that Farr was an informer, the Court held that Banks did not receive a fair trial with regard to the penalty phase.²⁰⁰

With regard to the Cook's *Brady* claim, the Court held that "jurists of reason would find . . . debatable" the issue of whether Rule 15(b)²⁰¹ applies to habeas proceedings.²⁰² The Court noted that twice before it had assumed that Rule 15(b) did apply.²⁰³ The Court did so because, prior to AEDPA, there was no inconsistency between Rule 15(b) and the State's defenses of exhaustion and procedural default, which could be waived based on the State's conduct.²⁰⁴ The Court also stated that there was no reason why an evidentiary hearing could not be equated with a trial for Rule 15(b) purposes as long as the respondent consented and had an opportunity to present evidence.²⁰⁵ The Court reversed the Fifth Circuit's denial of a certificate of appealability.²⁰⁶

C. *Crawford v. Washington*

Petitioner in *Crawford v. Washington*²⁰⁷ challenged the admission at trial of a tape-recorded statement made by his wife during a police interrogation. Crawford stabbed a man who had allegedly tried to rape his wife. He was arrested on the day of the stabbing and both he and his wife made tape-recorded statements to police after *Miranda*²⁰⁸ warnings were given. The statements differed on whether the victim had anything in his hand at the time Crawford stabbed him. Crawford claimed self-defense at trial. Mrs. Crawford did not testify because of the state's marital privilege. In admitting her recorded statement, the trial court relied on the test laid out in *Ohio v. Roberts*,²⁰⁹ which allows for the introduction of an unavailable witness's out of court statement if it bears "adequate indicia of reliability."²¹⁰ The *Roberts* test is met

200. *Id.* at 1279.

201. FED. R. CIV. P. 15(b).

202. *Banks*, 124 S. Ct. at 1279 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

203. *Id.* at 1279-80 (citing *Harris v. Nelson*, 394 U.S. 286, 294 n.5 (1969) (use of Rule 15(b) in habeas proceedings "non controversial"); *Withrow v. Williams*, 507 U.S. 680, 696 (1993)).

204. *Id.* at 1280.

205. *Id.* (citing *Withrow*, 507 U.S. at 696).

206. *Id.*

207. 124 S. Ct. 1354 (2004).

208. *Miranda v. Arizona*, 334 U.S. 436 (1966).

209. 448 U.S. 56 (1980).

210. *Crawford*, 124 S. Ct. at 1357-58 (quoting *Roberts*, 448 U.S. at 65-66 (citation omitted)).

when evidence either falls within a “firmly rooted hearsay exception” or carries “particularized guarantees of trustworthiness.”²¹¹

The issue before the Court was whether the admission of Mrs. Crawford’s statement violated the Confrontation Clause²¹² under the *Roberts* test.²¹³ Justice Scalia, writing for the majority, described the *Roberts* test as both too broad and too narrow:

First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.²¹⁴

According to the Court, the Confrontation Clause is a procedural guarantee that demands cross-examination on the particular manner in which reliability is to be tested.²¹⁵ The Court distinguished between testimonial and non-testimonial hearsay; it is acceptable for states to develop their own hearsay law when non-testimonial hearsay is at issue.²¹⁶

The Court stated that Crawford’s case highlighted the vague nature of the *Roberts* test.²¹⁷ Each court below focused on its own reasons why Mrs. Crawford’s statement was or was not reliable.²¹⁸ The court reasoned “[b]y replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design.”²¹⁹

D. *Fellers v. United States*

Fellers was arrested at his home after a grand jury indicted him for conspiracy to distribute methamphetamine. On arrival officers not only informed Fellers that they had a warrant for his arrest but told him that they had come to discuss his involvement with four named individuals in distributing methamphetamine. In response to this prompting, Fellers made inculpatory statements. Fellers was transported to county

211. *Id.* at 1358.

212. U.S. CONST. amend. VI (“the accused shall enjoy the right . . . to be confronted with witnesses against him”).

213. *Crawford*, 124 S. Ct. at 1359.

214. *Id.* at 1369.

215. *Id.* at 1370.

216. *Id.* at 1374.

217. *Id.* at 1372.

218. *Id.* at 1372-74.

219. *Id.* at 1373.

jail after approximately fifteen minutes, where he was advised of his *Miranda* rights for the first time. He then repeated his earlier inculcating statements.²²⁰

At trial the court suppressed statements Fellers made while at his home, but his jailhouse statements were admitted into evidence. He was convicted of conspiring to possess with intent to distribute methamphetamine. On appeal Fellers claimed that his jailhouse statements should have been suppressed as the fruits of the statements obtained in his home, and that the Eighth Circuit Court of Appeals erred in holding that the Sixth Amendment²²¹ right to counsel was not applicable.²²²

The Court determined the Eighth Circuit Court of Appeals erred when it held that, because no interrogation occurred in Fellers's home, the arresting officers did not violate the Sixth Amendment.²²³ The Court concluded deliberate elicitation was the applicable standard under the amendment.²²⁴ According to the Court, there was no question that the officers deliberately elicited information from Fellers.²²⁵ Thus, the officers violated the Sixth Amendment when they elicited statements from an indicted defendant in the absence of either counsel or a waiver of the right to counsel.²²⁶

The court of appeals further erred when it improperly based its "fruits" analysis on whether Fellers's statements were "knowingly and voluntarily made" under the Fifth Amendment.²²⁷ The Court reversed and remanded for a determination of whether the Sixth Amendment requires the suppression of Fellers's jailhouse statements as the fruit of the earlier questioning that did violate the Sixth Amendment.²²⁸

220. *Fellers v. United States*, 124 S. Ct. 1019, 1021 (2004).

221. U.S. CONST. amend. VI.

222. *Fellers*, 124 S. Ct. at 1021-22.

223. *Id.* at 1023.

224. *Id.* at 1022-23 (citing *United States v. Henry*, 447 U.S. 264, 270 (1980); *Brewer v. Williams*, 430 U.S. 387, 398 (1972)).

225. *Id.* at 1023.

226. *Id.*

227. *Id.*; U.S. CONST. amend. V.

228. *Fellers*, 124 S. Ct. at 1023.