

# Death Penalty Law

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This Article surveys the death penalty decisions of the Georgia Supreme Court from June 1, 2004 through May 31, 2005.<sup>1</sup> 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.

## I. RIGHT TO COUNSEL

This section covers issues of the defendant's right to counsel and right to self-representation.

### A. *Right to Counsel*

In *Grant v. State*,<sup>2</sup> the trial court ordered the appellant's lead and co-counsel removed, despite their obvious qualifications and firmly-established positive relationship with the appellant.<sup>3</sup> The Georgia Supreme Court concluded that the trial court abused its discretion by failing to give sufficient weight to the existing relationship between the defendant and counsel.<sup>4</sup> The supreme court opined that the appellant's status as a capital defendant and his and the court system's strong

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1. For a survey of death penalty decisions handed down during the prior year, see Holly Geerdes and David Lawless, *Death Penalty Law*, 56 MERCER L. REV. 197 (2004).

2. 278 Ga. 817, 607 S.E.2d 586 (2005).

3. *Id.* at 817, 607 S.E.2d at 587.

4. *Id.* at 818, 607 S.E.2d at 587.

interest in maintaining a pre-existing working relationship between a defendant and his counsel greatly outweighed the trial court's wish that local counsel, though unfamiliar with the case, be appointed to represent the defendant.<sup>5</sup> The supreme court's decision followed the rule that when selecting counsel for indigent death penalty defendants, a trial court should heavily weigh the defendant's "relationship of trust and confidence with prior counsel" and prior counsel's understanding of the "legal and factual complexities of the case."<sup>6</sup>

Similarly, the appellant in *Williams v. State*<sup>7</sup> contended that his counsel had been improperly removed from his case. The Georgia Supreme Court followed the reasoning in *Grant* and held that the trial court's removal of counsel over the appellant's objections constituted an abuse of discretion and directed that prior counsel be reinstated.<sup>8</sup>

#### B. Right to Self-representation

In *Lamar v. State*,<sup>9</sup> the supreme court held that the appellant was denied his constitutional right to self-representation.<sup>10</sup> Ten days before jury selection, the appellant expressed an interest in representing himself because of his dissatisfaction with counsel's defense strategy. Five days later, in light of the appellant's continued demands to represent himself, counsel moved for a continuance in order for a mental health expert to evaluate the appellant's competence to stand trial and represent himself.<sup>11</sup> Although it is unconstitutional for a mentally incompetent person to be tried regardless of whether that person is acting pro se or being represented by counsel,<sup>12</sup> the trial court found, based on a recent mental health examination and the appellant's pretrial behavior, that the defendant's mental competence would not prevent self-representation.<sup>13</sup> A special jury trial on competency pursuant to section 17-7-130(a) of the Official Code of Georgia Annotated ("O.C.-

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5. *Id.*

6. *Id.* at 817, 607 S.E.2d at 587 (quoting *Amadeo v. State*, 259 Ga. 469, 470-71, 384 S.E.2d 181, 182 (1989)).

7. 279 Ga. 154, 611 S.E.2d 51 (2005).

8. *Id.* at 154, 611 S.E.2d at 51.

9. 278 Ga. 150, 598 S.E.2d 488 (2004).

10. *Id.* at 150, 598 S.E.2d at 490.

11. *Id.* at 150-51, 598 S.E.2d at 490-91.

12. *Id.* (citing *Godinez v. Moran*, 509 U.S. 389, 399 (1993); *Colwell v. State*, 273 Ga. 634, 635, 544 S.E.2d 120, 124 (2001)).

13. *Id.*

G.A.”)<sup>14</sup> was not required in this case because the defendant did not enter a plea of mental incompetence.<sup>15</sup>

The next step in determining whether the appellant knowingly and intelligently waived his constitutional right to counsel was for the trial court to explain to the defendant the “dangers and disadvantages” inherent in representing himself.<sup>16</sup> Instead of following this step, the trial court questioned the appellant about his knowledge of death penalty law.<sup>17</sup> The Georgia Supreme Court reasoned that the trial court committed reversible error by not following *Faretta v. California*<sup>18</sup> and instead, inquired into the appellant’s irrelevant legal knowledge.<sup>19</sup> The supreme court then determined, based on the appellant’s answers to the trial court’s inquiry, that the appellant understood the dangers and disadvantages of representing himself and knowingly and voluntarily chose to waive his right to counsel and proceed pro se.<sup>20</sup>

## II. PRETRIAL ISSUES

This section covers issues involving the right to a speedy trial, custodial statements, change of venue, admissibility of evidence, discovery, statute of limitations, proper notice, and other pretrial issues.

### A. *Speedy Trial*

The appellant in *Wimberly v. State*<sup>21</sup> was arrested and indicted on murder charges in March 2001. After the appellant filed a motion to dismiss in June 2004 for failure to grant a speedy trial pursuant to the Sixth Amendment,<sup>22</sup> the trial court denied the motion, finding neither prejudice caused by the delay nor bad faith in the State’s election to try appellant’s co-indictee first.<sup>23</sup> When deciding if the right to a speedy trial was violated, trial courts must engage in the four-factor *Barker*<sup>24</sup> analysis and balance the length of the delay, the reason for the delay, the defendant’s assertion of his Sixth Amendment right, and the

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14. O.C.G.A. § 17-7-130(a) (2004).

15. *Lamar*, 278 Ga. at 151, 598 S.E.2d at 491.

16. *Id.* at 152, 598 S.E.2d at 491 (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975)).

17. *Id.*, 598 S.E.2d at 492.

18. 422 U.S. 806 (1975).

19. *Lamar*, 278 Ga. at 152-53, 598 S.E.2d at 492.

20. *Id.* at 153, 598 S.E.2d at 492.

21. 279 Ga. 65, 608 S.E.2d 625 (2005).

22. U.S. CONST. amend. VI.

23. *Wimberly*, 279 Ga. at 65, 608 S.E.2d at 626.

24. *Barker v. Wingo*, 407 U.S. 514 (1972).

prejudice to the defendant, along with other relevant circumstances.<sup>25</sup> First, the defendant must show the delay was “presumptively prejudicial,” meaning beyond reasonable customary delay, to trigger this four-factor balancing process.<sup>26</sup> The supreme court determined the delay was customary because the appellant was a co-indictee in a multiple-murder capital case and the State had a statutory right to decide to try him after his co-indictee.<sup>27</sup> The Georgia Supreme Court held that the trial court committed no error by failing to engage in the *Barker* analysis because the defendant did not meet his burden of showing that the thirty-eight month delay was presumptively prejudicial.<sup>28</sup>

The appellant in *Williams v. State*<sup>29</sup> was indicted and charged in 1997 in connection with a burglary of the home of a married couple who subsequently died in a house fire the same day of the burglary. Already serving time in prison on an unrelated charge, the defendant voluntarily implicated himself in the deaths of the victims. In addition to the burglary charge from the 1997 indictment and a two-count felony murder charge predicated on that burglary, a new indictment was returned in 1998 charging the defendant with arson, malice murder, armed robbery, and aggravated assault. In 2003 the defendant’s motion to dismiss the 1998 indictment on speedy trial grounds was denied by the trial court.<sup>30</sup> The Georgia Supreme Court affirmed all charges except the 1997 burglary and felony murder charges.<sup>31</sup> Additionally, the supreme court remanded the case for further proceedings on the issue of whether the defendant’s constitutional right “to a speedy trial on the charge of burglary was denied and, if so, for additional consideration of how that denial affects the viability of Williams’s felony murder charges predicated on the alleged burglary.”<sup>32</sup>

On remand, the trial court factored in the additional one-year delay for the 1997 indictment, found the delay presumptively prejudicial, and applied the *Barker* balancing test.<sup>33</sup> After applying the balancing test, the trial court found that other factors outweighed the presumptive prejudice against the defendant and that the prosecution of the 1997

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25. *Wimberly*, 279 Ga. at 66, 608 S.E.2d at 626 (citing *Barker*, 407 U.S. at 530, 533; *Wooten v. State*, 262 Ga. 876, 878, 426 S.E.2d 852, 855 (1993)).

26. *Id.*

27. *Id.* at 66-67, 608 S.E.2d at 627.

28. *Id.* at 67, 608 S.E.2d at 627.

29. 279 Ga. 106, 610 S.E.2d 32 (2005).

30. *Id.* at 107, 610 S.E.2d at 33.

31. *Id.*

32. *Id.* (quoting *Williams v. State*, 277 Ga. 598, 598, 592 S.E.2d 848, 849 (2004)).

33. *Id.*

charges was not barred by the Sixth Amendment right to a speedy trial.<sup>34</sup>

On appeal, the appellant contended that the trial court erred by failing to dismiss the burglary and felony murder charges on speedy trial grounds.<sup>35</sup> The Georgia Supreme Court noted that though the approximately seventy-four month delay from the 1997 indictment was presumptively prejudicial, the reasons for the delay were not deliberate on the part of the State.<sup>36</sup> Furthermore, the delay could be partially attributed to the defendant's actions.<sup>37</sup> Although the appellant did file a demand for a speedy trial after his 1997 indictment, he withdrew the demand after receiving notice of the State's intent to seek the death penalty following the 1998 indictment.<sup>38</sup> The supreme court also noted that the appellant made no specific showing as to how the additional delay impaired his defense.<sup>39</sup> Weighing these *Barker* factors, the Georgia Supreme Court held that the trial court committed no error by denying the appellant's motion to dismiss on speedy trial grounds.<sup>40</sup>

#### B. Custodial Statements

In *O'Kelley v. State*,<sup>41</sup> the appellant made an initial appearance before a magistrate judge in a jailhouse courtroom the day he was arrested and asked for a court-appointed attorney. No prosecutor was present, and no evidence was discussed. The appellant simply signed a form listing allegations against him, a request for counsel, and information about bail and upcoming hearings. Two days later, the appellant was interrogated by detectives without an attorney present.<sup>42</sup> The appellant claimed statements made during that interrogation should be suppressed because his Sixth Amendment right to assistance of counsel was violated, and the Georgia Supreme Court agreed.<sup>43</sup>

The United States Supreme Court previously held that a person is entitled to the assistance of counsel at the initiation of adversary judicial

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34. *Id.*

35. *Id.* at 108, 610 S.E.2d at 33.

36. *Id.*, 610 S.E.2d at 34.

37. *Id.* The court noted that the defendant's actions included being incarcerated on unrelated charges, filing a motion for assistance, and requesting hearings. *Id.* at 108-09, 610 S.E.2d at 33-34.

38. *Id.* at 109, 610 S.E.2d at 34.

39. *Id.* at 110, 610 S.E.2d at 35.

40. *Id.*

41. 278 Ga. 564, 604 S.E.2d 509 (2004).

42. *Id.* at 564-65, 604 S.E.2d at 509-10.

43. *Id.* at 565, 568, 604 S.E.2d at 510, 512.

proceedings.<sup>44</sup> Subsequently, in *Ross v. State*,<sup>45</sup> the Georgia Supreme Court held that a “first appearance” was not considered an “adversary judicial proceeding” that attaches the Sixth Amendment right to counsel.<sup>46</sup> Overruling *Ross*, the supreme court held in *O’Kelley* that although a first appearance is usually not a critical stage of a criminal proceeding, a first appearance does trigger the defendant’s constitutional right to counsel.<sup>47</sup> The supreme court decided that the defendant’s right to counsel was asserted and attached at the initial appearance.<sup>48</sup> The supreme court then stated that the appellant’s custodial statements made during later interrogation without counsel present were inadmissible.<sup>49</sup>

The appellant in *Smith v. State*<sup>50</sup> had been convicted of various offenses related to a crime spree in Georgia and Florida. In his Georgia trial, the appellant contended that his custodial statements made to Florida police were admitted in error because he waived his *Miranda*<sup>51</sup> rights to the Florida issues only, not the Georgia issues.<sup>52</sup> The Georgia Supreme Court explained that there was no requirement for a criminal suspect to understand all the consequences of waiving his Fifth Amendment<sup>53</sup> privilege for that waiver to be valid.<sup>54</sup> Subsequently, a *Jackson v. Denno*<sup>55</sup> hearing determined the defendant’s custodial statements to be admissible.<sup>56</sup>

In *Riley v. State*,<sup>57</sup> the appellant had been convicted of killing his three young children by starting a house fire on the morning of August 16, 2000.<sup>58</sup> Later on the day of the fire, the appellant drove to the sheriff’s office to be interviewed and, during the interrogation, admitted

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44. *Id.* at 565, 604 S.E.2d at 510 (citing *Brewer v. Williams*, 430 U.S. 387, 398 (1977)).

45. 254 Ga. 22, 326 S.E.2d 194 (1985).

46. *O’Kelley*, 278 Ga. at 566, 604 S.E.2d at 511 (citing *Ross*, 254 Ga. 22, 26-27, 326 S.E.2d 194, 199-201 (1985)).

47. *Id.* at 567, 604 S.E.2d at 511-12.

48. *Id.* at 568, 604 S.E.2d at 512.

49. *Id.*

50. 279 Ga. 48, 610 S.E.2d 26 (2005).

51. *Miranda v. Arizona*, 384 U.S. 436 (1966).

52. *Smith*, 279 Ga. at 51, 610 S.E.2d at 29.

53. U.S. CONST. amend. V.

54. *Smith*, 279 Ga. at 51, 610 S.E.2d at 29 (citing *Colorado v. Spring*, 479 U.S. 564, 577 (1987)).

55. 378 U.S. 368 (1964) (a court proceeding held outside the jury’s presence to determine whether the defendant’s confession was voluntary and, therefore, admissible as evidence).

56. *Smith*, 279 Ga. at 51, 610 S.E.2d at 29.

57. 278 Ga. 677, 604 S.E.2d 488 (2004).

58. *Id.* at 677-78, 604 S.E.2d at 491-92.

that he intentionally set his son's bed on fire.<sup>59</sup> The Georgia Supreme Court held that the appellant's statements were voluntary and admissible based, in part, on his average intelligence, his waiver of his *Miranda* rights, and his freedom to leave the interrogation until he confessed to starting the fire.<sup>60</sup> Despite the interview becoming confrontational, the appellant was neither threatened nor made promises by the interrogating officers, and the officers' bluff that the source of the fire would be revealed by scientific evidence did not make the custodial statements inadmissible.<sup>61</sup>

### C. Change of Venue

The appellant in *Riley* also alleged that the trial court's change of venue order, requiring that jurors be selected from Walton County for the Newton County trial, should have been changed again because prospective Walton County jurors had heard about his case.<sup>62</sup> The Georgia Supreme Court determined that the allegation was meritless because only eight of the ninety-three prospective jurors were excused because of exposure to pretrial publicity.<sup>63</sup> Additionally, the racial disparity between the two counties' jury pools was so slight that it did not warrant another change of venue.<sup>64</sup>

In *Perkinson v. State*,<sup>65</sup> the appellant contended that the trial court erred by refusing to change the venue.<sup>66</sup> The Georgia Supreme Court noted that "[a] trial court must order a change of venue in a death penalty case when a defendant can make a 'substantive showing of the likelihood of prejudice by reasons of extensive publicity.'"<sup>67</sup> The appellant could prevail if he showed that pretrial publicity had either made the trial location inherently prejudicial or caused actual bias in individual jurors.<sup>68</sup> Addressing the inherent prejudice of the location, the supreme court remarked that the extensive media coverage of the case was not inflammatory or prejudicial, and an *Atlanta Journal Constitution* article containing inadmissible trial information was read

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59. *Id.* at 679-80, 604 S.E.2d at 493.

60. *Id.* at 680, 604 S.E.2d at 493.

61. *Id.*, 604 S.E.2d at 493-94.

62. *Id.* at 687, 604 S.E.2d at 498.

63. *Id.*

64. *Id.* at 687-88, 604 S.E.2d at 498.

65. 279 Ga. 232, 610 S.E.2d 533 (2005).

66. *Id.* at 234, 610 S.E.2d at 538.

67. *Id.* at 234-35, 610 S.E.2d at 538 (quoting *Barnes v. State*, 269 Ga. 345, 347, 496 S.E.2d 674, 680 (1998)).

68. *Id.* at 235, 610 S.E.2d at 538.

only by a small percentage of prospective jurors.<sup>69</sup> Even assuming as many as fifteen of one hundred prospective jurors were excused for bias, the supreme court reasoned that this number would not indicate that the trial environment was inherently prejudicial.<sup>70</sup> The Georgia Supreme Court determined that the trial court did not err in denying the motion for change of venue.<sup>71</sup>

In *Franks v. State*,<sup>72</sup> the appellant moved for a change of venue after approximately two-thirds of the 153 prospective jurors indicated exposure to pretrial publicity.<sup>73</sup> The trial court placed the sixty-seven unexposed potential jurors at the front of the venire and proceeded with voir dire. After approximately seventy prospective jurors had been questioned, the appellant again moved for a change of venue and argued that the original venire order should be restored.<sup>74</sup> The Georgia Supreme Court opined that the trial court did not err by continuing voir dire without reverting to the original order and noted that the appellant failed to show he had not received a selection of unbiased, properly drawn prospective jurors.<sup>75</sup>

#### D. Admissibility of Evidence

In *Franks* the appellant's girlfriend stated in response to the prosecution's rebuttal that she had gone to the scene of the crime, the appellant's pawn shop, on the day of the murders. Upon realizing the appellant was not there and suspecting his infidelity to her, she hit redial on the phone to determine the last number called.<sup>76</sup> The appellant argued that the State committed a *Brady*<sup>77</sup> violation by not properly revealing evidence regarding the phone call to the defendant until it was introduced as rebuttal testimony.<sup>78</sup> To prevail on a *Brady* violation, the appellant must show:

[T]he state possessed evidence favorable to the defendant; the defendant did not possess the evidence nor could he obtain it himself with any reasonable diligence; the prosecution suppressed the favorable evidence; and had the evidence been disclosed to the defense, a

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69. *Id.*

70. *Id.*, 610 S.E.2d at 538-39.

71. *Id.* at 236, 610 S.E.2d at 539.

72. 278 Ga. 246, 599 S.E.2d 134 (2004).

73. *Id.* at 266, 599 S.E.2d at 151.

74. *Id.* at 266-67, 599 S.E.2d at 150-51.

75. *Id.* at 267, 599 S.E.2d at 151.

76. *Id.* at 254, 599 S.E.2d at 142.

77. *Brady v. Maryland*, 373 U.S. 83 (1963).

78. *Franks*, 278 Ga. at 265, 599 S.E.2d at 150.

reasonable probability exists that the outcome of the proceeding would have been different.<sup>79</sup>

The Georgia Supreme Court stated that the appellant's *Brady* claim failed for myriad reasons: the evidence was unfavorable to the appellant; the appellant had knowledge of the call before trial and was in a better position than the State to discover the identity of the caller; and the State did not suppress the evidence.<sup>80</sup>

In *Riley* the appellant claimed that evidence seized from his mobile home after it was consumed by fire should have been suppressed. After the fire, the appellant told police officers that he had only his car and the clothes on his back and also made no attempt to secure the premises.<sup>81</sup> Affirming the trial court's decision, the Georgia Supreme Court held that because the appellant had no reasonable expectation of privacy in the completely destroyed trailer, no search warrants were needed to collect the evidence, even though the warrants issued were valid and supported by probable cause.<sup>82</sup> A cigarette lighter found on the ground outside the trailer on the day of the fire was also properly admitted.<sup>83</sup>

In *Jenkins v. State*,<sup>84</sup> the appellant challenged the admissibility of incriminating statements made by his uncle, prior to his uncle's death, that were admitted by the trial court under the necessity exception to the hearsay rule.<sup>85</sup> The United States Supreme Court recently held in *Crawford v. Washington*<sup>86</sup> "that the Sixth Amendment Confrontation Clause<sup>87</sup> prohibits the admission of 'testimonial' statements from an unavailable witness unless the defendant has had a prior opportunity to cross-examine the witness."<sup>88</sup> In *Crawford* the Court noted that a statement was testimonial if it was made with "[t]he involvement of government officers in the production of testimonial evidence."<sup>89</sup> The Georgia Supreme Court held that the uncle's statements were testimonial because they were made in response to police questioning during the investigation of the murder.<sup>90</sup> Because Jenkins never had the opportu-

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79. *Id.* (quoting *Mize v. State*, 269 Ga. 646, 648-49, 501 S.E.2d 219, 224-25 (1998)).

80. *Id.*

81. *Riley*, 278 Ga. at 684, 604 S.E.2d at 496.

82. *Id.* See *Pervis v. State*, 181 Ga. App. 613, 353 S.E.2d 200 (1987).

83. 278 Ga. at 684, 604 S.E.2d at 496.

84. 278 Ga. 598, 604 S.E.2d 789 (2004).

85. *Id.* at 605, 604 S.E.2d at 795.

86. 541 U.S. 36 (2004).

87. U.S. CONST. amend. VI.

88. *Jenkins*, 278 Ga. at 605, 604 S.E.2d at 795 (citing *Crawford*, 541 U.S. at 69).

89. *Id.* (quoting *Crawford*, 541 U.S. at 53).

90. *Id.* at 606, 604 S.E.2d at 795-96.

nity to cross-examine his uncle, the supreme court held that the trial court committed reversible error by admitting those statements.<sup>91</sup>

In *Lamar v. State*,<sup>92</sup> the appellant argued that the search and seizure of his backpack violated his constitutional rights. The appellant's bag was on the floor and in plain view of patrons at his place of employment, and a Federal Bureau of Investigation ("FBI") agent had been given permission by the employer to be on the premises. Based on witness identification that Lamar was wearing a backpack as he was leaving the scene of the crime, the agent had probable cause to seize the bag as possible evidence.<sup>93</sup> The Georgia Supreme Court reasoned that even if the State failed to carry its burden of proving the agent's search was legal, the lack of any incriminating items found in the bag caused any error in the admission of this evidence to be harmless.<sup>94</sup>

The appellant also contended that his arrest warrants were unlawful, but the supreme court stated that there was no constitutional requirement of a warrant needed to arrest someone at a business open to the public.<sup>95</sup> Moreover, because the warrants fully complied with Georgia statutory requirements,<sup>96</sup> the appellant could not argue that some evidence should have been suppressed due to an illegal arrest.<sup>97</sup>

#### E. Discovery

In *Perkinson* the Georgia Supreme Court held that the trial court did not err in permitting the State's pretrial discovery of the appellant's school records containing evaluations by school counselors.<sup>98</sup> The supreme court noted that even assuming school records were privileged under O.C.G.A. section 24-9-21,<sup>99</sup> when a criminal defendant raises an affirmative defense of mental retardation, that privilege is waived under O.C.G.A. section 24-9-21(5) through (8).<sup>100</sup> Additionally, the appellant agreed to reciprocal discovery under O.C.G.A. section 17-16-4(b)(2),<sup>101</sup> which allows the prosecutor to inspect and copy any mental examination

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91. *Id.*, 604 S.E.2d at 796.

92. 278 Ga. 150, 598 S.E.2d 488 (2004).

93. *Id.* at 154, 598 S.E.2d at 493.

94. *Id.*

95. *Id.* at 155, 598 S.E.2d at 493.

96. O.C.G.A. § 17-4-41 (2004).

97. *See Lamar*, 278 Ga. at 154, 598 S.E.2d at 493.

98. 279 Ga. at 236, 610 S.E.2d at 539.

99. O.C.G.A. § 24-9-21 (1995).

100. *Perkinson*, 279 Ga. at 236, 610 S.E.2d at 539 (citing *Trammel v. Bradberry*, 256 Ga. App. 412, 424, 568 S.E.2d 715, 725-26 (2002)).

101. O.C.G.A. § 17-16-4 (2004 & Supp. 2005).

if the defendant intends to introduce the evidence.<sup>102</sup> Because the appellant intended to use the school records as the foundation of his mental retardation defense, the Georgia Supreme Court held that the trial court did not err in allowing the State pretrial access to the records.<sup>103</sup>

In *Riley* the supreme court concluded that any error in the trial court's exclusion of expert testimony regarding the appellant's lack of emotion attributable to his personality was harmless in light of all the other evidence against the appellant.<sup>104</sup>

#### F. Statute of Limitations

In *Jenkins* the appellant had been charged with malice murder, felony murder, aggravated assault, armed robbery, kidnapping, burglary, and possession of a firearm. The appellant argued that all the charges except murder and felony murder should be dismissed because the statute of limitations had expired. Although the State indicted the appellant over seven years after the crimes were committed, it argued the statute of limitations was tolled because the identity of the perpetrator was unknown.<sup>105</sup> The trial court agreed that the statute of limitations had expired but ordered that the tolling question nonetheless be submitted for jury determination.<sup>106</sup>

The State alleged that based on O.C.G.A. section 17-3-2(2),<sup>107</sup> the statute of limitations was tolled because the person who committed the crimes was unknown until a previously unidentified palm print was matched to the appellant on July 25, 2000.<sup>108</sup> Interpreting that statute to apply "where there is no identified suspect among the universe of all potential suspects," the Georgia Supreme Court reasoned that the State, shortly after the crime, had actual knowledge that the appellant was a suspect based on physical evidence, his conflicting statements, and other witness statements.<sup>109</sup> Thus, the supreme court affirmed the trial court's decision that the non-murder charges should be dismissed.<sup>110</sup>

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102. *Perkinson*, 279 Ga. at 236, 610 S.E.2d at 539.

103. *Id.*

104. 248 Ga. at 683, 604 S.E.2d at 495.

105. *Jenkins*, 278 Ga. at 598, 604 S.E.2d at 790.

106. *Id.*

107. O.C.G.A. § 17-3-2(2) (2004).

108. *Jenkins*, 278 Ga. at 601, 604 S.E.2d at 792.

109. *Id.* at 602-03, 604 S.E.2d at 793.

110. *Id.* at 603, 604 S.E.2d at 793-94.

In addition, the Georgia Supreme Court stated that the trial court erred in submitting the properly dismissed charges to the jury.<sup>111</sup> The supreme court remarked:

Although the Court of Appeals in *Tuzman*<sup>112</sup> suggested that the trial court could refuse to hold a pretrial hearing on the plea in bar and submit the statute of limitations issue to the jury, we believe that the proper procedure for litigating a plea in bar based upon the statute of limitations should be analogous to a pretrial *Jackson v. Denno* hearing. . . .<sup>113</sup>

The supreme court further explained the procedure, stating:

If a defendant prevails on a pretrial plea in bar on the statute of limitations, the charge should be dismissed; if the State prevails on this issue before trial, the defendant may still require the State to prove at trial that the charge is not barred by the statute of limitations.<sup>114</sup>

#### G. Proper Notice

In *Smith* the appellant, after being re-indicted, contended that the State failed to give proper notice of its intent to seek the death penalty, but the Georgia Supreme Court remarked that the State corrected this problem by formally notifying and properly re-arraigning Smith at a later date.<sup>115</sup>

In *Riley* the appellant claimed that the State did not allege the supporting statutory aggravating factors in the indictment, but the Georgia Supreme Court disagreed and refused to vacate the appellant's death sentences.<sup>116</sup>

#### H. Others Issues

The appellant in *Perkinson* was not present at an in-chambers meeting between the lawyers and trial judge to discuss disclosure of potentially exculpatory evidence. Under *Brady* the prosecution was required to disclose that the State-retained psychologist found Perkinson to be mildly retarded upon review of the appellant's existing mental examina-

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111. *Id.* at 604, 604 S.E.2d at 794.

112. *State v. Tuzman*, 145 Ga. App. 481, 243 S.E.2d 675 (1978).

113. *Jenkins*, 278 Ga. at 604, 604 S.E.2d at 794.

114. *Id.*, 604 S.E.2d at 795.

115. 279 Ga. at 50, 610 S.E.2d at 28.

116. 278 Ga. at 680, 604 S.E.2d at 493 (citing *Terrell v. State*, 276 Ga. 34, 41, 572 S.E.2d 595, 602 (2002)).

tion records.<sup>117</sup> The trial court granted a continuance for the State to retain another expert to test the appellant and to evaluate the new examination.<sup>118</sup> The Georgia Supreme Court concluded that the trial court had not abused its discretion in granting the continuance and that the appellant acquiesced to the conference occurring outside his presence.<sup>119</sup> The supreme court noted that the appellant made no complaint about the continuance and willingly submitted to the mental evaluation given by the State's new expert.<sup>120</sup>

### III. JURY SELECTION

This section covers issues involving peremptory challenges, juror qualification, scope of voir dire, death qualification, and jury sequestration.

#### A. Peremptory Challenges

In *Robinson v. State*,<sup>121</sup> the State claimed that O.C.G.A. section 15-12-165,<sup>122</sup> a statute giving a criminal defendant twice as many peremptory strikes as the State, was unconstitutional. The State argued that because the defendant was male and the two victims were female, the defense would strike twenty women, and the State would strike ten men, under the guise of gender neutral reasons. The State contended that discrimination would occur after each side used ten peremptory strikes because the defendant would continue to strike females after the State could no longer strike males.<sup>123</sup> The trial court agreed with the State's equal protection argument that O.C.G.A. section 15-12-165 allowed disparate treatment of jurors based on gender.<sup>124</sup>

The Georgia Supreme Court noted that the Equal Protection Clause<sup>125</sup> prohibits gender discrimination in jury selection, and if either party uses a peremptory strike with discriminatory intent, the proper remedy is a *Batson*<sup>126</sup> or *J.E.B.*<sup>127</sup> motion.<sup>128</sup> The supreme court held that peremptory challenges are never allowed to dismiss a

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117. *Perkinson*, 279 Ga. at 236-37, 610 S.E.2d at 539.

118. *Id.* at 237, 610 S.E.2d at 539.

119. *Id.*, 610 S.E.2d at 540.

120. *Id.*

121. 278 Ga. 134, 598 S.E.2d 466 (2004).

122. O.C.G.A. § 15-12-165 (2005).

123. *Robinson*, 278 Ga. at 134, 598 S.E.2d at 466.

124. *Id.* at 134-35, 598 S.E.2d at 467.

125. U.S. CONST. amend. XIV, § 1.

126. *Batson v. Kentucky*, 476 U.S. 79 (1986).

127. *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

128. *Robinson*, 278 Ga. at 135, 598 S.E.2d at 467-68.

potential juror based solely on gender, regardless of whether the State has fewer challenges, and therefore, the trial court erred in finding O.C.G.A. section 15-12-165 unconstitutional.<sup>129</sup>

### B. *Juror Qualification*

In *Perkinson v. State*,<sup>130</sup> the Georgia Supreme Court held that “[t]he trial court did not err by refusing to excuse prospective jurors for cause because they [disagreed] with defense counsel in voir dire that some . . . mitigating evidence . . . could affect their sentencing decision.”<sup>131</sup> The supreme court also determined that those jurors were properly qualified regarding capital punishment.<sup>132</sup>

In *Riley v. State*,<sup>133</sup> the appellant complained that the trial court erred by refusing to excuse two prospective jurors for cause in spite of their alleged bias in favor of the death penalty.<sup>134</sup> The supreme court previously held that “[a] prospective juror who has an unwavering bias in favor of one of the possible sentences authorized by law, to the exclusion of at least one of the other possible sentences, is not qualified to serve.”<sup>135</sup> The Georgia Supreme Court concluded that the trial court did not abuse its discretion by finding that two jurors qualified because the record showed that they would consider all three proposed sentencing options despite some equivocation.<sup>136</sup>

The appellant next claimed that the trial court erred by excusing two potential jurors for cause despite their qualifying voir dire responses.<sup>137</sup> The Georgia Supreme Court stated that no error occurred because one prospective juror had stated he opposed capital punishment and could not impose a death sentence.<sup>138</sup>

### C. *Scope of Voir Dire*

The appellant in *Riley* also claimed that the trial court improperly restricted voir dire in a manner that interfered with his ability to determine prospective jurors’ capital punishment views.<sup>139</sup> The

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129. *Id.* at 135-36, 598 S.E.2d at 468.

130. 279 Ga. 232, 610 S.E.2d 533 (2005).

131. *Id.* at 239, 610 S.E.2d at 541.

132. *Id.*

133. 278 Ga. 677, 604 S.E.2d 488 (2004).

134. *Id.* at 685-86, 604 S.E.2d at 497.

135. *Id.* at 686, 604 S.E.2d at 497 (quoting *Sallie v. State*, 276 Ga. 506, 508, 578 S.E.2d 444, 449 (2003)).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 685, 604 S.E.2d at 496.

Georgia Supreme Court concluded that the trial court was too restrictive with the first prospective juror regarding questions of prejudgment, but that it corrected this error by allowing the defendant to ask individual jurors on voir dire if they were inclined to impose a specific sentence in a murder trial.<sup>140</sup> The supreme court remarked that after the first prospective juror, the trial court did not abuse its discretion because the appellant was able to ask questions indicative of the jurors' impartiality and fairness.<sup>141</sup>

In *Lamar v. State*,<sup>142</sup> the appellant argued that he was denied the right to inquire into prospective jurors' opposition to a life sentence with the possibility of parole and willingness to impose that sentence for murder.<sup>143</sup> The Georgia Supreme Court noted that if this issue arose on retrial, the trial court should follow *Zellmer v. State*<sup>144</sup> when conducting voir dire and allow a capital defendant to make such inquiries.<sup>145</sup>

#### D. Death Qualification

The Georgia Supreme Court also reiterated in *Lamar* that it has consistently held that "[q]ualifying potential jurors on the basis of their death penalty views is not unconstitutional."<sup>146</sup>

In *Riley* the Georgia Supreme Court again quoted *Braley v. State*<sup>147</sup> when noting that the use of views on capital punishment to qualify jurors was constitutional.<sup>148</sup>

#### E. Sequestration of Jury

In *Lamar* the appellant argued that it was error for the trial court to refuse his request for an unsequestered jury.<sup>149</sup> Because O.C.G.A. section 15-12-142(a)<sup>150</sup> authorized the trial court to keep a jury seques-

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140. *Id.*, 604 S.E.2d at 497.

141. *Id.*

142. 278 Ga. 150, 598 S.E.2d 488 (2004).

143. *Id.* at 153-54, 598 S.E.2d at 492-93.

144. 272 Ga. 735, 534 S.E.2d 802 (2000) (holding that a death penalty defendant must be permitted to inquire if potential jurors were conscientiously opposed to a life sentence with the possibility of parole and if they would be willing to consider imposing that sentence for murder).

145. *Lamar*, 278 Ga. at 154, 598 S.E.2d at 493 (citing *Zellmer*, 272 Ga. 735, 737, 534 S.E.2d 802, 804).

146. *Id.* (quoting *Braley v. State*, 276 Ga. 47, 52, 572 S.E.2d 583, 592 (2002)).

147. 276 Ga. 47, 572 S.E.2d 583 (2002).

148. *Riley*, 278 Ga. at 685, 604 S.E.2d at 497.

149. *Lamar*, 278 Ga. at 155, 598 S.E.2d at 494.

150. O.C.G.A. § 15-12-142(a) (2005).

tered even over a defendant's objection, the Georgia Supreme Court held that no error occurred.<sup>151</sup>

#### IV. GUILT AND INNOCENCE

This section covers issues involving insanity defenses, cross-examination, expert testimony, admissibility of evidence, closing arguments, and jury charges.

##### A. *Insanity Defenses*

In *Lamar v. State*,<sup>152</sup> the appellant challenged O.C.G.A. section 17-7-130.1<sup>153</sup> as both vague and overbroad.<sup>154</sup> The Georgia Supreme Court determined that the appellant's vagueness argument had no merit because the statute included guidelines for avoiding arbitrary and discriminatory implementation.<sup>155</sup> The supreme court also concluded that the appellant's overbreadth argument lacked merit because the statute did not require the defendant's cooperation nor did it sanction the defendant for refusing to cooperate with court-appointed experts.<sup>156</sup>

##### B. *Cross-examination*

In *Franks v. State*,<sup>157</sup> the appellant argued that polygraph results should be allowed after a witness opened the door to that evidence.<sup>158</sup> After a witness testified about a phone call she made from the crime scene the day of the murders, the appellant challenged her credibility on cross-examination. The trial court allowed the appellant to question the witness about numerous FBI and police interviews in which she failed to mention she made a phone call, but the trial court forbade the appellant to ask questions about a polygraph test the witness had taken.<sup>159</sup> On re-direct by the prosecution, the witness was non-responsive when she mentioned that she had taken a polygraph exam.<sup>160</sup> The Georgia Supreme Court, agreeing with the trial court, stated that

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151. *Lamar*, 278 Ga. at 155-56, 598 S.E.2d at 494.

152. 278 Ga. 150, 598 S.E.2d 488 (2004).

153. O.C.G.A. § 17-7-130.1 (2004).

154. The statute provides for an examination of a defendant by a court-appointed psychologist or psychiatrist when the insanity defense is raised. *Lamar*, 278 Ga. at 156-57, 598 S.E.2d at 494-95.

155. *Id.*

156. *Id.* at 157, 598 S.E.2d at 495.

157. 278 Ga. 246, 599 S.E.2d 134 (2004).

158. *Id.* at 265, 599 S.E.2d at 149.

159. *Id.* at 265-66, 599 S.E.2d at 149-50.

160. *Id.*

this brief reference was not enough to open the door for cross-examining the witness about her polygraph test and that it did not prejudice the appellant because the test results were not revealed.<sup>161</sup>

### C. *Expert Testimony*

In *Riley v. State*,<sup>162</sup> the appellant argued that it was error to limit an expert witness' testimony regarding false confession theory.<sup>163</sup> The expert witness was a psychologist called to testify about the appellant's propensity to give a false confession as a result of interrogation tactics, interview environment, and the appellant's own personality traits.<sup>164</sup> The trial court refused expert testimony on how the police interview technique could have led to a false confession.<sup>165</sup> In determining the permissible extent of the expert testimony, the expert witness testified that he had never previously testified about false confession theory and only became familiar with the theory after being retained in the case. The expert witness also stated that his knowledge of the theory came from reading five recently published articles, some of which were professionally criticized.<sup>166</sup> The Georgia Supreme Court stated that no error occurred when the trial court limited the witness' expert testimony because the theory had not advanced enough to be considered scientifically reliable.<sup>167</sup>

### D. *Admissibility of Evidence*

In *Riley* the appellant complained that photographs of the victims' bodies at the crime scene were inflammatory and unduly prejudicial, but the Georgia Supreme Court concluded that no error occurred because they were relevant to show the nature and extent of injuries and the location of the bodies.<sup>168</sup> The appellant also argued that the trial court erred in admitting evidence of his bad character and prior difficulties.<sup>169</sup> Rejecting the appellant's contention, the Georgia Supreme Court stated that "[e]vidence that is otherwise relevant and material to the issues in a criminal case does not become inadmissible simply because it incidentally puts a defendant's character or reputation into

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161. *Id.* at 266, 599 S.E.2d at 150.

162. 278 Ga. 677, 604 S.E.2d 488 (2004).

163. *Id.* at 681, 604 S.E.2d at 494.

164. *Id.*

165. *Id.*

166. *Id.* at 681-82, 604 S.E.2d at 494.

167. *Id.* at 682, 604 S.E.2d at 495.

168. *Id.* at 686, 604 S.E.2d at 497.

169. *Id.* at 687, 604 S.E.2d at 498.

evidence.”<sup>170</sup> The supreme court noted that evidence of the appellant’s financial difficulties showed an alleged motive for the murder; evidence of romantic involvements showed that the appellant viewed his children as problematic to his relationship with his girlfriend; and evidence of prior difficulties between the appellant and his children showed motive and intent.<sup>171</sup> The Georgia Supreme Court also noted that no error occurred in allowing testimony from neighbors and firefighters about the cold demeanor and lack of emotion the appellant displayed during and after the fire that killed his three children.<sup>172</sup>

In *Lamar* the Georgia Supreme Court held that the trial court did not err by finding that appellant’s personal items seized at the time of his arrest were admissible because they were relevant to the issue of his sanity at the time the murder was committed.<sup>173</sup>

In *Smith v. State*,<sup>174</sup> the appellant argued that the State failed to establish the chain of custody for a videotape of his arrest, but the Georgia Supreme Court held that the tape was properly admitted because testimony of the cameraman established that the video was an accurate portrayal of the appellant’s arrest.<sup>175</sup>

#### *E. Closing Argument*

In *Smith* the appellant contended that the State, during its closing argument, was wrong to assert that the appellant had shown no remorse for his crimes because it was an improper comment on his failure to testify.<sup>176</sup> The Georgia Supreme Court noted that it is generally “reversible error if ‘(1) the prosecutor’s manifest intention was to comment on the accused’s failure to testify, or (2) the remark was of such a character that a jury would naturally and necessarily take it to be a comment on the accused’s failure to testify.’”<sup>177</sup> However, during closing argument, both the defendant and the prosecutor have more latitude to make reasonable inferences from evidence already presented at trial.<sup>178</sup> The supreme court stated that no error resulted from the prosecution’s closing statement because it was a reasonable inference

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170. *Id.* (quoting *Mize v. State*, 269 Ga. 646, 650, 501 S.E.2d 219, 226 (1998) (citation omitted)).

171. *Id.*

172. *Id.*

173. 278 Ga. at 155, 598 S.E.2d at 493.

174. 279 Ga. 48, 610 S.E.2d 26 (2005).

175. *Id.* at 51, 610 S.E.2d at 28-29.

176. *Id.* at 49, 610 S.E.2d at 27.

177. *Id.*, 610 S.E.2d at 27-28 (quoting *LeMay v. State*, 265 Ga. 73, 75, 453 S.E.2d 737, 739 (1995)).

178. *Id.* at 50, 610 S.E.2d at 28.

based on evidence that the appellant laughed and bragged about killing the victim.<sup>179</sup>

In *Perkinson v. State*,<sup>180</sup> the appellant argued that it was error for the prosecution to tell the jury that the appellant was “not mentally retarded, and he can’t hide behind it.”<sup>181</sup> The appellant claimed that it was improper to refer to mental retardation as a “walk-away” defense, but the trial court disagreed and found that mental retardation was somewhat of a defense.<sup>182</sup> The Georgia Supreme Court held that no error occurred, noting that mental retardation is similar to a defense because “the jury would logically understand that some benefit must accrue to [the appellant] if found to be guilty but mentally retarded because he vigorously attempted to prove his mental retardation at trial. . . .”<sup>183</sup>

#### F. Jury Charge

In *Franks* the appellant argued that the trial court erred in charging the jury with the following:

You may infer that a person of sound mind and discretion intends to accomplish the natural and probable consequences of that person’s intentional acts, and if a person of sound mind and discretion intentionally and without justification uses a deadly weapon or instrument in the manner in which the weapon or instrument is ordinarily used and thereby causes the death of a human being, you may infer an intent to kill.<sup>184</sup>

In *Harris v. State*,<sup>185</sup> the Georgia Supreme Court previously held this charge to be erroneous, a ruling that applied to all cases waiting to be heard, including *Franks*.<sup>186</sup> However, the supreme court stated that the error was not a reversible one because it was unlikely that the charge affected the verdict because of the overwhelming evidence of malice.<sup>187</sup>

In *Riley* the appellant alleged that the trial court erred in refusing to give jury charges on the lesser offenses of involuntary manslaughter and reckless conduct, but the Georgia Supreme Court held that no evidence

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179. *Id.*

180. 279 Ga. 232, 610 S.E.2d 533 (2005).

181. *Id.* at 239, 610 S.E.2d at 541.

182. *Id.*

183. *Id.*

184. 278 Ga. at 266, 599 S.E.2d at 150.

185. 273 Ga. 608, 543 S.E.2d 716 (2001).

186. *Franks*, 278 Ga. at 266, 599 S.E.2d at 150.

187. *Id.*, 599 S.E.2d at 150-51.

existed to require these charges.<sup>188</sup> The appellant admitted to committing felony arson by intentionally setting his son's bed on fire; therefore, the supreme court concluded that charges of involuntary manslaughter and reckless conduct were not authorized by the evidence.<sup>189</sup>

In *Lamar* the Georgia Supreme Court stated that it would have been proper for the trial court to emphasize that the jury could consider changes to the appellant's mental state resulting from new medication he had been taking since the time of the crime.<sup>190</sup> However, because the jury heard testimony that the appellant was on medication that could affect his mental state during the trial, the supreme court held that the trial court's failure to charge the jury in that fashion did not constitute reversible error.<sup>191</sup>

## V. SENTENCING

This section covers issues involving admissibility of evidence, victim impact statements, mitigation evidence, statutory aggravators, closing arguments, the right to a jury trial, and religion.

### A. Admissibility of Evidence

In *Lamar v. State*,<sup>192</sup> the Georgia Supreme Court concluded that no error occurred in allowing the State to replay a videotape of the murder at sentencing.<sup>193</sup> This holding was consistent with prior supreme court decisions concluding that a video may be shown during closing arguments and, upon the jury's request and with proper instruction, evidence may be resubmitted during the penalty phase.<sup>194</sup>

In *Perkinson v. State*,<sup>195</sup> the appellant alleged that the trial court erred by allowing into evidence a video of the crime scene from the victim's perspective taped months after the murder took place.<sup>196</sup> The Georgia Supreme Court held that the admission was erroneous because the video added nothing to the mental image of the crime already produced by sufficient witness testimony.<sup>197</sup> However, the supreme

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188. 278 Ga. at 688, 604 S.E.2d at 498.

189. *Id.*, 604 S.E.2d at 498-99.

190. 278 Ga. at 156, 598 S.E.2d at 494.

191. *Id.*

192. 278 Ga. 150, 598 S.E.2d 488 (2004).

193. *Id.* at 156, 598 S.E.2d at 494.

194. *Id.*

195. 279 Ga. 232, 610 S.E.2d 533 (2005).

196. *Id.* at 237, 610 S.E.2d at 540.

197. *Id.* at 237-38, 610 S.E.2d at 540 (citing *Pickren v. State*, 269 Ga. 453, 456, 500 S.E.2d 566, 569-70 (1998)).

court held that the error was harmless because the video was a brief and fair representation of the crime.<sup>198</sup>

In *Riley v. State*,<sup>199</sup> the Georgia Supreme Court held that no error occurred in allowing the admission of an old letter from the appellant to his wife, demanding she participate in sex with him and another woman.<sup>200</sup> Moreover, the supreme court held that the trial court committed no error in finding the expert testimony on false confession theory inadmissible during the penalty phase.<sup>201</sup>

In *Henry v. State*,<sup>202</sup> the appellant contended that his post-arrest confession was inadmissible at sentencing. The Georgia Supreme Court held that no error occurred because no coercive police activity existed; the appellant had been advised of his *Miranda* rights; and the confession was knowingly and voluntarily given.<sup>203</sup>

### B. Victim Impact Statements

The supreme court in *Henry* also held that allowing the victim's mother to testify about the impact of the murder on her was not erroneous.<sup>204</sup> Likewise, in *Riley* the Georgia Supreme Court held that the admission of impact testimony of the victim's maternal grandparents was proper.<sup>205</sup>

### C. Mitigation

In *Height v. State*,<sup>206</sup> the appellant argued that his polygraph test results should have been admitted as mitigation evidence. The results of the polygraph exam the appellant took the day of the murder indicated that he was being truthful when he denied harming the victim. The test administrator, Georgia Bureau of Investigation ("GBI") Agent Owen, testified that although she concluded the appellant was not being deceptive in his answers to her questions, she had great concerns about the reliability of the test. The agent stated that she believed the test was administered too early in the investigation, resulting in the questions being too general and the possibility that a perpetrator may not have psychologically accepted responsibility for the crime. The agent

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198. *Id.*

199. 278 Ga. 677, 604 S.E.2d 488 (2004).

200. *Id.* at 689, 604 S.E.2d at 499.

201. *Id.* at 683, 604 S.E.2d at 495-96.

202. 278 Ga. 617, 604 S.E.2d 826 (2004).

203. *Id.* at 621, 604 S.E.2d at 830.

204. *Id.* (citing O.C.G.A. § 17-10-1.2(a)(1) (2004)).

205. 278 Ga. at 688, 604 S.E.2d at 499.

206. 278 Ga. 592, 604 S.E.2d 796 (2004).

further noted that she was less confident about the reliability of this test than any of the approximately 3000 other exams she conducted in her 25-year GBI career.<sup>207</sup>

The trial court held that “polygraph evidence [in the penalty phase] is limited to the narrow exception requiring a stipulation by both parties.”<sup>208</sup> The Georgia Supreme Court disagreed, noting that “an inflexible prohibition on admission of polygraph evidence absent a stipulation conflicts with our recognition of the expansive scope of the evidence that the defendant in a capital case in this state may present in mitigation of his sentence.”<sup>209</sup> The supreme court also emphasized that the silence of O.C.G.A. section 17-10-30<sup>210</sup> on the definition of mitigating circumstances allowed broad discretion for the admission of any mitigating evidence.<sup>211</sup> Overruling parts of *Baxter v. Kemp*,<sup>212</sup> the supreme court held that “Georgia’s general ban on the admission of polygraph test results absent the parties’ stipulation should not be applied automatically in the sentencing phase of a capital case so as to prevent the defendant from presenting a favorable polygraph test result.”<sup>213</sup> Cautioning that the trial court still had discretion to deny the admission of polygraph results that it determined not to be sufficiently reliable, the supreme court remanded the case for a ruling on the reliability of the appellant’s test.<sup>214</sup>

#### D. Statutory Aggravators

In *Riley* the appellant argued that “the evidence was insufficient for the jury to find the statutory aggravating circumstance that the murder . . . was outrageously or wantonly vile, horrible, or inhuman in that it involved depravity of mind.”<sup>215</sup> While “[d]epravity of mind may be found where the victim is subjected to serious psychological abuse before death,” anticipation and anxiety of impending death is not enough to find this abuse.<sup>216</sup> Because the age of the victim may support a finding of depravity of mind, the Georgia Supreme Court held that the

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207. *Id.* at 593, 604 S.E.2d at 797.

208. *Id.* at 594, 604 S.E.2d at 797.

209. *Id.*, 604 S.E.2d at 797-98.

210. O.C.G.A. § 17-10-30 (2004).

211. *Height*, 278 Ga. at 594, 604 S.E.2d at 798 (citing *Barnes v. State*, 269 Ga. 345, 358-59, 496 S.E.2d 674, 687-88 (1998)).

212. 260 Ga. 184, 391 S.E.2d 754 (1990).

213. *Height*, 278 Ga. at 595, 604 S.E.2d at 798.

214. *Id.* at 595-96, 604 S.E.2d at 798-99.

215. 278 Ga. at 688, 604 S.E.2d at 499 (citing O.C.G.A. § 17-10-30(b)(7)).

216. *Id.* at 688-89, 604 S.E.2d at 499 (citing *Phillips v. State*, 250 Ga. 336, 340-41, 297 S.E.2d 217, 221 (1982)).

trial court did not err by finding evidence that the victim was only three years old and screaming for help at the time of the fire was sufficient for the jury to find depravity of mind.<sup>217</sup>

In *Tarver v. State*,<sup>218</sup> the appellant challenged the sufficiency of the evidence to support the jury's finding of three statutory aggravating circumstances. Regarding the definition of aggravating circumstances in O.C.G.A. section 17-10-30(b)(7),<sup>219</sup> the Georgia Supreme Court stated that there was insufficient evidence to support the jury's finding.<sup>220</sup> The term aggravating circumstance:

“consists of two major components, the second of which has three sub-parts, as follows: (I) The offense of murder was outrageously or wantonly vile, horrible or inhuman (II) in that it involved (A) aggravated battery to the victim, (B) torture to the victim, or (C) depravity of mind of the defendant[, and] . . . the evidence must be sufficient to satisfy the first major component of the statutory aggravating circumstance and at least one sub-part of the second component.”<sup>221</sup>

In *Tarver* the State relied solely on the argument that the appellant had depravity of mind, not that the victims suffered torture or aggravated battery.<sup>222</sup> The supreme court noted that the evidence only showed that the appellant fired the fatal shot during a struggle with the victim and that the other three shots to the victim did not reveal “a consciousness materially more ‘depraved’ than that of any person guilty of murder.”<sup>223</sup> Based on this finding, the supreme court held that the evidence did not support the depravity of mind component of O.C.G.A. section 17-10-30(b)(7).<sup>224</sup>

In *Perkinson* the Georgia Supreme Court noted that the verdict form, which stated the jury's finding on the fourth statutory aggravating circumstance, was defective.<sup>225</sup> The form stated that the jury had found the murder only “horrible or inhuman,” thus, not meeting the statutorily-required finding that the murder be “outrageously or wantonly vile, horrible, or inhuman.”<sup>226</sup> The supreme court vacated

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217. *Id.* (citing *Phillips*, 250 Ga. at 340, 297 S.E.2d at 221).

218. 278 Ga. 358, 602 S.E.2d 627 (2004).

219. O.C.G.A. § 17-10-13(b)(7) (2004).

220. *Tarver*, 278 Ga. at 359, 602 S.E.2d at 629.

221. *Id.* at 361, 602 S.E.2d at 630 (quoting *Hance v. State*, 245 Ga. 856, 860-61, 268 S.E.2d 339, 345 (1980)).

222. *Id.* at 362, 602 S.E.2d at 631.

223. *Id.* (quoting *Godfrey v. Georgia*, 446 U.S. 420, 432 (1980)).

224. *Id.*

225. 279 Ga. at 240, 610 S.E.2d at 541.

226. *Id.*

that statutory aggravating circumstance, but upheld the appellant's death sentence because of the jury's findings of three other statutory aggravators.<sup>227</sup>

### *E. Closing Argument*

In *Perkinson* the Georgia Supreme Court also held that the prosecutor made an improper statement during closing argument.<sup>228</sup> Although the statement that a sentence of life without parole "can be only [sic] used if there are no aggravating circumstances" was incorrect, the supreme court stated that it did not affect the outcome of the case because the trial court correctly charged the jury that a sentence of life without parole was always an option regardless of any statutory aggravating circumstances.<sup>229</sup>

In *Lamar* the Georgia Supreme Court stated that on retrial, the jury must be charged on the meaning of a life sentence both with and without the possibility of parole and that the closing arguments may address the appropriateness of each sentence.<sup>230</sup>

In *Henry* the appellant contended that the trial court erred by allowing the State to argue, during the sentencing phase, that the appellant deserved the death penalty because of the future danger he posed to others, such as inmates, guards, and visitors.<sup>231</sup> Because it is improper to argue that a defendant will kill in prison merely because he killed while free, the Georgia Supreme Court held that the trial court committed reversible error by allowing the statements during the sentencing phase.<sup>232</sup>

### *F. Right to Jury Trial*

The appellant in *Henry* also argued that it was a violation of his constitutional rights for the trial court, rather than a jury, to impose the death penalty.<sup>233</sup> In *Ring v. Arizona*,<sup>234</sup> the United States Supreme Court held that all defendants are "entitled to a jury determination of any fact on which the legislature conditions an increase in their

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227. *Id.*, 610 S.E.2d at 542.

228. *Id.* at 238, 610 S.E.2d at 540.

229. *Id.*, 610 S.E.2d at 540-41.

230. 278 Ga. at 156, 598 S.E.2d at 494 (citing O.C.G.A. § 17-10-31.1(d) (2004)).

231. 278 Ga. at 618-19, 604 S.E.2d at 828.

232. *Id.* at 619-20, 604 S.E.2d at 829 (citing *Pye v. State*, 269 Ga. 779, 789-91, 505 S.E.2d 4, 14-15 (1998) (Fletcher, P.J., concurring specially)).

233. *Id.* at 620-21, 604 S.E.2d at 829.

234. 536 U.S. 584 (2002).

maximum punishment.”<sup>235</sup> Based on *Ring* and on the appellant’s waiver of his right to a jury trial for sentencing purposes, the Georgia Supreme Court concluded that the trial court was authorized by O.C.G.A. section 17-10-32<sup>236</sup> to hand down a death sentence.<sup>237</sup>

### G. Religion

In *Henry* the appellant further complained that the trial court wrongly mentioned religion during the sentencing phase, and the supreme court noted that the sentencing body should refer only to Georgia law, not religion, when making a sentencing determination.<sup>238</sup>

## VI. PRESERVATION OF ERRORS

This section covers issues such as proper preservation of error, failure to object, and untimely objection.

In *Smith v. State*,<sup>239</sup> the appellant claimed that the State did not give proper notice of its intent to seek the death penalty, but the Georgia Supreme Court stated that the appellant did not properly preserve the error for review because he failed to make an objection during his re-arraignment.<sup>240</sup>

In *Franks v. State*,<sup>241</sup> the appellant did not object when the trial court moved a group of prospective jurors to the front of the venire because of their lack of exposure to pretrial publicity. The trial court found that the appellant’s objection five days later was late, and the Georgia Supreme Court agreed that the untimely objection did not preserve the issue for appeal.<sup>242</sup>

In *Riley v. State*,<sup>243</sup> the trial court did not allow the defense to ask a prospective juror if he was “inclined to one type of sentence or another for murder?”<sup>244</sup> Although the Georgia Supreme Court held that the trial court erred because each party is allowed to ask about a prospective juror’s predisposition to a certain sentence for a defendant, the

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235. *Henry*, 278 Ga. at 620, 604 S.E.2d at 829 (quoting *Ring*, 536 U.S. at 589).

236. O.C.G.A. § 17-10-32 (2004).

237. *Henry*, 278 Ga. at 620-21, 604 S.E.2d at 829-30.

238. *Id.* at 621, 604 S.E.2d at 830 (citing *Carruthers v. State*, 272 Ga. 306, 308-11, 528 S.E.2d 217, 220-22 (2000)).

239. 279 Ga. 48, 610 S.E.2d 26 (2005).

240. *Id.* at 50, 610 S.E.2d at 28 (citing *Palmer v. State*, 271 Ga. 234, 238, 517 S.E.2d 502, 506 (1999)).

241. 278 Ga. 246, 599 S.E.2d 134 (2004).

242. *Id.* at 267, 599 S.E.2d at 151.

243. 278 Ga. 677, 604 S.E.2d 488 (2004).

244. *Id.* at 685, 604 S.E.2d at 496.

appellant's claim was not preserved for appeal because of his failure to object.<sup>245</sup>

In *Henry v. State*,<sup>246</sup> the appellant complained that the trial court erred in allowing the State to make a "future danger" argument during the sentencing phase, and the Georgia Supreme Court agreed that this constituted reversible error.<sup>247</sup> Though the dissent argued that this error was not properly preserved because it was not in the appellant's first appellate brief, the majority concluded that the error was included in an amended appellate brief filed before the court heard oral arguments and that review by the supreme court was not limited to a plain error standard.<sup>248</sup>

#### VII. DIRECT APPEAL

This section covers issues involving the constitutionality of death penalty statutes, proportionality review, and arbitrariness and disproportionality of sentences.

In *Lamar v. State*,<sup>249</sup> the Georgia Supreme Court confirmed that Georgia's death penalty statutes were constitutional.<sup>250</sup> In *Riley v. State*,<sup>251</sup> the supreme court reiterated that the death penalty statutes were not unconstitutional.<sup>252</sup> The supreme court also held that proportionality review was neither inadequate nor unconstitutional.<sup>253</sup> Further, the supreme court remarked that the death sentences imposed in *Riley* were neither arbitrary nor disproportionate, noting that the appellant, who burned his three children to death, received a similar sentence as compared to other cases involving "multiple murders, the murder of children, or the section (b)(7) statutory aggravating circumstances."<sup>254</sup>

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245. *Id.*

246. 278 Ga. 617, 604 S.E.2d 826 (2004).

247. *Id.* at 618-20, 604 S.E.2d at 828-29.

248. *Id.* at 620, 604 S.E.2d at 829 (citing *Pittman v. State*, 273 Ga. 849, 850, 546 S.E.2d 277, 279 (2001)).

249. 278 Ga. 150, 598 S.E.2d 488 (2004).

250. *Id.* at 155, 598 S.E.2d at 494 (citing *Gissendaner v. State*, 272 Ga. 704, 716, 532 S.E.2d 677, 689-90 (2000)).

251. 278 Ga. 677, 604 S.E.2d 488 (2004).

252. *Id.* at 686-87, 604 S.E.2d at 498 (citing *Gregg v. Georgia*, 428 U.S. 153, 198-206 (1976); *Braley v. State*, 276 Ga. 47, 56, 572 S.E.2d 583, 594-95 (2002)).

253. *Id.* at 687, 604 S.E.2d at 498 (citing *Braley*, 276 Ga. at 56, 572 S.E.2d at 594).

254. *Id.* at 689, 604 S.E.2d at 499 (citing O.C.G.A. § 17-10-35(c)(1), (3) (2004)).

In *Franks v. State*,<sup>255</sup> the supreme court held that the death sentence was not arbitrary or disproportionate.<sup>256</sup> The supreme court highlighted the jury's finding of five statutory aggravating circumstances: (1) aggravated battery, (2) armed robbery, (3) murder committed for the purpose of receiving money or other monetary value, (4) that the offense was outrageously or wantonly vile, horrible, or inhuman, and (5) in that it involved depravity of mind and torture.<sup>257</sup>

In *Perkinson v. State*,<sup>258</sup> the Georgia Supreme Court stated that the death sentence handed down to the appellant was not arbitrary or disproportionate to similar cases.<sup>259</sup>

#### VIII. MENTAL RETARDATION

In *Perkinson v. State*,<sup>260</sup> the appellant claimed, following his presentation of evidence in the guilt-innocence phase, that the trial court erred by denying his motion for a directed verdict on the issue of mental retardation.<sup>261</sup> The Georgia Supreme Court reasoned that a "directed verdict was not warranted because the evidence regarding [the appellant's] mental ability was disputed and conflicting."<sup>262</sup> Because the State and the defense had different theories and evidence that either supported or refuted the appellant's claim, the supreme court ruled that the trial court did not err by submitting the issue of mental retardation to the jury.<sup>263</sup>

The Georgia Supreme Court also reiterated that beyond a reasonable doubt was the correct burden of proof for a defendant's mental retardation claim and that O.C.G.A. section 17-7-131<sup>264</sup> was not contradictory or unconstitutionally vague.<sup>265</sup> The supreme court also held that the trial court's jury charge in *Perkinson* concerning mental retardation was not reversible error.<sup>266</sup> Although the trial court improperly added "at the time of the commission of the offense" to the statutory jury instruction language, the jury was nevertheless properly instructed

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255. 278 Ga. 246, 599 S.E.2d 134 (2004).

256. *Id.* at 267, 599 S.E.2d at 151.

257. *Id.*

258. 279 Ga. 232, 610 S.E.2d 535 (2005).

259. *Id.* at 239-40, 610 S.E.2d at 541 (citing O.C.G.A. § 17-10-35(c)(3)).

260. 279 Ga. 232, 610 S.E.2d 535 (2005).

261. *Id.* at 234, 610 S.E.2d at 537.

262. *Id.* (quoting *Jenkins v. State*, 269 Ga. 282, 291, 498 S.E.2d 502, 511 (1998)).

263. *Id.*, 610 S.E.2d at 537-38.

264. O.C.G.A. § 17-7-131 (2004).

265. *Perkinson*, 279 Ga. at 234, 610 S.E.2d at 538.

266. *Id.*

regarding the statutory definition of mental retardation.<sup>267</sup> Specifically, the jury must find that the mental retardation was “associated with impairments in adaptive behavior which manifested during the developmental period.”<sup>268</sup> The trial court also substituted the words “became clear” for “manifested” in the jury charge, but the Georgia Supreme Court stated that no error occurred because, under those circumstances, the terms had the same meaning.<sup>269</sup>

#### IX. METHOD OF EXECUTION

In *Riley v. State*,<sup>270</sup> the Georgia Supreme Court confirmed that lethal injection was not an unconstitutional method of execution.<sup>271</sup> Likewise, in *Franks v. State*,<sup>272</sup> the supreme court remarked that the appellant failed to prove that lethal injection was unconstitutional.<sup>273</sup>

#### X. UNIFIED APPEAL

Following the trial court’s denial of its motion to recuse the trial judge, the State in *State v. Martin*<sup>274</sup> appealed to the Georgia Supreme Court.<sup>275</sup> The supreme court held that it did not have jurisdiction to consider the State’s argument because recusal was not listed in O.C.G.A. section 5-7-1,<sup>276</sup> the statute that lists and describes the issues the State has authority to appeal.<sup>277</sup>

The State then argued that a matter not listed in O.C.G.A. section 5-7-1 is appealable by the State under the interim review procedure set forth by the Unified Appeal Procedure and other statutes; however, the supreme court disagreed.<sup>278</sup> Because the interim review procedure allows only appeals based on arguably-reversible errors, the supreme court stated that the procedure was intended to correct reversible errors before the trial began, not expand the scope of matters that the State may appeal.<sup>279</sup>

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267. *Id.*

268. *Id.*, 610 S.E.2d at 537 (quoting O.C.G.A. § 17-7-131(a)(3)).

269. *Id.* at 239, 610 S.E.2d at 541.

270. 278 Ga. 677, 604 S.E.2d 488 (2004).

271. *Id.* at 689, 604 S.E.2d at 499.

272. 278 Ga. 246, 599 S.E.2d 134 (2004).

273. *Id.* at 265, 599 S.E.2d at 149.

274. 278 Ga. 418, 603 S.E.2d 249 (2004).

275. *Id.* at 418, 603 S.E.2d at 249.

276. O.C.G.A. § 5-7-1 (1995 & Supp. 2005).

277. *Martin*, 278 Ga. at 419, 603 S.E.2d at 251.

278. *Id.* at 420, 603 S.E.2d at 251 (citing O.C.G.A. §§ 17-10-35.1 to -35.2 (2004); O.C.G.A. § 5-6-35(c) (1995 & Supp. 2005); Ga. Ct. R. & P., Unified App. P. II(F) (2004)).

279. *Id.*

In *Lamar v. State*,<sup>280</sup> the Georgia Supreme Court held that the Unified Appeal Procedure was constitutional and was intended to protect the rights of death penalty defendants.<sup>281</sup>

#### XI. INEFFECTIVE ASSISTANCE OF COUNSEL

In *Franks v. State*,<sup>282</sup> the appellant raised several claims that his trial counsel was ineffective. To prevail on those claims, the appellant had to prove both deficient performance by counsel and actual prejudice.<sup>283</sup>

##### A. *Guilt-Innocence Phase Closing Argument*

First, the appellant claimed that his counsel's closing argument during the guilt-innocence phase constituted ineffective assistance. The appellant argued that his counsel conceded his guilt on some charges without his permission, which resulted in a disruption of the adversarial process. The trial record revealed that counsel argued that though the appellant was "guilty" of physically attacking the victim's two children, he lacked the criminal intent to be convicted.<sup>284</sup> The Georgia Supreme Court concluded that counsel had not intentionally conceded the appellant's guilt on any charged offense and that the *Cronic*<sup>285</sup> presumption of prejudice did not apply because counsel remained a devoted advocate of the appellant throughout the trial.<sup>286</sup>

The supreme court also noted that a violation of the *Strickland*<sup>287</sup> standard did not occur because it was not unreasonable for trial counsel to make concessions regarding the attacks on the children to preserve the credibility of the defense.<sup>288</sup>

The appellant also failed to show counsel's ineffectiveness for calling him a "loser" because, in the context of the closing argument, calling the appellant and his acquaintance two "small-time losers" who had angered

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280. 278 Ga. 150, 598 S.E.2d 488 (2004).

281. *Id.* at 155, 598 S.E.2d at 494 (citing *Jackson v. State*, 270 Ga. 494, 498, 512 S.E.2d 241, 246 (1999)).

282. 278 Ga. 246, 599 S.E.2d 134 (2004).

283. *Id.* at 250, 599 S.E.2d at 139-40 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Smith v. Francis*, 253 Ga. 782, 783, 325 S.E.2d 362, 363 (1985)).

284. *Id.* at 255, 599 S.E.2d at 143.

285. *United States v. Cronic*, 466 U.S. 648 (1984).

286. *Franks*, 278 Ga. at 256-57, 599 S.E.2d at 144 (citing *United States v. Williamson*, 53 F.3d 1500, 1511 (1995)).

287. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

288. *Franks*, 278 Ga. at 257, 599 S.E.2d at 144.

big-time drug dealers was a reasonable way to explain how the appellant was not responsible for the murder.<sup>289</sup>

### B. *Penalty Phase Closing Argument*

The appellant also argued that counsel's use of the phrase "hell on earth" when describing the violence of the crimes in his opening statement was ineffective, but the Georgia Supreme Court again disagreed.<sup>290</sup> Because trial counsel revised his comment in his closing argument by stating that a sentence of life without parole "assures that the hell that visited this earth as you've heard described here does not return," the supreme court concluded that it was not unreasonable for counsel to reference the tragic ordeal undergone by the victims.<sup>291</sup>

### C. *Plea Negotiations*

Additionally, the appellant argued that his counsel was ineffective because he failed to negotiate a plea bargain with the State, but the record showed that his trial counsel did pursue a possible plea bargain that the district attorney was not willing to enter without more substantial information on other suspects. Testimony also showed that Franks instructed his counsel that he was not interested in pleading guilty, even if it was a chance to avoid the death penalty.<sup>292</sup>

### D. *Voir Dire*

The appellant also complained that counsel was ineffective because his counsel failed to sufficiently question prospective jurors, seek removal of allegedly biased jurors, or challenge the excusals of other jurors.<sup>293</sup> The Georgia Supreme Court noted that the trial court had already questioned a few jurors about the death penalty, so trial counsel's failure to ask those questions did not affect the jury selection process.<sup>294</sup> Regarding the retention or excusal of some potential jurors, the supreme court explained that the failure to challenge the trial court's decision was inconsequential because, at most, those jurors would have become alternates, and no alternate jurors were needed in the appellant's trial.<sup>295</sup>

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289. *Id.*, 599 S.E.2d at 144-45.

290. *Id.* at 258, 599 S.E.2d at 145.

291. *Id.*

292. *Id.* at 258-59, 599 S.E.2d at 145.

293. *Id.* at 259, 599 S.E.2d at 146.

294. *Id.*

295. *Id.*

*E. Trial Counsel's Strategy*

Moreover, the Georgia Supreme Court stated that counsel's strategy, focusing on others who may have committed the killing and the appellant's lack of criminal intent, was not deficient considering the tremendous amount of evidence against the appellant, coupled with the fact that he was not fully cooperative with his counsel during the trial.<sup>296</sup>

*F. Conflict of Interest*

In *Franks* the appellant was represented by attorneys Robbins and Homans on the Hall County charges, but a different attorney was appointed to represent him on the Haralson County murder charges. After the appellant requested Robbins take over the defense of the Haralson County charges, his family paid Robbins a \$25,000 retainer fee.<sup>297</sup> Though Robbins failed to notify the Hall County Indigent Defense Committee about the fee and failed to seek to an appointment as the appellant's counsel in Haralson County, the Georgia Supreme Court concluded that no conflict of interest existed.<sup>298</sup> No evidence existed that the fee lessened Robbins's zealous representation or loyalty to the appellant or that there was an actual conflict of interest "with respect to a material factual or legal issue or to a course of action."<sup>299</sup>

*G. Mitigation Investigation*

The appellant also argued that trial counsel inadequately investigated his background for possible mitigating evidence.<sup>300</sup> The Georgia Supreme Court held that it need not decide if counsel's investigation was reasonable because the appellant did not show he was prejudiced by the investigation that was conducted.<sup>301</sup> The appellant's counsel presented a detailed summary of his life under seal, without showing that it would be admissible at trial, and claimed that the procedure was proper to prevent the State from learning advantageous information for its use at retrial.<sup>302</sup> The supreme court reasoned that the procedure of presenting sealed information countered the ineffective assistance of counsel claim because "it prevents the trial court and appellate court from

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296. *Id.* at 260, 599 S.E.2d at 146.

297. *Id.*

298. *Id.* at 260-61, 599 S.E.2d at 146-47.

299. *Id.*, 599 S.E.2d at 147 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 356 n.3 (1980)).

300. *Id.* at 261, 599 S.E.2d at 147.

301. *Id.* at 263, 599 S.E.2d at 148.

302. *Id.*

evaluating whether prejudice resulted from trial counsel's alleged failure to uncover and present mitigating evidence."<sup>303</sup>

#### *H. Presentation of Mental Health Evidence*

In *Franks* the appellant claimed his counsel was deficient in investigating and presenting mental health evidence, but once again, the Georgia Supreme Court reasoned that the appellant failed to show prejudice because no additional evidence was presented regarding any problems or conditions other than what was presented during the guilt-innocence phase.<sup>304</sup>

Finally, the appellant argued that the psychiatrist selected by trial counsel to evaluate him had a conflict of interest because the doctor previously treated the child victims.<sup>305</sup> Though the doctor briefly spoke to the children in August 1994 when substituting for a colleague, the trial counsel's selection of the doctor was not erroneous because the trial counsel was under extreme time pressure to find an available psychiatrist who could evaluate the appellant on short notice.<sup>306</sup>

### XII. POSTCONVICTION

In *Crawford v. State*,<sup>307</sup> the appellant appealed after the trial court denied his extraordinary motion for a new trial and request for DNA testing.<sup>308</sup> The Georgia Supreme Court concluded that "the denial of a motion seeking DNA testing made as part of an extraordinary motion for new trial [may] be recognized as an appealable issue, but . . . the filing of an application for discretionary appeal is the proper form of appeal in such a case."<sup>309</sup>

The supreme court also concluded that the trial court did not err in finding that the appellant failed to meet the O.C.G.A. section 5-5-41(c)(3)<sup>310</sup> requirement, which states that a defendant's motion must show that "[t]he requested DNA testing would raise a reasonable probability that the defendant would have been acquitted if the results of DNA testing had been available at the time of conviction, in light of all the evidence in the case."<sup>311</sup> Because the evidence presented at

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303. *Id.*

304. *Id.*, 599 S.E.2d at 149.

305. *Id.* at 264, 599 S.E.2d at 149.

306. *Id.*

307. 278 Ga. 95, 597 S.E.2d 403 (2004).

308. *Id.* at 95-96, 597 S.E.2d at 403.

309. *Id.* at 96, 597 S.E.2d at 404.

310. O.C.G.A. § 5-5-41(c)(3) (1995 & Supp. 2005).

311. *Crawford*, 278 Ga. at 96-97, 597 S.E.2d at 404 (quoting O.C.G.A. § 5-5-41(c)(3)(D)).

trial was overwhelmingly against the appellant, even the most favorable DNA testing results, if they had been available at trial, would not reasonably be expected to lead to his acquittal or a lessening of his sentence.<sup>312</sup>

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312. *Id.* at 97-99, 597 S.E.2d at 405-06.