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## ***Carruthers v. State*: Thou Shalt Not Make Direct Religious References in Closing Argument**

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# CASENOTE

## ***Carruthers v. State: Thou Shalt Not Make Direct Religious References in Closing Argument***

In *Carruthers v. State*,<sup>1</sup> the Georgia Supreme Court addressed the very “precise line” that must be drawn between religious references that are permissible and those that must not be allowed in the sentencing phase of capital cases.<sup>2</sup> Specifically, the court held that the prosecutor’s use of direct quotations from the Bible “invoked a higher moral authority and diverted the jury from the discretion provided to them under state law.”<sup>3</sup> The court ultimately found that the allowance of these direct religious references, over the objection of defense counsel, constituted an impermissible violation of defendant’s right to due process.<sup>4</sup>

### I. FACTUAL BACKGROUND

On December 12, 1995, Jannette Williams arrived at Anthony Carruthers’ house and took Carruthers and Billy Edward Easter, Jr. to

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1. 272 Ga. 306, 528 S.E.2d 217, *cert. denied*, (2000).
  2. *Id.* at 310, 528 S.E.2d at 222.
  3. *Id.*
  4. *Id.* at 311, 528 S.E.2d at 222-23.

her house in her car. She invited the men into her home and, after conversing with them for a period of time, she sat on Carruthers' lap. Carruthers whispered something into her ear, to which Williams responded that she had a boyfriend. Carruthers proceeded to grab her arm. At this point, Easter went upstairs to use the bathroom.<sup>5</sup>

Easter went back downstairs when he heard the sound of breaking glass. When Easter arrived downstairs, he saw Carruthers choking Williams. After Williams fell to the floor unconscious or semiconscious, Carruthers cut her neck with a knife. He commented that the knife was dull and threw it across the room. When Williams showed signs of life, Carruthers went to the kitchen, obtained another knife, and cut Williams' neck in a repetitive motion, nearly decapitating her. Thereafter, Carruthers rolled Williams over and stabbed her eleven times in the chest.<sup>6</sup>

Only a short time after the murder, Carruthers' girlfriend saw Williams' car at Carruthers' residence, noticed his bloody clothes in his washing machine, and noticed scratches on his neck. Subsequently, Carruthers and Easter drove to Florida in Williams' car, and Carruthers sold the car for drugs. Upon discovering that the drugs were fake, Carruthers chased and possibly shot at a man who had been involved in the sale. When he returned to Georgia, Carruthers told his girlfriend that he had killed a woman who owed him money. Shortly thereafter, on December 20, 1995, Williams' car was found in Florida. Blood was found in the automobile, and a DNA test matched the blood with Williams'.<sup>7</sup>

On October 2, 1996, a Clayton County grand jury indicted Carruthers for malice murder, among other charges.<sup>8</sup> Trial began on March 23, 1998, and on March 27, the jury found Carruthers guilty on all counts.<sup>9</sup> Prior to closing arguments in the sentencing phase, Carruthers filed a motion in limine requesting that during closing arguments the court exclude "any Bible passages that appealed to the passion of the jury and would encourage it to impose a death sentence based on religion."<sup>10</sup> A preargument hearing was held in which the prosecutor made known his intent to cite passages directly from the biblical books of Romans,

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5. *Id.* at 307, 528 S.E.2d at 220.

6. *Id.*

7. *Id.* at 307-08, 528 S.E.2d at 220.

8. *Id.* at 306-07 n.1, 528 S.E.2d at 220 n.1. Carruthers was also indicted on two counts of felony murder, possession of a knife during the commission of a crime against the person of another, theft by taking a motor vehicle, and possession of a firearm during the commission of the theft of a motor vehicle. *Id.*

9. *Id.* at 307, 528 S.E.2d at 220.

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

Genesis, and Matthew. Carruthers' counsel objected to the prosecutor's use of these biblical references. The trial court, however, overruled the objections and permitted the passages to be used.<sup>11</sup>

In closing arguments, the state focused on the issue of deterrence. Making direct references to biblical passages, the prosecutor contended it was imperative that society deter criminals by imposing a death sentence on those who kill other people.<sup>12</sup> Specifically, the prosecutor argued:

Deterrence is very important and the Bible suggests to us why deterrence is appropriate. Romans tells us that every person is subject to the governing authority, every person is subject. And in Matthew it tells us, who sheddeth man's blood by man shall his blood be shed for in the image of God made [he] man. For all they who take the sword shall die by the sword, and this is a message that is very clear, that society must deter criminals.<sup>13</sup>

After arguments were heard, on March 29, the jury fixed the sentence for the malice murder at death. The trial court then sentenced Carruthers to death.<sup>14</sup>

Carruthers filed a motion for a new trial in April and amended that motion twice before it was denied by the court on February 3, 1999.<sup>15</sup> Following the denial of the motion, this appeal was brought on June 24, 1999.<sup>16</sup>

## II. LEGAL BACKGROUND

The Georgia Supreme Court has addressed the issue of the proper scope of closing arguments a number of times. In dealing with this issue the court has been guided by statutory provisions and precedent. These general guiding principles are worth

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11. *Id.*

12. *Id.*

13. *Id.* In a footnote, the Georgia Supreme Court noted that the passage, "Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man," is from the book of Genesis. *Id.* at 308 n.3, 528 S.E.2d at 221 n.3.

14. *Id.* at 307 n.1, 528 S.E.2d at 220 n.1. The trial court vacated the felony murder convictions by operation of law and sentenced Carruthers to consecutive prison sentences of twenty years for theft by taking a motor vehicle, five years for the possession of a knife during the commission of a crime against the person of another, and five years for the possession of a firearm during the commission of the theft of a motor vehicle. *Id.*

15. *Id.* The original motion was filed on April 14, 1998, and it was amended on September 21, 1998, and again on January 19, 1999. *Id.*

16. *Id.*

consideration before a more in depth evaluation of recent developments is undertaken.

Importantly, the Official Code of Georgia Annotated ("O.C.G.A.") requires that the Georgia Supreme Court conduct an independent review of all death sentences.<sup>17</sup> Particularly, with regard to the issue of the permissible scope of arguments in the sentencing phase of capital cases, the Code states the court shall determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor."<sup>18</sup> This determination requires a careful review of the entire record to discover the existence of any unauthorized factors that might have affected the ultimate decision to impose a death sentence.<sup>19</sup> Undoubtedly, a close examination of the arguments made by counsel is well within the purview of what is required by this statute.<sup>20</sup>

In addition to this statutory guidance, the court has been aided in addressing the general issue of the permissibility of passionate arguments by reference to a key case from 1983. Grappling with arguments designed to appeal to the emotions of the jury in a capital case, the court in *Conner v. State*<sup>21</sup> held that "argument by the prosecutor which 'dramatically appeals' to such legitimate emotional response is not 'constitutionally intolerable.'"<sup>22</sup> The court reasoned that the imposition of the death penalty necessarily involved a certain degree of emotional response and that it was not, and could never be, "a wholly rational, calculated, or logical process."<sup>23</sup> While *Conner* did not deal with direct references to religious texts, it did permit an appeal to emotion to play a very broad role.<sup>24</sup>

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17. O.C.G.A. § 17-10-35(a) (1998).

18. *Id.* § 17-10-35(c)(1).

19. See *Conner v. State*, 251 Ga. 113, 117, 303 S.E.2d 266, 272-73 (1983).

20. *Id.* at 118, 303 S.E.2d at 273.

21. 251 Ga. 113, 303 S.E.2d 266 (1983).

22. *Id.* at 122, 303 S.E.2d at 276.

23. *Id.* at 121, 303 S.E.2d at 275. This reasoning comes from an extended look at Justice Stewart's treatment of the purposes of the death penalty and his discussion of the concept of retribution in *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

24. 251 Ga. at 122, 303 S.E.2d at 276. The court made this position obvious, stating, "We think it is clear that neither the Eighth Amendment nor OCGA § 17-10-35(c)(1) (Code Ann. § 27-2537) forbids a death penalty based in part on an emotional response to factors in evidence which implicate valid penological justifications for the imposition of the death penalty." *Id.*

With this guidance, the court has addressed the narrower topic of religious references in closing arguments of the sentencing phase of capital cases in several important opinions. These opinions tend to show, when analyzed together, that the court has developed a uniform and structured way of resolving this issue. In these opinions, the court consistently made determinations regarding three key elements: (1) an evaluation of the proper or improper nature of the references that were made; (2) a consideration of whether a timely objection was raised by defense counsel; and (3) a consideration of whether the allowance of the references by the trial court constituted reversible error. Because these determinations were made with regard to varying religious references that were characterized by the court in different ways, and because the circumstances under which the references were made differed from case to case, these relatively recent opinions provide an important context within which the *Carruthers* opinion can be examined.

One type of religious reference that the court has addressed involved what could be characterized as a response to religious-oriented arguments made by defense counsel. In *Todd v. State*,<sup>25</sup> the court held that responsive religious references were not improper.<sup>26</sup> The court conceded that arguments for the imposition of the death penalty based on the defendant's religion would be improper; however, when a defendant has offered evidence in mitigation regarding his postarrest church attendance, a prosecutor is permitted to question the "genuineness of the defendant's 'jail-house' religious conversion."<sup>27</sup> Additionally, the majority noted defendant failed to raise a timely objection to the references that he later contended were improper.<sup>28</sup> This failure set the standard of review as a determination of whether or not the argument in reasonable probability changed the result of the trial, rather than a question of whether the argument was objectionable.<sup>29</sup> Applying this

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25. 261 Ga. 766, 410 S.E.2d 725 (1991).

26. *Id.* at 768 n.2, 410 S.E.2d at 728 n.2.

27. *Id.* The sincerity of a defendant's claimed rehabilitation can be considered for sentencing. *Id.*

28. *Id.* at 767, 410 S.E.2d at 728.

29. *Id.* (citing *Ford v. State*, 255 Ga. 81, 90, 335 S.E.2d 567 (1985), *vacated on other grounds by Ford v. Georgia*, 479 U.S. 1075 (1987)).

standard, the court did not find sufficient prejudice to reverse.<sup>30</sup>

Disagreeing with the majority's reasoning in *Todd*, Justice Benham wrote a noteworthy dissent addressing, among other things, the religious references of the prosecutor.<sup>31</sup> Characterizing the references as more than simple responses to the defense's argument, Justice Benham found several arguments that he considered to be prejudicially improper. First, the prosecutor contended the State was entitled to "Old Testament Retribution."<sup>32</sup> Additionally, the prosecutor "disparaged mercy as a sentencing consideration" with references to the New Testament and quoted the biblical passage, "[h]e who sheddeth the blood of man, by man shall his blood be shed."<sup>33</sup> Justice Benham reasoned that these arguments, along with other arguments regarding the enforcement of the "laws of the Bible," not only improperly appealed to religious affiliations but also "urged the jury to apply a law other than that of Georgia as given to the jury by the trial court."<sup>34</sup> Furthermore, he contended allowing these arguments constituted a denial of defendant's right to due process and was a clear violation of the guidelines in O.C.G.A. section 17-10-35, prohibiting the imposition of the death penalty with passion and prejudice.<sup>35</sup> Though well reasoned, Justice Benham's dissent did not change the way the court approached what it characterized as responsive religious references.

In *Crowe v. State*,<sup>36</sup> the court again held arguments to be permissible given the context in which they were made.<sup>37</sup> The prosecutor contended that "the Bible says that you shall be put to death if you kill somebody."<sup>38</sup> The court considered these references in the context of the arguments made by defendant in mitigation, which "consisted largely of appeals to religion."<sup>39</sup> In this context, the court viewed the references made by the

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30. *Id.* at 768, 410 S.E.2d at 728.

31. *Id.* at 774-78, 410 S.E.2d at 732-35.

32. *Id.* at 776, 410 S.E.2d at 733-34 (Benham, J., dissenting).

33. *Id.*, 410 S.E.2d at 734.

34. *Id.*

35. *Id.*

36. 265 Ga. 582, 458 S.E.2d 799 (1995).

37. *Id.* at 593, 458 S.E.2d at 811.

38. *Id.*

39. *Id.* Defendant called as witnesses different ministers and fellow church goers who testified as to defendant's religious involvement and activities. *Id.*

prosecutor as a reasonable means of countering the defense's contentions and did not consider them to be part of an improper argument to impose the death penalty based on a religious command.<sup>40</sup> The court further noted that defendant failed to object to the references in a timely fashion and, on appeal, did not succeed in showing a reasonable probability that the arguments changed the result of the trial.<sup>41</sup> Thus, allowing the arguments did not constitute reversible error.<sup>42</sup>

Not all religious references in closing arguments have been characterized by the court as responsive. A second major type of reference the court has considered is an explanatory reference, as in *Christenson v. State*.<sup>43</sup> There, the prosecutor referred to retribution as "[w]hat we learned in Sunday School as an 'eye for an eye and a tooth for a tooth.'"<sup>44</sup> The court held this type of religious reference was simply an explanation of the notion of retribution and was not improper.<sup>45</sup> Unfortunately, the court did not provide an extended analysis of its reasoning.<sup>46</sup>

The court did provide at least some reasoning for its view on explanatory religious references in the later case of *Hill v. State*.<sup>47</sup> The court held that a prosecutor could argue inferences from the evidence, though the inferences might not be those the defendant would like to have drawn.<sup>48</sup> While the court again recognized the impermissible nature of arguments that might urge an imposition of the death penalty based on the religion of the defendant or on the teachings of a particular religion, the court relied on the reasoning in *Conner* to support their decision to allow broad latitude regarding allusions made in arguments.<sup>49</sup> Finally, the court noted that, even had the

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40. *Id.* The court considered the references to have been permissible allusions to "principles of divine law." *Id.* (quoting *Hill v. State*, 263 Ga. 37, 45-46, 427 S.E.2d 770, 778 (1993)).

41. *Id.*

42. *Id.*

43. 261 Ga. 80, 402 S.E.2d 41 (1991).

44. *Id.* at 89-90, 402 S.E.2d at 50.

45. *Id.* at 89, 402 S.E.2d at 50.

46. *Id.* The court did cite to *Walker v. State*, 254 Ga. 149, 327 S.E.2d 475 (1985) and to *Conner v. State*, 251 Ga. 113, 303 S.E.2d 266 (1983) apparently relying on the reasoning in *Conner* that supported a great deal of latitude in closing arguments. *Id.*

47. 263 Ga. 37, 427 S.E.2d 770 (1993).

48. *Id.* at 45, 427 S.E.2d at 778.

49. *Id.* at 46, 427 S.E.2d at 778. "[C]ounsel may 'bring to his use in the discussion of the case well-established historical facts and may allude to such principles of divine law relating to transactions of men as may be appropriate to the case.'" *Id.* at 46-47, 427

religious references been improper, there was no timely objection made by the defense, and the brevity of the references did not permit a finding of sufficient prejudice to warrant reversal.<sup>50</sup>

This reasoning with regard to religious references characterized by the court as explanatory in nature was applied again, even more recently, in *Greene v. State*.<sup>51</sup> In *Greene*, the court held "references to principles of divine law related to the penological justifications for the death penalty," including the issues of retribution and mercy, permissible in light of defendant's crime.<sup>52</sup> Relying on the reasoning set forth in *Hill* and *Conner*, the court noted that, while directly urging the death penalty by making references to the defendant's religion or to religious commands would be improper, prosecutors are not prohibited from making general references to "divine law relating to transactions of men as may be appropriate to the case."<sup>53</sup> Furthermore, in keeping with precedent, the court addressed the other key factors.<sup>54</sup> The court stated that defendant's failure to object to the arguments and the insufficient showing that the arguments, even if improper, changed the result of the trial were additional reasons for not reversing the sentence.<sup>55</sup>

Importantly, the court was not unanimous in its reasoning and treatment of the references in *Greene*.<sup>56</sup> Chief Justice Benham wrote an important dissent in which he characterized the prosecutor's references as going beyond explanation.<sup>57</sup> Chief Justice Benham contended the prosecutor "implicitly urge[d] the jury that certain passages of the Bible, as interpreted by the Baptist faith, mandate imposition of the death penalty."<sup>58</sup> He

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S.E.2d at 778 (quoting *Conner*, 251 Ga. at 122-23, 303 S.E.2d at 276).

50. *Id.* at 45-46, 427 S.E.2d at 778. The references appeared on approximately one page of a 49-page argument transcript, and the sufficiency requirement to be satisfied for reversal was a showing that the improper argument changed the result of the trial. *Id.* (citing *Todd v. State*, 261 Ga. at 768, 410 S.E.2d at 728).

51. 266 Ga. 439, 469 S.E.2d 129, *rev'd on other grounds*, 519 U.S. 145 (1996).

52. *Id.* at 450, 469 S.E.2d at 141.

53. *Id.*, 469 S.E.2d at 140.

54. *Id.* at 449-50, 469 S.E.2d at 140-41.

55. *Id.*, 469 S.E.2d at 141.

56. *Id.* at 452, 469 S.E.2d at 142 (Benham, C.J., concurring in part and dissenting in part).

57. *Id.* at 459, 469 S.E.2d at 146.

58. *Id.* The prosecutor described himself as "a plain old country Baptist," then proceeded to argue the biblical meaning of retribution and mercy with repeated references back to defendant. *Id.*, 469 S.E.2d at 146-47.

urged that neither the reasoning of the court in *Hill* (explanatory references), nor its rationale from *Crowe* (responsive references), should be construed as proscribing the court's "ability to find error in new prosecutorial approaches to religious discourse."<sup>59</sup> Furthermore, in Chief Justice Benham's view, the failure of the defense to object should not have prevented reversal in this case because the magnitude of the "improprieties," in reasonable probability, altered the outcome of the sentencing phase.<sup>60</sup>

Chief Justice Benham's reasoning from *Greene* offers insight into the court's approach to yet another serious type of religious reference. In his dissent, Chief Justice Benham characterized the prosecutor's argument as containing direct religious references with language of command.<sup>61</sup> When the court has characterized arguments as containing these types of direct, commanding references, it treats these references differently than arguments containing responsive and explanatory references.<sup>62</sup>

In *Hammond v. State*,<sup>63</sup> another relatively recent opinion, the court dealt with arguments consisting of religious references that could be characterized as being of a direct, commanding nature.<sup>64</sup> The prosecutor argued that defendant had not only violated the law of Georgia, but that defendant had also violated the "law of God."<sup>65</sup> The court reasoned that this reference, and other religious references requiring the imposition of the death penalty, constituted an "inflammatory" appeal to private beliefs and violated O.C.G.A. section 17-10-30, in urging a death sentence for all homicides.<sup>66</sup> Thus, the court held these direct, commanding references were improper.<sup>67</sup> The court did not stop with that determination, though: It noted defendant's failure to object to the references in a timely manner and the likelihood that the references did not affect

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59. *Id.*, 469 S.E.2d at 147.

60. *Id.* at 460, 469 S.E.2d at 147.

61. *Id.* at 459, 469 S.E.2d at 146.

62. *See, e.g.*, *Hammond v. State*, 264 Ga. 879, 452 S.E.2d 745 (1995).

63. 264 Ga. 879, 452 S.E.2d 745 (1995).

64. *Id.* at 886, 452 S.E.2d at 753.

65. *Id.* The prosecutor argued, "He violated the law of God. Thou shalt not kill." *Id.*

66. *Id.* "OCGA § 17-10-30 provides that only when the jury finds the existence, beyond a doubt, of at least one specified statutory aggravating circumstance, may the death penalty be imposed." *Id.*

67. *Id.* at 886-87, 452 S.E.2d at 753.

the outcome.<sup>68</sup> Given these factors, the court ultimately held that even improper religious arguments cannot be grounds for reversal when there has been no objection to those arguments and there has not been a sufficient showing that the references changed the result of the trial.<sup>69</sup>

### III. RATIONALE OF THE COURT

In *Carruthers v. State*, the court squarely addressed its past treatment of religious references in closing arguments and set forth its primary concerns.<sup>70</sup> The court first noted one serious problem with direct religious references is that they "inject the often irrelevant and inflammatory issue of religion into the sentencing process."<sup>71</sup> Additionally, because many religious texts and teachings urge a sentence of death for killing, the use of those arguments can "diminish the jury's sense of responsibility" and "imply that another, higher law should be applied in capital cases, displacing the law in the court's instructions."<sup>72</sup>

The court acknowledged allowing brief, passing references, but contrasted these references with direct references to particular religious commands for imposing the death penalty, which the court was unwilling to permit.<sup>73</sup> Furthermore, the court distinguished the mandates of Georgia law from the mandates of certain religious teachings by noting that Georgia law provides a jury with the discretion to recommend different sentences and has strict procedural protections that allow the imposition of the death penalty only when certain requirements and circumstances have been shown.<sup>74</sup>

Pointing out that it had repeatedly disapproved of the use of direct biblical and religious quotes urging the imposition of the death penalty, the court noted the continued use of these references by prosecutors and the ongoing willingness on the

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68. *Id.*

69. *Id.* This outcome seems to make it clear that the mere presence of a reference deemed to be improper does not necessarily warrant reversal. The determination of the other factors is critical.

70. 272 Ga. 306, 528 S.E.2d 217 (2000).

71. *Id.* at 309, 528 S.E.2d at 221.

72. *Id.* (quoting *People v. Wrest*, 839 P.2d 1020, 1028 (Cal. 1992)).

73. *Id.*, 528 S.E.2d at 221-22.

74. *Id.*, 528 S.E.2d at 222. See O.C.G.A. §§ 17-10-30 to -31.1 (1998).

part of trial courts to permit these types of arguments.<sup>75</sup> The court did, however, identify a very important difference between *Carruthers* and past opinions dealing with these issues.<sup>76</sup> In *Carruthers* the defendant anticipated the argument that was later made by the prosecutor and actually filed a motion in limine to exclude the argument.<sup>77</sup> The court explained the significance of the trial court's denial of this motion by indicating that the standard for review was no longer an issue of "whether the improper argument in reasonable probability changed the result of the trial, but simply whether the argument was objectionable and prejudicial."<sup>78</sup> While the court conceded that it might be difficult to draw a bright line between references that are acceptable and those that are not, the prosecutor here directly quoted religious mandates as requiring a death sentence, and this was a clear violation.<sup>79</sup> Ultimately, the court stated that "[l]anguage of command and obligation from a source other than Georgia law should not be presented to a jury."<sup>80</sup>

The court concluded that the denial of defendant's motion to exclude these improper arguments amounted to a violation of his due process rights protected by O.C.G.A. section 17-10-35 and by the state and federal constitutions.<sup>81</sup> Also, because these violations could not be determined to have been harmless, the court reversed the death sentence and remanded the case for resentencing.<sup>82</sup>

Justice Carley wrote separately as the sole dissenter in this opinion.<sup>83</sup> While he concurred with the court's decision to affirm *Carruthers*' convictions, he dissented on the reversal of the death sentence.<sup>84</sup> Justice Carley argued that the court deviated from precedent that had permitted references to religious teachings.<sup>85</sup> He also responded to the majority's

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75. 272 Ga. at 310, 528 S.E.2d at 222.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* "In citing specific passages, [the prosecutor] invoked a higher moral authority and diverted the jury from the discretion provided to them under state law." *Id.*

80. *Id.* (citing *Jones v. Kemp*, 706 F. Supp. 1534, 1560 (N.D. Ga. 1989)).

81. *Id.* at 311, 528 S.E.2d at 222-23.

82. *Id.*, 528 S.E.2d at 223.

83. *Id.* at 318, 528 S.E.2d at 227 (Carley, J., concurring in part and dissenting in part).

84. *Id.* at 318, 528 S.E.2d at 227.

85. *Id.*, 528 S.E.2d at 227-28. Justice Carley pointed to *Greene*, 266 Ga. at 449, 469 S.E.2d at 140, *Conner*, 251 Ga. at 122, 303 S.E.2d at 276, and *Hill*, 263 Ga. at 46, 427

emphasis on Carruthers' objection at trial by expressing his understanding that prior rulings indicated a defendant's failure to object was only an alternative reason for not overturning death sentences that had involved religious references.<sup>86</sup> He argued that the prosecutor's comments were not objectionable and prejudicial because the prosecutor did not reference the Bible as a "separate and independent source of authority for returning a death sentence" and that the comments were made for "assisting the jury in understanding 'why deterrence is appropriate.'"<sup>87</sup> Justice Carley further contended that the subject of deterrence had long been a permissible topic for argument and that the broad range of discussion generally allowed in closing arguments should surely authorize an explanation of deterrence as having its "roots in religious teachings."<sup>88</sup>

#### IV. IMPLICATIONS

In the years since *Christenson*<sup>89</sup> and leading up to the decision in *Carruthers*, the Georgia Supreme Court has approached this issue in a variety of different ways. Because of this variation, it is difficult to predict with a high degree of certainty what this opinion will mean for the determination of whether religious references in closing argument warrant reversal of a death sentence.

In spite of this difficulty, however, it would appear that the issue of a timely objection at trial is a key element to be considered.<sup>90</sup> The court made it very clear that this case was unlike the previous cases addressing this issue because the defense counsel in *Carruthers* filed an anticipatory motion in limine to exclude any religious references and objected to the references when they were actually made.<sup>91</sup> Defendants in

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S.E.2d at 778, to support his contention that religious references were not prohibited altogether, but rather only certain direct mandates were circumscribed. *Id.*

86. *Id.* at 319, 528 S.E.2d at 228.

87. *Id.*

88. *Id.* at 320, 528 S.E.2d at 229. "In the State's argument, the Bible did not supplant applicable statutes, but rather explicated those enactments." *Id.*

89. See *supra* notes 43-46 and accompanying text.

90. 272 Ga. at 310, 528 S.E.2d at 222.

91. *Id.*

previous cases failed to object at trial to the religious references.<sup>92</sup>

Given this analysis, it would follow that in future cases, when religious references have been made by the prosecution and the defense has unsuccessfully objected to those references, the court will review the references to determine if they were of an objectionable and prejudicial nature. The standard of review for reversal will not be a determination of whether the argument "in reasonable probability changed the result of the trial."<sup>93</sup>

Arguably, the reliability of this prediction is unclear when one considers Justice Carley's contention that the matter of an objection is simply an alternative reason to be weighed.<sup>94</sup> However, Justice Carley is by himself in this view, for the moment. One would hope his prediction of arbitrary judicial discretion is not the future treatment to be expected.<sup>95</sup>

Undoubtedly, the additional reasoning of Justice Carley's dissent regarding the permissible use of religious references to explain the "historical and moral underpinnings" of various statutorily sanctioned punishments will be an issue that the court must address more directly in the future.<sup>96</sup> The court in *Carruthers* characterized the references made as direct quotations that constituted an invocation of an authority other than Georgia law.<sup>97</sup> By characterizing the comments this way, the court dealt with the references as impermissible "[l]anguage of command and obligation" and avoided an analysis of the viability of the references if viewed as explanatory.<sup>98</sup>

The impact the decision in *Carruthers* will have on future cases involving religious references is thus difficult to assess, at least in terms of ultimate outcomes. The court has, however, set forth some very important factors that will likely be carefully considered in determining the appropriateness and permissibility of religious references in closing arguments of capital cases.

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92. *Id.*

93. *Id.*

94. *Id.* at 319, 528 S.E.2d at 228 (Carley, J., concurring in part and dissenting in part).

95. *See id.* at 321, 528 S.E.2d at 229. "Henceforth, death sentences are subject to reversal if an emotional argument by the State does not satisfy the sensibilities of a majority of the Justices on this Court." *Id.*

96. *Id.* at 320, 528 S.E.2d at 229.

97. *Id.* at 310, 528 S.E.2d at 222.

98. *Id.* Under the reasoning of cases like *Greene*, this sort of explanatory characterization might well result in the references being held permissible.

The focus will be on (1) the directness of the references, (2) the commanding or explanatory nature of the language used in the references, and (3) the presence or absence of the defense's objection to the references. When these references appear to be direct references, with commanding language and defense makes an objection at trial, the court will likely find proper grounds for reversal.

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