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Death Penalty

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I. INTRODUCTION

Between June 1, 2011 and May 31, 2012, the Georgia Supreme Court addressed several significant points of law in the context of death penalty litigation. The court grappled with two challenging speedy trial issues, one constitutional and the other statutory, in *Phan v. State*[1] and *Walker v. State*,[2] respectively. The court announced a new rule on the calculation of time limitations for impeachable convictions in *Clay v. State*.[3] The court revisited the subject of burden of proof in mental retardation cases in *Stripling v. State*.[4] And the court articulated a clear standard for evaluating prejudice in a claim of ineffective assistance of counsel at the sentencing phase of a death penalty trial in *Humphrey v. Morrow*.[5]

II. CASES

In *Phan v. State*,[6] the Georgia Supreme Court addressed, on interim review for the second time, a pretrial case that has been pending in Gwinnett County since March of 2005.[7] The claim advanced by Phan in this appeal was that his constitutional right to a speedy trial had

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1. 290 Ga. 588, 723 S.E.2d 876 (2012) ("*Phan II*").
2. 290 Ga. 696, 723 S.E.2d 894 (2012).
3. 290 Ga. 822, 725 S.E.2d 260 (2012).
4. 289 Ga. 370, 711 S.E.2d 665 (2011).
5. 289 Ga. 864, 717 S.E.2d 168 (2011).
6. 290 Ga. 588, 723 S.E.2d 876 (2012).
7. *Id.* at 588, 723 S.E.2d at 878.

been violated by pretrial delay attributable to a "'systemic breakdown' in the public defender system" that essentially left him unrepresented.[8]

Two lawyers were appointed by the Georgia Public Defender Standards Council (GPDSC) to represent Phan, but funding issues came to a head in 2007 when counsel requested approval for travel to Vietnam to develop evidence for both phases of trial. In 2009, Phan "filed a constitutional speedy trial demand and a motion to dismiss for the State's failure to provide sufficient resources for the defense."[9] By April 2009, GPDSC had also stopped paying for attorney fees. The trial court denied the motions, and the case was certified for interim review.[10] The court remanded the case with directions for the trial court to conduct a full hearing and enter findings on each of the *Barker v. Wingo*[11] factors.[12] The trial court conducted a full hearing pursuant to the court's directive in 2010 and, upon completion of that hearing, again denied the motion to dismiss and ordered that Phan's attorneys "be removed as counsel and that staff attorneys from the capital defender division [of GPDSC] be 'immediately assigned.'"[13]

At the outset, the court framed the case as one "address[ing] the consequences of a financially strained indigent defense system operating within a recession-era [s]tate budget."[14] The court ultimately engaged in a fact-specific analysis of the speedy trial claim and affirmed the trial court's refusal to dismiss the indictment.[15] The opinion hinged on the court's weighing of the second *Barker v. Wingo* factor: "reasons for the delay."[16] Under this factor, the court evaluated Phan's claim that the reason for the delay was a "systemic 'breakdown in the public defender system'" that ought to weigh against the State.[17] Citing its recent decision in *Weis v. State*[18] (another death penalty interim appeal), the court affirmed the trial court's conclusion that such a breakdown had not

8. *Id.* at 590-91, 723 S.E.2d at 880 (quoting Vermont v. Brillon, 129 S. Ct. 1283, 1286 (2009)).

9. *Id.* at 590, 723 S.E.2d at 880.

10. *Id.* at 588-90, 723 S.E.2d at 878-81.

11. 407 U.S. 514 (1972).

12. Phan v. State, 287 Ga. 697, 699-700, 699 S.E.2d 9, 11 (2010) ("*Phan I*"); *see Barker*, 407 U.S. at 530.

13. *Phan II*, 290 Ga. at 592, 723 S.E.2d at 880-81.

14. *Id.* at 588, 723 S.E.2d at 878.

15. *Id.* at 599, 723 S.E.2d at 885.

16. *Id.* at 595, 723 S.E.2d at 883.

17. *Id.* at 594, 723 S.E.2d at 882 (quoting *Vermont*, 129 S. Ct. at 1286).

18. 287 Ga. 46, 50, 694 S.E.2d 350, 355 (2010).

occurred because there were other public defender counsel available to represent Phan.[19]

Phan also raised a claim that "his rights to counsel and due process [were] violated by the trial court's decision to replace [his counsel of choice] with staff attorneys from [GPDSC]."[20] The court rejected these claims, reiterating its earlier pronouncements establishing that a defendant's choice of appointed counsel can be overridden where sufficient "countervailing considerations" exist.[21] The court distinguished *Grant v. State*[22] (yet another death penalty interim appeal) where it concluded that "involving local counsel in [the] case was not a sufficient 'countervailing consideration' to justify removal of defendant's preferred counsel."[23] Here, the court found "compelling 'countervailing considerations'" insofar as "retaining current counsel would perpetuate the funding problems that have plagued this case thus far."[24] The court also noted that one of Phan's lawyers "relocated his practice to Charleston, South Carolina."[25] The court concluded this opinion by noting that it does not "endorse[] . . . the system that has led us down this tortuous path" and offering its "hope that those within the branches of government empowered to remedy these institutional problems will make it a priority to do so."[26]

In *Walker v. State*,[27] the court addressed a statutory speedy trial claim on interim review.[28] The dispute in this case centered on the proper interpretation of the language in the Official Code of Georgia Annotated (O.C.G.A.) section 17-7-171(b)[29] requiring absolute discharge "[i]f more than two regular terms of court are convened and adjourned after the term at which the demand for speedy trial is filed."[30] The court ultimately concluded, contrary to its prior cases, that the language in question should be construed to mean that three terms of court must convene and adjourn prior to an acquittal.[31] Accordingly, the court

19. *Phan II*, 290 Ga. at 595, 723 S.E.2d at 882-83.
20. *Id.* at 597, 723 S.E.2d at 884.
21. *Id.* (quoting *Weis*, 287 Ga. at 50, 694 S.E.2d at 355); *see also* Davis v. State, 261 Ga. 221, 222, 403 S.E.2d 800, 801 (1991).
22. 278 Ga. 817, 607 S.E.2d 586 (2005).
23. *Phan II*, 290 Ga. at 597-98, 723 S.E.2d at 884 (citing *Grant*, 278 Ga. at 817, 607 S.E.2d at 587).
24. *Id.* at 597, 723 S.E.2d at 884.
25. *Id.*
26. *Id.* at 598-99, 723 S.E.2d at 885.
27. 290 Ga. 696, 723 S.E.2d 894 (2012).
28. *Id.* at 696, 723 S.E.2d at 895.
29. O.C.G.A. § 17-7-171(b) (2008 & Supp. 2012).
30. *Walker*, 290 Ga. at 698, 723 S.E.2d at 896; *see also* O.C.G.A. § 17-7-171(b).
31. *Walker*, 290 Ga. at 701, 723 S.E.2d at 898.

affirmed the trial court's denial of Walker's motion to dismiss as "premature."[32]

The State filed a notice of intent to seek the death penalty against Walker during the third full term of court after she filed her timely demand for trial pursuant to O.C.G.A. § 17-7-171.[33] During the fourth term, Walker filed a motion for discharge and acquittal, which the trial court denied as premature based on the fact that the filing of a notice of intent to seek the death penalty during the third term had the effect of "reset[ting] the statutory speedy trial clock, which will not start over 'until the convening of the first term following the completion of pretrial review proceedings in the Supreme Court under Code Section 17-10-35.1.'"[34]

Acknowledging its interpretation to the contrary in previous "dicta" as well as a tension within the statutory language itself, the court ultimately concluded that interpreting the statute to mandate discharge and acquittal after only two terms of court would render the words "more than" mere surplusage.[35] The three-vote concurrence would have adhered to the court's earlier interpretation that only two terms need be convened and adjourned to warrant discharge.[36] The concurrence, however, also noted that Walker's counsel expressed no objection to the State's motion for continuance during the first term of court "subject to the fact that we filed a demand for a speedy trial."[37] The concurrence would have affirmed the trial court on the independent ground that this particular representation by counsel did not constitute "strict compliance" with the statutory requirement of announcing "ready for trial" at "both terms of court."[38]

In *Clay v. State*,[39] the court addressed a complicated series of suppression issues on interim review as well as an issue of first impression dealing with how to calculate the ten-year period beyond which a prior conviction becomes presumptively inadmissible for impeachment purposes pursuant to O.C.G.A. § 24-9-84.1(b).[40] Clay asserted in the trial court that if the prior conviction at issue was more than ten years old before the time of the testimony to be impeached, the

32. *Id.*
33. *Id.* at 696-97, 723 S.E.2d at 895; O.C.G.A. § 17-7-171.
34. *Walker*, 290 Ga. at 697, 723 S.E.2d at 895-96; *see also* O.C.G.A. § 17-7-171(c).
35. *Walker*, 290 Ga. at 696, 698, 723 S.E.2d at 895-97.
36. *Id.* at 701-02, 723 S.E.2d at 899 (Melton, J., concurring).
37. *Id.* at 702-03, 723 S.E.2d at 899.
38. *Id.* at 703-04, 723 S.E.2d at 900.
39. 290 Ga. 822, 725 S.E.2d 260 (2012).
40. *Id.* at 822, 725 S.E.2d at 263-64; O.C.G.A. § 24-9-84.1(b) (2006).

stricter balancing standard of subsection (b) should apply.[41] The State, on the other hand, contended that the appropriate "end point" for calculation purposes was "the date of the crimes for which Clay will be tried in this case."[42] The trial court sided with Clay on this issue and the supreme court affirmed, "adopt[ing] the date the witness testifies or the evidence of the prior conviction is introduced as the end point for determining whether a conviction falls within the ten-year limit prescribed by [O.C.G.A.] § 24-9-84.1(b)."[43]

The prior ten-year-old convictions at issue in this particular appeal were Clay's own convictions that the State sought to introduce against him in the event that he elected to testify.[44] The trial court found "the probative value of Clay's prior convictions substantially outweighs their prejudicial effect" despite their age.[45] Clay contended on appeal, however, that the trial court's failure to enumerate specific factors supporting this conclusion amounted to an abuse of discretion.[46] The court agreed and remanded, holding that "a trial court must make an on-the-record finding of the specific facts and circumstances upon which it relies in determining that the probative value of a prior conviction that is more than ten years old substantially outweighs its prejudicial effect. . . ."[47]

The suppression issues in the case primarily dealt with a series of four statements made by Clay to police officers.[48] The trial court found, among other factors, that the *Miranda* warnings were read to Clay "in such a 'super-speed' manner that the warnings likely could not have been identified 'as anything more than gibberish.'"[49] The trial court also concluded that the first three statements were involuntary as a result of Clay's level of intoxication. Despite the fact that it was obtained in violation of Clay's *Miranda* rights, the trial court ruled the fourth statement admissible based on the fact that it was given voluntarily. The court reversed on the narrow issue of the admissibility of this fourth statement, reiterating the general rule that statements obtained in violation of *Miranda* are not admissible for any purpose other than impeachment.[50]

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41. *Clay*, 290 Ga. at 832, 725 S.E.2d at 270; O.C.G.A. § 24-9-84.1(b).
42. *Clay*, 290 Ga. at 832, 725 S.E.2d at 270.
43. *Id.* at 835, 725 S.E.2d at 272; O.C.G.A. § 24-9-84.1(b).
44. *Clay*, 290 Ga. at 832, 725 S.E.2d at 270.
45. *Id.* at 835, 725 S.E.2d at 272.
46. *Id.* at 835-36, 725 S.E.2d at 272.
47. *Id.* at 838, 725 S.E.2d at 274.
48. *Id.* at 822, 725 S.E.2d at 264.
49. *Id.* at 825, 725 S.E.2d at 266.
50. *Id.* at 827-28, 725 S.E.2d at 267.

The court also affirmed the trial court's order below suppressing items of bloody clothing seized from Clay's "personal effects bag" in the hospital.[51] The State advanced two theories in support of the seizure of this evidence: inevitable discovery and plain sight.[52] The court ultimately rejected both.[53] The State's inevitable discovery argument was that an inventory search of Clay's belongings at his formal arrest would have revealed the clothing items.[54] The court rejected this argument based on the fact that the State failed to produce any evidence of "routine inventory procedures for booking searches" and, therefore, "failed to meet its burden" to establish by a preponderance of the evidence that discovery was inevitable.[55] The court also rejected the State's plain view argument on the grounds that "all that was in plain view when [the police] seized the bagged clothing from the counter was the pink and white personal effects bag itself . . . ."[56]

In *Stripling v. State*,[57] the court grappled with issues framed by a pending mental retardation retrial and resentencing ordered in connection with a 1988 crime.[58] The court's focus was on the constitutionality of Georgia's statutory requirement that a defendant establish his own mental retardation by proof beyond a reasonable doubt in order to be exempted from the death penalty.[59] The court ultimately adhered to its earlier holding in *Head v. Hill*,[60] that such a requirement is, in fact, constitutional.[61]

The trial court made three rulings that form the basis of this interim review. First, the trial court ruled that the beyond-a-reasonable-doubt standard was unconstitutional, and a defendant may only be required to prove retardation by a preponderance of the evidence.[62] This ruling was reversed.[63] Second, the trial court ruled that, despite the fact that Stripling bore the burden of proof at his retrial on mental retardation, "the State would make the first opening statement . . . and that the

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51. *Id.* at 830, 725 S.E.2d at 268-69.
52. *Id.* at 828, 830, 725 S.E.2d at 267, 269.
53. *Id.* at 830-31, 725 S.E.2d at 269.
54. *Id.* at 828, 725 S.E.2d at 268.
55. *Id.* at 830, 725 S.E.2d at 269.
56. *Id.* at 831, 725 S.E.2d at 269.
57. 289 Ga. 370, 711 S.E.2d 665 (2011).
58. *Id.* at 370, 711 S.E.2d at 667.
59. *Id.* at 370-71, 711 S.E.2d at 667-68 (citing Atkins v. Virginia, 536 U.S. 304, 321 (2002)).
60. 277 Ga. 255, 262, 587 S.E.2d 613, 622 (2003).
61. *Stripling*, 289 Ga. at 374, 711 S.E.2d at 669.
62. *Id.* at 370-71, 289 S.E.2d at 667.
63. *Id.* at 372-73, 289 S.E.2d at 668.

State would be entitled to make the first and last of the closing arguments."[64] This ruling was affirmed.[65] And third, the trial court ruled that it "lacked the authority" to consider a plea of guilty but mentally retarded under the circumstances of this case.[66] The court found that the trial court did, in fact, have the authority to accept such a plea, but only to the extent that the State was in agreement with it.[67]

The court commenced its discussion of the burden of proof question with the observation that it had "previously addressed this very issue."[68] Although *Atkins v. Virginia*[69] announced a categorical Eighth Amendment bar to the execution of mentally retarded defendants, the court relied yet again on "the specific statement by the [United States] Supreme Court that it had not established any particular procedural standards that must be applied to mental retardation."[70] The court also reiterated its characterization of the heightened burden of proof as a provision that "serve[s] to *define* the category of mental retardation within Georgia law."[71]

The court noted in passing that the trial court's rejection of the beyond-a-reasonable-doubt standard "relied on a decision by a three-judge panel of the Eleventh Circuit Court of Appeals . . . that has since been vacated for rehearing en banc."[72] The vacated panel decision in *Hill v. Schofield*[73] did, in fact, appear to establish that a beyond-a-reasonable-doubt standard was fundamentally incompatible with the categorical bar announced in *Atkins*.[74] Several months after the court's opinion in *Stripling*, the panel decision in *Hill* was reversed by the United States Court of Appeals for the Eleventh Circuit sitting en banc in *Hill v. Humphrey*.[75]

The en banc Eleventh Circuit's opinion was explicitly predicated on the fact that *Hill* was a case that came before the court for habeas, as opposed to direct, review.[76] The Eleventh Circuit explained:

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64. *Id.* at 374, 289 S.E.2d at 670.
65. *Id.* at 375, 289 S.E.2d at 670.
66. *Id.* at 371, 289 S.E.2d at 667.
67. *Id.* at 376, 289 S.E.2d at 670.
68. *Id.* at 371, 289 S.E.2d at 668.
69. 536 U.S. 304, 313 (2002).
70. *Stripling*, 289 Ga. at 372, 289 S.E.2d at 668.
71. *Id.* at 373, 289 S.E.2d at 668.
72. *Id.* at 371, 289 S.E.2d at 667 (citing Hill v. Schofield, 608 F.3d 1272 (11th Cir. 2010), *vacated*, 625 F.3d 1313 (11th Cir. 2010)).
73. 608 F.3d 1272 (11th Cir. 2010).
74. *Id.* at 1283.
75. 662 F.3d 1335 (11th Cir. 2011).
76. *Id.* at 1361.

> Even if the State of Georgia has somehow inappropriately struck the balance between two competing interests in § 17-7-131(c)(3), and even if the Georgia Supreme Court's decision upholding that statute is considered incorrect or unwise by a federal court, AEDPA [(the Antiterrorism and Effective Death Penalty Act of 1996)] precludes a federal court from imposing its will, invalidating that state statute as unconstitutional, and granting federal habeas relief in the absence of "clearly established" federal law, which the United States Supreme Court admonishes is *a holding of that Court.* There is no United States Supreme Court case holding that a reasonable doubt burden of proof for claims of mental retardation violates the Eighth Amendment. *Atkins* did not ask or answer that question.[77]

So, although the United States Supreme Court denied a writ of certiorari in *Hill* on June 4, 2012, the Court has not, to date, been called upon to make a formal pronouncement in a case on direct appeal about whether or not Georgia's burden of proof is consistent with its decision in *Atkins*.[78] In other words, although the Georgia Supreme Court here "reaffirm[ed] that Georgia's statutory definition of mental retardation, with its requirement that only mental deficiencies capable of proof beyond a reasonable doubt, is not unconstitutional under *Atkins*,"[79] the possibility remains open that the United States Supreme Court could ultimately take a different view.

In *Humphrey v. Morrow*,[80] the court reversed a grant of sentencing relief by a state habeas court on the grounds of ineffective assistance of trial counsel and reinstated Morrow's death sentence.[81] On a cross appeal filed by Morrow, the court affirmed the habeas court's rejection of Morrow's jury pool composition claims as well as his complaint regarding the form of his sentencing verdict.[82]

The court rejected the State's contention that prejudice flowing from alleged ineffective assistance of counsel at a death penalty sentencing should be measured by the same standard as that used for any other ineffective assistance claim.[83] Citing to the United States Supreme Court's opinion in *Wiggins v. Smith*,[84] the court held that prejudice in the context of a death penalty sentencing is established where "'there is

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77. *Id.* at 1360; O.C.G.A. § 17-7-131(c)(3) (2008 & Supp. 2012).
78. Hill v. Humphrey, 132 S. Ct. 2727 (2012).
79. *Stripling*, 289 Ga. at 374, 711 S.E.2d at 669.
80. 289 Ga. 864, 717 S.E.2d 168 (2011).
81. *Id.* at 864-65, 717 S.E.2d at 171.
82. *Id.*
83. *Id.* at 866-67, 717 S.E.2d at 172-73.
84. 539 U.S. 510 (2003).

a reasonable probability that at least one juror would have struck a different balance' in his or her final vote regarding sentencing following extensive deliberations among the jurors."[85]

Even under this standard, however, the court remained unpersuaded by the habeas court's finding that Morrow's counsel failed to discover and present important mitigating evidence at trial, ultimately concluding that "much of the habeas court's order is simply a recitation of the same basic life history that was outlined for the jury at trial."[86] The court did note new evidence tending to establish that Morrow's sister was sexually molested by a caretaker but dismissed the significance of this evidence on the grounds that Morrow's sister "did not tell Morrow about the abuse until after he was arrested, meaning it could not have affected his conduct during the murders."[87] The court also noted new evidence that Morrow himself may have been "raped by his cousin as a child," but concluded that this evidence "would not have been given great weight by the jury" because it was ultimately based only on "his own statement to a psychologist."[88] The court likewise rejected the notion that the testimony of a new "independent forensic expert" could have affected the outcome of Morrow's trial, finding both that "the jury would, like us, favor the testimony of the State's experts" and that, in any event, the new expert's "version would not be significantly mitigating."[89]

The first cross appeal claim addressed by the court related to the composition of Morrow's grand and traverse jury pools.[90] The court affirmed the habeas court's finding that the jury pool composition issues in this case were "decided adversely to Morrow on direct appeal" and were therefore barred by res judicata.[91] Although Morrow presented new evidence in the form of updated U.S. Census data to establish underrepresentation, the court concluded that this evidence constituted "merely . . . a new *means* by which the relevant facts might be proven" as opposed to "new underlying facts" that would justify revisiting the claim on habeas corpus.[92]

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85. *Morrow*, 289 Ga. at 867, 717 S.E.2d at 173 (quoting *Wiggins*, 539 U.S. at 537).
86. *Id.* at 871-72, 717 S.E.2d at 176.
87. *Id.* at 871, 717 S.E.2d at 175.
88. *Id.* at 871-72, 717 S.E.2d at 176 (citing Whatley v. Terry, 284 Ga. 555, 565, 668 S.E.2d 651, 659 (2008)).
89. *Id.* at 870, 874, 717 S.E.2d at 175, 177.
90. *Id.* at 875, 717 S.E.2d at 178.
91. *Id.* at 875-76, 717 S.E.2d at 178.
92. *Id.* at 875-76, 717 S.E.2d at 178.

Another of Morrow's cross appeal claims related to the form of the jury's sentencing verdict.[93] Morrow complained that the verdict in his case was improper because the verdict form "did not clearly indicate that the jury had unanimously recommended a death sentence for either of the two individual murders but, instead, simply found multiple statutory aggravating circumstances regarding each of the individual murders and recommended one unified death sentence."[94] The court found that this claim was barred by procedural default.[95] Although a showing of ineffective assistance of appellate counsel could have overcome this bar, the court found that the failure to litigate this claim on direct appeal was not ineffective because the claim had not been preserved by objection at trial.[96] The court then went on to reject the notion that the failure to preserve this claim was ineffective "because [Morrow] has failed to show that an objection at trial would have in reasonable probability led to anything other than the imposition of *two* death sentences."[97]

In *Pierce v. State*,[98] the court struck an illegal sentence imposed following a guilty plea that was entered to avoid the death penalty.[99] Pierce pled guilty to two murders and an aggravated assault and was sentenced to consecutive terms of life in prison without the possibility of parole.[100] The court held that because the trial court failed "to make a specific, express finding of a statutory aggravating circumstance beyond a reasonable doubt," as required by former O.C.G.A. § 17-10-32.1(b),[101] Pierce's life without parole sentence could not stand.[102]

The State argued that because O.C.G.A. § 17-10-32.1 had been repealed[103] to allow for the imposition of life without the possibility of parole in all murder cases regardless of whether they involve statutory aggravating circumstances, a remand would be "an exercise in futility."[104] The court disagreed based on the plain language of the statute indicating that the changes were not intended to apply retroactively.[105]

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93. *Id.* at 876-77, 717 S.E.2d at 179.
94. *Id.* at 876, 717 S.E.2d at 179.
95. *Id.*
96. *Id.* at 876-77, 717 S.E.2d at 179.
97. *Id.* at 877, 717 S.E.2d at 179.
98. 289 Ga. 893, 717 S.E.2d 202 (2011).
99. *Id.* at 896, 717 S.E.2d at 205.
100. *Id.* at 893-94, 717 S.E.2d at 203.
101. O.C.G.A. § 17-10-32.1 (1993).
102. *Pierce*, 289 Ga. at 896, 717 S.E.2d at 205.
103. O.C.G.A. § 17-10-32.1 (1993 & Supp. 2012).
104. *Pierce*, 289 Ga. at 896, 717 S.E.2d at 205.
105. *Id.* at 896, 717 S.E.2d at 205.

Because Pierce's offense occurred prior to the effective date of the new law, the court remanded his case for resentencing, noting that the trial court would be free to consider imposing a sentence of life without parole on remand so long as it first "finds the existence of at least one aggravating circumstance."[106]

III. CONCLUSION

The court's death penalty jurisprudence did not include review of a single new death sentence on direct appeal in our sample period. The interim review cases generated some interesting and significant points of law but did not announce any new fundamental legal principles specific to the litigation of death penalty cases in Georgia. The court continues to express its frustration over complications relating to the provision of counsel and appropriate resources in death penalty cases. The court also further stakes out its position on the burden of proof question in mental retardation cases and, thereby, frames the issue for possible review in the United States Supreme Court.

106. *Id.* at 896-97, 717 S.E.2d at 205.

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