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Death Penalty

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by Josh D. Moore*

I. INTRODUCTION

The Georgia Supreme Court addressed two death sentences on direct appeal in this survey period,[1] affirming both of them, and addressed four more death penalty cases at various stages of collateral review, leaving death sentences intact in all but one case. Claims of ineffective assistance of counsel frequently dominated the court's discussion of these cases, playing a central role in all but two of them. The court, however, also addressed some important issues touching on mental-health evaluations and evidence, lethal injection, death qualification, and victim-impact testimony.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

The court dealt with ineffective assistance of counsel claims in four different death penalty cases. Lower courts had actually granted relief on this ground in three out of the four cases: *State v. Worsley*, *Humphrey v. Nance*, and *Humphrey v. Walker*. Of these three cases, the court ultimately affirmed the lower court's judgment only in *Walker* and reversed in both *Nance* and *Worsley*, reinstating the death sentences.[2] In the fourth case, *Sears v. Humphrey*, the state habeas court denied relief twice, both prior and subsequent to a remand from the United

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1. For an analysis of Georgia death penalty law during the prior survey period, see Josh D. Moore, *Death Penalty, Annual Survey of Georgia Law*, 65 MERCER L. REV. 93 (2013).

2. *See* Humphrey v. Walker, 294 Ga. 855, 855, 757 S.E.2d 68, 71 (2014); State v. Worsley, 293 Ga. 315, 316, 745 S.E.2d 617, 619 (2013); Humphrey v. Nance, 293 Ga. 189, 191, 744 S.E.2d 706, 710 (2013).

States Supreme Court in 2010,[3] and the Georgia Supreme Court affirmed.[4]

A. The Failure to Present All Available Mitigation Evidence

After the Georgia Supreme Court declined to hear an appeal from the denial of Demarcus Sears's state habeas petition, the United States Supreme Court granted certiorari in 2010 and remanded the case by a five-vote per curiam opinion, concluding that the state habeas court had erroneously "determined it could not speculate as to what the effect of additional evidence would have been" because "Sears' counsel did present *some* mitigation evidence during Sears' penalty phase."[5] The crux of the Court's 2010 holding in *Sears v. Upton*[6] can be fairly summarized as follows: "We certainly have never held that counsel's effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant."[7]

This observation set the stage for several opinions this year from the Georgia Supreme Court, including *Sears v. Humphrey*,[8] grappling with the question of how to properly analyze ineffective assistance of counsel claims where some, or even a substantial amount of, mitigation evidence was actually presented at trial.[9] The court's clearest articulation of its position on this important question came in *Humphrey v. Nance*,[10] where it held, "Trial counsel are not constitutionally deficient as a matter of law simply because they do not present *all* reasonably available mitigating evidence, even if the omitted evidence is consistent with their chosen strategy."[11] The court echoed this conclusion in *State v. Worsley*,[12] observing simply that "counsel is not required to present all mitigating evidence."[13]

Though there is nothing irreconcilable between the United States Supreme Court's holding that a claim of ineffective assistance of counsel may not be rejected purely based on the fact that *some* mitigation evidence was presented at trial and the Georgia Supreme Court's

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3. *See* Sears v. Upton, 561 U.S. 945, 946 (2010).
4. Sears v. Humphrey, 294 Ga. 117, 117-18, 751 S.E.2d 365, 368 (2013).
5. *Upton*, 561 U.S. at 946.
6. 561 U.S. 945 (2010).
7. *Id.* at 955.
8. 294 Ga. 117, 751 S.E.2d 365 (2013).
9. *See, e.g., id.*; *Nance*, 293 Ga. 189, 744 S.E.2d 706.
10. 293 Ga. 189, 744 S.E.2d 706 (2013).
11. *Id.* at 192, 744 S.E.2d at 711 (emphasis added).
12. 293 Ga. 315, 745 S.E.2d 617 (2013).
13. *Id.* at 326, 745 S.E.2d at 626.

holding that such a claim is not guaranteed to succeed based purely on the fact that *some* available mitigation evidence was omitted, a decided tension nonetheless begins to emerge in the treatment of these claims.[14] This tension appears to manifest itself most clearly in the way the two different courts value or dismiss new mitigation evidence developed after trial, a difference of approach perhaps best illustrated by contrasting the United States Supreme Court's per curiam opinion in *Upton* with Justice Scalia's derisive dissent.[15]

B. Competing Theories of Mitigation

In *Sears*, the Georgia Supreme Court hews very closely to Justice Scalia's dissent in *Upton*,[16] where Justice Scalia dismissed much of the new evidence Sears presented as "incredible" and "sill[y]," ultimately concluding that "it is impossible to say that substituting the 'deprived-childhood-*cum*-brain-damage' defense for the 'good-middle-class-kid-who-made-a-mistake' defense would probably have produced a different verdict."[17] The Georgia Supreme Court appears to share Justice Scalia's deep skepticism about the comparative efficacy of this former class of evidence, and this skepticism is clearly reflected in the court's holdings in both *Sears* and *Nance*.[18]

In *Sears*, for example, the Georgia Supreme Court rejected the notion that proof of brain damage and drug use might have affected the result of the trial, concluding that "a reasonable jury could have viewed evidence that Sears suffers from frontal lobe damage as aggravating" and that expert testimony about the possible long-term effects of drug abuse was "a factor that a reasonable jury could consider aggravating."[19] The United States Supreme Court, on the other hand, looking at more-or-less the same record, had previously observed that "[c]ompetent counsel should have been able to turn some of the adverse evidence into a positive–perhaps in support of a cognitive deficiency mitigation theory."[20] In other words, one gets the sense that these two courts are able to look at a single set of facts and circumstances and see two radically different pictures.

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14. *See generally Upton*, 561 U.S. 945; *Worsley*, 293 Ga. 315, 745 S.E.2d 617.
15. *See Upton*, 561 U.S. at 951, 957 (Scalia, J., dissenting).
16. *See Sears*, 294 Ga. at 159-60, 751 S.E.2d at 395.
17. *Upton*, 561 U.S. at 964 (Scalia, J., dissenting).
18. *See generally Sears*, 294 Ga. 117, 751 S.E.2d 365; *Nance*, 293 Ga. 189, 744 S.E.2d 706.
19. *Sears*, 294 Ga. at 153, 155, 751 S.E.2d at 391, 393-94.
20. *Upton*, 561 U.S. at 951.

The court in *Sears* also, and perhaps more significantly, faulted the mitigation evidence presented by habeas counsel for being inconsistent with the evidence presented at trial.[21] This criticism also played an important role in the court's opinions in *Nance* and, to a lesser extent, in *Worsley*.[22] In *Nance*, for example, the court observed that "evidence of frontal lobe damage to explain Nance's behavior at the time of the murder would have undermined their mitigation theory that he was a changed man,"[23] and the court in *Worsley* noted that "some of the [new] testimony contradicted the testimony of [Worsley's expert at trial]."[24]

These opinions reflect an unwillingness on the part of the Georgia Supreme Court, one clearly shared by Justice Scalia, to fault trial counsel for appearing to eschew one colorable mitigation theory in favor of another.[25] This unwillingness appears to be particularly acute in cases where a "positive" mitigation theory was pursued, to one extent or another, at trial–the "changed man" in *Nance* and the "good-middle-class-kid-who-made-a-mistake" in *Humphrey*–and evidence, such as brain damage or trauma, is subsequently discovered or more fully developed that would lend itself to painting a darker, and arguably more frightening, picture of the defendant.[26]

C. Deference to the Lower Courts on IAC

Humphrey v. Walker[27] represents the only case from this survey period where the Georgia Supreme Court ultimately affirmed a lower court's finding of ineffective assistance of counsel.[28] The court concluded its analysis by explaining,

> In the light of the factual findings of the habeas court – to which we must defer, insofar as they have some evidentiary support – [] we cannot say that the habeas court erred when it determined that Walker

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21. *Sears*, 294 Ga. at 156-59, 751 S.E.2d at 393-95.

22. *See Worsley*, 293 Ga. at 327-28, 745 S.E.2d at 627; *Nance*, 293 Ga. at 214, 744 S.E.2d at 725.

23. *Nance*, 293 Ga. at 217, 744 S.E.2d at 727.

24. *Worsley*, 293 Ga. at 326, 745 S.E.2d at 626.

25. *See generally Upton*, 561 U.S. at 957-64 (Scalia, J., dissenting); Sears, 294 Ga. 117, 751 S.E.2d 365; *Worsley*, 293 Ga. 315, 745 S.E.2d 617; *Nance*, 293 Ga. 189, 744 S.E.2d 706.

26. *See Sears*, 294 Ga. at 129-30, 751 S.E.2d at 376; *Nance*, 293 Ga. at 205, 744 S.E.2d at 719; *but see* Perkins v. Hall, 288 Ga. 810, 817-19, 708 S.E.2d 335, 343-44 (2011) (relying on new evidence of trauma and brain damage to reverse a habeas court's rejection of an ineffective assistance claim at sentencing).

27. 294 Ga. 855, 757 S.E.2d 68 (2014).

28. *Id.* at 860-61, 876, 757 S.E.2d at 74, 84.

> was denied the effective assistance of counsel with respect to an investigation and evaluation of his competence.[29]

Although this language is consistent with the court's oft-repeated characterization of its proper role as "accept[ing] the habeas court's factual findings unless clearly erroneous" while "independently apply[ing] the legal principles to the facts,"[30] the court, nonetheless, appears to have extended somewhat more deference in *Walker* than in other cases. For example, in weighing the persuasiveness of Walker's mental-health evidence, the court made the following observation: "The habeas court was in the best position to assess the credibility of [the psychologist], and it obviously found him quite credible."[31] Such statements are nowhere to be found in the court's discussion of the witnesses presented after trial in *Nance* or *Worsley*.[32]

In *Sears*, the court quoted its recent opinion in *Humphrey v. Morrow*[33] for the seemingly straightforward proposition that "our assessment of how a jury might have reacted to the additional evidence that [Sears] has presented in the habeas court is an assessment of the legal question of prejudice, which we perform de novo."[34] The court clarified this principle by explaining that it means the court "must conduct [its] *own* reweighing of the mitigating and aggravating evidence."[35] This particular "reweighing" requirement arguably did not apply in *Walker*, where the question was framed not by the jury's determination of penalty, but rather by the question of competency to stand trial.[36]

As discussed earlier,[37] a deep skepticism for the efficacy of certain types of "double-edged" mitigation evidence, especially in conjunction with an inversely high value placed on the aggravating factors present, has seemed to drive the court's analysis of ineffective assistance of counsel claims focused on the sentencing phase of death penalty

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29. *Id.* at 874, 757 S.E.2d at 83.

30. *Sears*, 294 Ga. at 122, 751 S.E.2d at 371.

31. *Walker*, 294 Ga. at 876, 757 S.E.2d at 84.

32. *See generally Worsley*, 293 Ga. 315, 745 S.E.2d 617; *Nance*, 293 Ga. 189, 744 S.E.2d 706.

33. 289 Ga. 864, 717 S.E.2d 168 (2011).

34. *Sears*, 294 Ga. at 137, 751 S.E.2d at 381 (alteration in original) (quoting *Morrow*, 289 Ga. at 870, 717 S.E.2d at 175).

35. *Id.* at 122, 751 S.E.2d at 371 (emphasis added).

36. *See Walker*, 294 Ga. at 857-58, 757 S.E.2d at 72; *see also Perkins*, 288 Ga. at 823, 708 S.E.2d at 346-47 (rejecting ineffective assistance of counsel claim focused on competency but granting relief for ineffective assistance at sentencing).

37. *See infra* Part II.B.

trials.[38] In both *Nance* and *Worsley*, the court ultimately substituted its own judgment for that of the lower courts, which actually heard the evidence at issue.[39] Because the question of "how a jury might have reacted to the additional evidence" has been characterized as a pure conclusion of law, this substitution of judgment need not be justified by a finding of either clear error or abuse of discretion.[40]

The painstaking factual development of these lengthy opinions reveals that the court has taken its task seriously, but the court has never waivered from its position that the conclusions of a lower court on the question of prejudice at sentencing, or, to put it another way, on the "impactfulness" of new mitigation evidence, are due no deference on appeal.[41] This approach has resulted in a trend, noted even among observers outside the legal community, of reinstating death sentences where lower reviewing courts have reversed them on the grounds of ineffective assistance of counsel at sentencing.[42] The court's opinions in *Nance* and *Worsley* continue that trend.[43]

D. Silent or Ambiguous Record on Ineffective Assistance

In *Worsley*, the court reminded litigants of yet another potential pitfall in a claim of ineffective assistance of counsel, namely that "a silent or ambiguous record is not sufficient to overcome the presumption of reasonable performance, and it is Appellee's burden to make a complete and clear record."[44] The court observed, in this regard, that only one of Worsley's trial lawyers was called by the appellee at the motion for new trial, "so the record is altogether silent about what the other trial counsel knew and did not know."[45] Regarding the trial counsel who did testify, the court noted that the "Appellee never asked him what he

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38. *See, e.g.*, *Sears*, 294 Ga. at 149, 751 S.E.2d at 388 (finding no prejudice in failure to present evidence of brain impairment based on "the following reasons: (1) the weakness of much of the evidence upon which Sears' mental health experts relied to support their testimony and diagnoses; (2) the aggravating potential of this evidence; (3) the testimony's inconsistency with the evidence at trial; and (4) the strength of the aggravating circumstances in Sears' case.").

39. *See generally Worsley*, 293 Ga. 315, 745 S.E.2d 617; *Nance*, 293 Ga. 189, 744 S.E.2d 706.

40. *Sears*, 294 Ga. at 137, 751 S.E.2d at 381 (quoting *Morrow*, 289 Ga. at 870, 717 S.E.2d at 175).

41. *See, e.g.*, *id.*

42. *See* Bill Rankin, *Crime and Punishment; High Court Tends to Back Death Sentences*, ATLANTA J.-CONST., Dec. 2, 2013, at A1.

43. *See generally Worsley*, 293 Ga. at 315, 745 S.E.2d at 617; *Nance*, 293 Ga. at 189, 744 S.E.2d at 706.

44. *Worsley*, 293 Ga. at 325 n.10, 745 S.E.2d at 625 n.10.

45. *Id.*

knew, and what he did not know, about the testimony that family members might give."[46] Under these circumstances, the court found "*no evidence whatsoever* that trial counsel was unaware of the testimony that the sisters or other family members were prepared to give at trial."[47]

III. LETHAL INJECTION

The near-universal unwillingness of major pharmaceutical companies to provide medications for use in executions has led to a national shortage of lethal-injection drugs that, in turn, has created great difficulties for states like Georgia that would attempt to carry out these sentences.[48] As a consequence of this dilemma, not a single execution was carried out during this survey period.[49]

In *Owens v. Hill*,[50] the court addressed the constitutionality of section 42-5-36(d)(2) of the Official Code of Georgia Annotated (O.C.G.A.),[51] a new statutory provision that categorically prevents disclosure of, among other things, "identifying information . . . of any person or entity that manufactures, supplies, compounds, or prescribes the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence."[52]

Many states, including Georgia, have been forced to turn to compounding pharmacies to supply the necessary drugs for lethal injection as a result of the pharmaceutical companies' refusal to provide them.[53] The dispute in *Hill* was framed by the State's refusal to comply with a

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46. *Id.*

47. *Id.* In this same vein, the court rejected the claim that Worsley's trial counsel were ineffective "for their failure to speak with any of Appellee's schoolteachers" on the grounds that "no schoolteacher testified at the motion for new trial. So, even if the failure to speak with a schoolteacher was unreasonable, Appellee cannot show any prejudice whatsoever as a result of that failure." *Id.* at 328 n.12, 745 S.E.2d at 627 n.12.

48. *See* Ed Pilkington, *Georgia rushes through executions before lethal injection drugs expire*, THE GUARDIAN, Feb. 21, 2013, http://www.theguardian.com/world/2013/feb/21/georgia-executions-lethal-injection-drug-pentobarbital.

49. The survey period is from June 1, 2013 to May 31, 2014. Andrew Cook was executed on February 21, 2013, and Marcus Wellons was executed on June 17, 2014. *U.S.A. Executions-1977-Present: Georgia*, DEATH PENALTY USA, http://deathpenaltyusa.org/usa/state/georgia.htm (last visited Sept. 12, 2014).

50. 295 Ga. 302, 758 S.E.2d 794 (2014).

51. O.C.G.A. § 42-5-36(d)(2) (2014).

52. *Id.*; *see also Hill*, 295 Ga. at 302, 758 S.E.2d at 796 (holding that maintaining "the confidentiality of . . . identifing information of the persons . . . involved in executions" is not unconstitutional).

53. *Compounding Pharmacies and Lethal Injections*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/compounding-pharmacies (last visited Sept. 12, 2014).

demand for "[s]ealed discovery of the identity of the compounding pharmacy and the supply chain and manufacturer(s) of any and all ingredients used to produce the lethal drug compound to be injected into Warren Hill."[54] Hill argued that such disclosure was necessary to make a showing of "substantial risk of serious harm" pursuant to *Baze v. Rees*,[55] and the lower court granted him injunctive relief.[56]

After dealing with numerous jurisdictional issues that are not specific to the death penalty, the court was ultimately left unimpressed by Hill's prospects of success on his Eighth Amendment claim under *Baze*.[57] The following passage from the majority opinion best encapsulates the court's overall perspective on the confidentiality statute at issue:

> We are mindful of Hill's argument about enhancing the public debate on the death penalty in general and on the participation of specific persons and entities in executions in particular, and we recognize that disclosing the compounding pharmacy that produces lethal injection drugs might enhance the ability of Hill and the general public to more fully satisfy themselves that Georgia's method of execution is humane. However, we conclude that Georgia's execution process is likely made more timely and orderly by the execution-participant confidentiality statute and, furthermore, that significant personal interests are also protected by it. Accordingly, we also conclude that it therefore, on balance, plays a positive role in the functioning of the capital punishment process.[58]

Justice Benham, writing for the two-vote dissent, explained,

> I write because I fear this State is on a path that, at the very least, denies Hill and other death row inmates their rights to due process and, at the very worst, leads to the macabre results that occurred in Oklahoma. There must be certainty in the administration of the death penalty.[59]

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54. *Hill*, 295 Ga. at 303, 758 S.E.2d at 797.

55. Baze v. Rees, 553 U.S. 35, 50 (2008) (quoting Farmer v. Brennan, 511 U.S. 825, 842 (1994)).

56. *Hill*, 295 Ga. at 302, 309, 312, 758 S.E.2d at 796, 801, 802-03 (quoting *Baze*, 553 U.S. at 50).

57. *Id.* at 307, 312, 758 S.E.2d at 799, 802-03.

58. *Id.* at 317, 758 S.E.2d at 806.

59. *Id.* at 318, 758 S.E.2d at 806-07 (Benham, J., dissenting). Justice Benham describes the Oklahoma incident at the beginning of his opinion. *Id.*

IV. REFUSAL TO COOPERATE WITH MENTAL HEALTH EVALUATIONS

The defendants in both *Sears v. Humphrey* and *Humphrey v. Walker* refused to submit to pretrial mental health evaluations,[60] a phenomenon perhaps not so rare as an outside observer might suspect. In *Sears*, the fact that "[b]oth attorneys testified that, after consulting with counsel, it was Sears' choice not to be evaluated" clearly played a role in the court's determination that counsel were not ineffective for failing to have him evaluated by a mental health expert.[61] In this regard, the court cited *Strickland v. Washington*[62] for the proposition "that it is proper for counsel to base their actions on 'informed strategic choices made by the defendant.'"[63]

Although the court in *Walker* did not necessarily fault counsel for failing to override their client's refusal to submit to an evaluation, it did, nonetheless, conclude that "a reasonable lawyer would not have abandoned the pursuit so quickly, just because Walker was opposed to the development of evidence of his mental health."[64] Unlike *Sears*, where the court observed that "without any indication that [Sears] was suffering from any significant, noticeable disorder, trial counsel made a reasonable strategic decision not to have him evaluated by a mental health expert,"[65] the court in *Walker* found that "each lawyer had good reasons to be concerned about the competence of their client, and each lawyer, in fact, had such concerns."[66]

Another significant distinction between *Sears* and *Walker* is that, unlike trial counsel in *Sears*, Walker's trial counsel had retained the services of a psychologist prior to trial. The problem, however, was that they neglected to consult with him after their client refused to submit to an evaluation.[67] Here, the court concluded, lay the flaw in their representation, namely their complete failure to explore "feasible alternatives to a personal examination."[68] The court stated, "If counsel had so consulted with the psychologist, they would have learned that he

60. *Walker*, 294 Ga. at 861, 757 S.E.2d at 74; *Sears*, 294 Ga. at 128, 751 S.E.2d at 375.
61. *Sears*, 294 Ga. at 129-30, 751 S.E.2d at 376.
62. 466 U.S. 668 (1984).
63. *Sears*, 294 Ga. at 129, 751 S.E.2d at 376 (quoting *Strickland*, 466 U.S. at 691).
64. *Walker*, 294 Ga. at 874, 757 S.E.2d at 83.
65. *Sears*, 294 Ga. at 130, 751 S.E.2d at 376 (internal quotation marks omitted).
66. *Walker*, 294 Ga. at 862, 757 S.E.2d at 75.
67. *Id.* at 861, 757 S.E.2d at 74.
68. *Id.*

could render an opinion about the mental health of their client even without Walker submitting to an examination."[69]

Perhaps the most salient point to emerge from the court's opinion in *Walker*, however, relates not to the complex duties and responsibilities of counsel in cases where clients refuse to be evaluated by a mental health expert, but rather to the broader question of the admissibility of mental-health expert testimony in a case where the defendant is not "personally" evaluated.[70] The position taken by the warden in *Walker* was that the expert testimony admitted in the habeas court would have been inadmissible in the trial court "to the extent that Walker refused to submit to an examination by an expert for the State."[71] The court, however, rejected this contention, explaining that

> the disallowance of such testimony seems mostly justified by notions of a level playing field, that is, the idea that the accused ought not be permitted to offer expert testimony based upon his own (possibly self-serving) statements and, at the same time, deny the State a fair opportunity to challenge those statements.[72]

Since the defense expert "based his opinions principally on the observations of Walker by third parties, to whom the State had access," the court held that his testimony "would not have been inadmissible *in a competence trial* simply because Walker would not submit to an examination."[73] In so holding, the court explicitly left unresolved the question of whether such expert testimony would be permissible "in the guilt-innocence or sentencing phases of trial."[74] This unresolved question could prove to be a very important one in the future.

V. DEATH PENALTY FOR NON-HOMICIDE OFFENSES

In *Sears v. Humphrey*, because his victim was killed not in Georgia but in Kentucky, Demarcus Sears was sentenced to die for the crime of kidnaping, which, the court explained in a footnote, is apparently permitted by O.C.G.A. § 17-10-30(b)(2)[75] when the crime "was committed while the offender was engaged in the commission of the capital felon[y] of murder."[76] The United States Supreme Court likewise

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69. *Id.*
70. *See id.* at 873-74, 757 S.E.2d at 82-83.
71. *Id.* at 873, 757 S.E.2d at 82.
72. *Id.* at 873-74, 757 S.E.2d at 82.
73. *Id.* at 874, 757 S.E.2d at 83 (emphasis added).
74. *Id.*
75. O.C.G.A. § 17-10-30(b)(2) (2013).
76. *Sears*, 294 Ga. at 117 & n.1, 757 S.E.2d at 368 & n.1 (alteration in original) (quoting Potts v. State, 261 Ga. 716, 720, 410 S.E.2d 89, 93 (1991)); *see also* O.C.G.A. § 17-

referred to this issue only in a footnote in *Sears v. Upton*, observing that "Sears has raised a categorical Eighth Amendment challenge to the constitutionality of his death sentence for a kidnaping offense, which we decline to reach. And any jurisdictional or constitutional issue with respect to Georgia's ability to execute Sears for a murder occurring in Kentucky is not before us."[77]

Many observers have assumed that the United States Supreme Court's holding in *Kennedy v. Louisiana*[78] put an end to the death penalty for non-homicide offenses.[79] It would appear, however, that this remains to be seen. In *Sears*, the court cited its previous opinions–*Potts v. State*[80] and *Stanley v. State*[81]–in support of the contention that the death penalty remains permissible for this particular non-homicide offense.[82] Both of these cases, however, predate the announcement of the holding in *Kennedy* by more than a decade, and neither involved situations where the murder occurred outside the state of Georgia.[83]

VI. DEATH QUALIFICATION

In *Edenfield v. State*,[84] a difficult question relating to "case specific" death qualification of jurors split the court.[85] The opinion provides an informative glimpse into the way the court will apply the important principles it articulated in *Ellington v. State*,[86] a 2012 decision.[87] On appeal, Edenfield claimed "that the trial court erred when it refused to strike a prospective juror who said in voir dire that he 'couldn't consider the possibility of parole' for someone convicted of the murder if the murder involved the 'sexual abuse [of] a child.'"[88] Since the facts of the

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10-30(b)(2).

77. *Upton*, 561 U.S. at 947 n.2.

78. 554 U.S. 407 (2008).

79. *See id.* at 413 (holding that the Eighth Amendment prohibits the use of "the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim").

80. 261 Ga. 716, 410 S.E.2d 89 (1991).

81. 240 Ga. 341, 241 S.E.2d 173 (1977).

82. *Sears*, 294 Ga. at 117 n.1, 757 S.E.2d at 368 n.1; *see also Potts*, 261 Ga. at 720, 410 S.E.2d at 93-94; *Stanley*, 240 Ga. at 350, 241 S.E.2d at 179.

83. *See generally Potts*, 261 Ga. 716, 410 S.E.2d 89; *Stanley*, 240 Ga. 341, 241 S.E.2d 173.

84. 293 Ga. 370, 744 S.E.2d 738 (2013).

85. *Id.* at 393, 744 S.E.2d at 757.

86. 292 Ga. 109, 735 S.E.2d 736 (2012).

87. *See Edenfield*, 293 Ga. at 376-93, 744 S.E.2d at 746-57.

88. *Id.* at 379, 744 S.E.2d at 748 (alteration in original).

case did involve the brutal rape, torture, and eventual murder of a six-year-old child, Edenfield contended that he was entitled to a reversal.[89]

The court commenced its discussion by observing, "If that were all the prospective juror had said, perhaps Edenfield might be right."[90] According to the court, however, the prospective juror "said a great deal more in his voir dire, and based on *all* that he said, the trial judge found that he was qualified."[91] The relevant exchange between the juror and the trial judge is reproduced in its entirety in the opinion, but can be fairly summarized as follows: When asked by the trial court if he could consider all three of the punishments at issue, the potential juror responded,

> I, I could consider them[,] but if, if, if it turns out that the person had been convicted of a case where he had, was guilty of sexual abuse [of] a child[,] then I certainly wouldn't, wouldn't ever allow, I couldn't consider the possibility of parole because it could happen again. I, and I–

At this point, the trial judge stepped in, stating, "It would be fact driven. It would be depending upon the facts–," and the potential juror agreed that it "absolutely" would.[92]

Although conceding that the "rehabilitation" questioning in this case "did not *explicitly* reference [the juror's] earlier statement that he could not consider parole if a child was murdered and sexually abused," a majority of the court was ultimately "satisfied that the trial court in this case might reasonably have concluded that it did [relate back to the juror's statement]."[93] The two-vote dissent, on the other hand, would have held that "[t]he juror never once gave a response that retreated from his initial, firm position regarding the possibility of parole for cases involving child molestation."[94]

The entire court, in other words, seems to accept the proposition that a potential juror who would categorically refuse to consider the possibility of parole for a defendant convicted in a case where a child was murdered and sexually abused would not have been qualified to serve on this trial.[95] The disagreement between the majority and

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89. *Id.* at 370, 744 S.E.2d at 742.

90. *Id.* at 379, 744 S.E.2d at 748.

91. *Id.*

92. *Id.* at 381, 744 S.E.2d at 749 (alteration in original).

93. *Id.* at 386-87, 744 S.E.2d at 752-53 (emphasis added).

94. *Id.* at 395, 744 S.E.2d at 758 (Thompson, P.J., dissenting).

95. The majority suggested in a footnote that a potential juror's "predisposition against parole may not have the same implications under" the post-2009 sentencing statutes. *Id.* at 379 n.13, 744 S.E.2d at 748 n.13 (majority opinion). However, it is difficult to see why

dissent was over whether the record clearly established that this particular juror held such an emphatic view.[96] In this regard, the majority opinion includes the observation that "although the potential juror spoke the word 'certainly,' he also appears to have stammered as he spoke, which suggests, if anything, uncertainty and hesitation."[97]

The majority further elaborated that "[a]ppellate judges, after all, have only a cold record from which to size up a prospective juror, and they are in no position to assess whether a prospective juror spoke with assurance or uncertainty, enthusiasm or hesitation, candor or guile."[98] The court's ultimate conclusion, that the "ambiguity" of this record gave rise to a situation where "reasonable people" might "reasonably disagree about what is to be done" and that "the discretion here belongs to the trial court,"[99] is likely a good predictor of the court's general conceptual approach to this issue in the future.

VII. VICTIM IMPACT

In addition to perceived deficiencies in the presentation of mitigation evidence, the lower court in *State v. Worsley* also based its decision to grant a new trial on trial counsel's failure to object to improper victim impact testimony. The victim's mother and sister testified, without objection, that Worsley deserved the "maximum" and "ultimate" sentence for his crime.[100] The supreme court agreed that these comments violated "settled law that testimony by relatives of a victim concerning the appropriate sentence is not properly admissible in a death penalty case," but it found no legal prejudice and therefore reversed the lower court.[101]

The court based its conclusion that the admission of this improper victim impact sentence did not give rise to "a reasonable likelihood . . . that the outcome of the sentencing phase would have been different" on

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this would be so since O.C.G.A. § 17-10-31 currently provides that "where a statutory circumstance is found but a recommendation of death is not made, *the jury* shall decide whether to recommend a sentence of life imprisonment without parole or life imprisonment with the possibility of parole." O.C.G.A. § 17-10-31 (2013) (emphasis added).

96. *See generally Edenfield*, 293 Ga. 370, 744 S.E.2d 738. The dissent would have found that the trial judge "was operating under the mistaken belief that [the juror's unwillingness to consider parole] was not disqualifying because the particular 'fact' of child molestation had not *yet* been proven through the evidence." *Id.* at 395, 744 S.E.2d at 758 (Thompson, J., dissenting).

97. *Id.* at 381 n.14, 744 S.E.2d at 749 n.14 (majority opinion).

98. *Id.* at 379, 744 S.E.2d at 748.

99. *Id.* at 387-88, 744 S.E.2d at 753.

100. *Worsley*, 293 Ga. at 328, 745 S.E.2d at 627.

101. *Id.* at 328, 329, 745 S.E.2d at 627, 628.

the following five factors: (1) "the statements were only implied requests for the jury to recommend the death penalty;" (2) "the jury likely could have inferred that the testifying witnesses supported the decision of the State to seek the death penalty simply from the fact that the witnesses appeared in the sentencing phase to give victim-impact testimony;" (3) "the statements, though improper, did not consist of especially heated rhetoric and do not appear to have been especially inflammatory;" (4) "the improper statements were only a small part of victim-impact testimony that was, for the most part, properly admissible;" and (5) "the case for death was a strong one."[102] Had this issue been preserved by objection at trial, in contrast, the State would have needed to establish that the error was "harmless beyond a reasonable doubt" to prevail.[103]

VIII. IMPROPER SENTENCING ARGUMENT

In *Edenfield v. State*, Edenfield complained in his direct appeal that reversible error had occurred when the prosecutor referred to him as an "animal" in closing argument at the sentencing phase.[104] When defense counsel objected to this argument, the prosecutor "withdrew his remark and apologized to the jury for having made it," and the trial judge instructed the jurors to "disregard it entirely."[105] The court rejected this issue as a basis for reversing Edenfield's death sentence on appeal, explaining, "We have held that characterizing a defendant in closing arguments as an 'animal' is 'unnecessary and undesirable,' but we also have held that allowing such a remark is not always reversible error."[106]

IX. INTERIM REVIEW

Edenfield also complained that the trial court had committed error by refusing to certify legal issues in his case for interim review.[107] The court dismissed this claim by explaining that a trial court's refusal to grant interim review is, by statute, not appealable, "[a]nd in any event, Edenfield can show no harm from the denial of leave to seek interim review because he is free in this appeal to raise any issues that he might properly have raised in an application for interim review."[108]

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102. *Id.* at 328-29, 745 S.E.2d at 627-28.

103. *Id.* at 329, 745 S.E.2d at 628; *see also* Bryant v. State, 288 Ga. 876, 898, 708 S.E.2d 362, 383 (2011).

104. 293 Ga. at 391-92, 744 S.E.2d at 756.

105. *Id.* at 391, 744 S.E.2d at 756.

106. *Id.* at 391-92, 744 S.E.2d at 756.

107. *Id.* at 376, 744 S.E.2d at 746.

108. *Id.*; *see also* O.C.G.A. § 17-10-35.2 (2013).