Mercer Law Review

Volume 65
Number 1 *Annual Survey of Georgia Law*

Article 9

12-2013

Death Penalty

Josh D. Moore

Death Penalty

by Josh D. Moore*

The Georgia Supreme Court addressed numerous cases touching on the death penalty in our survey period,[1] including the review of four death sentences on direct appeal in *Ellington v. State*,[2] *Rice v. State*,[3] *Barrett v. State*,[4] and *Brockman v. State*.[5] Three of the death sentences reviewed on direct appeal were affirmed and one was reversed. The court also reversed the decision of a habeas court to vacate a death sentence in *Humphrey v. Riley*.[6] Several other cases involving the death penalty at various stages of trial were also decided and will be addressed further as warranted.[7] Most of the court's decisions involved the application and refinement of existing precedent, but the court did provide some significant new guidance regarding the proper scope of jury selection in death penalty trials, holding that the questioning of prospective jurors for sentencing bias cannot be limited to the formal

---

* Appellate Director, Capital Defender Division of the Georgia Public Defender Standards Council. University of Michigan (A.B., 1991); Harvard Law School (J.D., 1995).

The Author would like to thank Belle-Anne Bowen (Mercer University, Walter F. George School of Law, 2014 J.D. candidate) for her invaluable research assistance.

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*, 64 MERCER L. REV. 109 (2012).

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

3. 292 Ga. 191, 735 S.E.2d 755 (2012).

4. 292 Ga. 160, 733 S.E.2d 304 (2012).

5. 292 Ga. 707, 739 S.E.2d 332 (2013).

6. 291 Ga. 534, 731 S.E.2d 740 (2012).

7. In addition to the cases discussed herein, one death penalty case reached the Georgia Supreme Court from the denial of an extraordinary motion for a new trial. *Drane v. State*, 291 Ga. 298, 728 S.E.2d 679 (2012). In *Drane*, the defendant moved for a new trial eighteen years after his conviction based upon his co-defendant's 2010 confession to a parole officer. The court affirmed the denial of the motion based upon its conclusion that Drane had not exercised due diligence in obtaining the co-defendant's testimony, having "shown absolutely nothing to demonstrate that he took diligent steps to ascertain what testimony [the co-defendant] might have been willing to give during the more than [seventeen] years *since* [the co-defendant's] trial." *Id.* at 304, 728 S.E.2d at 683 (emphasis in original).

allegations within an indictment but rather should be broad enough to reach any "critical fact" of the case.

I. CASE-SPECIFIC VOIR DIRE

The proper scope of voir dire in a death penalty trial has been the subject of considerable dispute over the years, generating at least some discussion in no fewer than seventy-six opinions from the Georgia Supreme Court since the 1970s.[8] In *Ellington v. State*,[9] the court

8. Brockman v. State, 292 Ga. 707, 717, 739 S.E.2d 332, 345 (2013); Ellington v. State, 292 Ga. 109, 121, 735 S.E.2d 736, 750 (2012); Leonard v. State, 292 Ga. 214, 216, 735 S.E.2d 767, 771 (2012); Rice v. State, 292 Ga. 191, 195, 733 S.E.2d 755, 762 (2012); Bryant v. State, 288 Ga. 876, 880-81, 708 S.E.2d 362, 371 (2011); Ledford v. State, 289 Ga. 70, 75-76, 709 S.E.2d 239, 248 (2011); Herrera v. State, 288 Ga. 231, 235, 702 S.E.2d 854, 858 (2010); Stinski v. State, 286 Ga. 839, 846, 691 S.E.2d 854, 866 (2010); Arrington v. State, 286 Ga. 335, 338, 687 S.E.2d 438, 446 (2009); O'Kelley v. State, 284 Ga. 758, 761, 670 S.E.2d 388, 393 (2008); Wagner v. State, 282 Ga. 149, 151, 646 S.E.2d 676, 679 (2007); Buttram v. State, 280 Ga. 595, 596, 631 S.E.2d 642, 645 (2006); Lewis v. State, 279 Ga. 756, 759, 620 S.E.2d 778, 783 (2005); Riley v. State, 278 Ga. 677, 684, 604 S.E.2d 488, 496 (2004); Sealey v. State, 277 Ga. 617, 619, 593 S.E.2d 335, 338 (2004); Laster v. State, 276 Ga. 645, 647, 581 S.E.2d 522, 525 (2003); Lawler v. State, 276 Ga. 229, 235, 576 S.E.2d 841, 848 (2003); Sallie v. State, 276 Ga. 506, 509, 578 S.E.2d 444, 450 (2003); Spickler v. State, 276 Ga. 164, 165, 575 S.E.2d 482, 485 (2003); Braley v. State, 276 Ga. 47, 51, 572 S.E.2d 583, 591 (2002); Brannan v. State, 275 Ga. 70, 75, 561 S.E.2d 414, 422 (2002); Lance v. State, 275 Ga. 11, 15, 560 S.E.2d 663, 671 (2002); Terrell v. State, 276 Ga. 34, 38, 572 S.E.2d 595, 600 (2002); Fults v. State, 274 Ga. 82, 85, 548 S.E.2d 315, 320 (2001); Lucas v. State, 274 Ga. 640, 645-46, 555 S.E.2d 440, 446-47 (2001); Presnell v. State, 274 Ga. 246, 248-49, 551 S.E.2d 723, 729 (2001); Rhode v. State, 274 Ga. 377, 379, 552 S.E.2d 855, 859 (2001); Gissendaner v. State, 272 Ga. 704, 707, 532 S.E.2d 677, 684 (2000); King v. State, 273 Ga. 258, 262, 539 S.E.2d 783, 791 (2000); Morrow v. State, 272 Ga. 691, 695, 532 S.E.2d 78, 84 (2000); Nance v. State, 272 Ga. 217, 222, 526 S.E.2d 560, 566 (2000); Zellmer v. State, 272 Ga. 735, 735, 534 S.E.2d 802, 803 (2000); Cromartie v. State, 270 Ga. 780, 783, 514 S.E.2d 205, 210 (1999); Johnson v. State, 271 Ga. 375, 380-81, 519 S.E.2d 221, 228 (1999); Pace v. State, 271 Ga. 829, 833-34, 524 S.E.2d 490, 499 (1999); Pruitt v. State, 270 Ga. 745, 750, 514 S.E.2d 639, 646 (1999); Barnes v. State, 269 Ga. 345, 351, 496 S.E.2d 674, 683 (1998); Jenkins v. State, 269 Ga. 282, 287, 498 S.E.2d 502, 509 (1998); Bishop v. State, 268 Ga. 286, 289, 486 S.E.2d 887, 893 (1997); Carr v. State, 267 Ga. 547, 553, 480 S.E.2d 583, 590 (1997); Greene v. State, 268 Ga. 47, 47, 485 S.E.2d 741, 742 (1997); Raulerson v. State, 268 Ga. 623, 629, 491 S.E.2d 791, 799 (1997); Turner v. State, 268 Ga. 213, 217, 486 S.E.2d 839, 843 (1997); Waldrip v. State, 267 Ga. 739, 743, 482 S.E.2d 299, 307 (1997); Drane v. State, 265 Ga. 255, 260, 455 S.E.2d 27, 33 (1995); Mobley v. State, 265 Ga. 292, 295, 455 S.E.2d 61, 67 (1995); Burgess v. State, 264 Ga. 777, 780, 450 S.E.2d 680, 688 (1994); Jones v. State, 263 Ga. 904, 906-07, 440 S.E.2d 161, 164 (1994); Walker v. State, 262 Ga. 694, 695, 424 S.E.2d 782, 783 (1993); Bennett v. State, 262 Ga. 149, 151, 414 S.E.2d 218, 221 (1992); Hall v. State, 259 Ga. 412, 414, 383 S.E.2d 128, 130 (1989); Isaacs v. State, 259 Ga. 717, 730, 386 S.E.2d 316, 328 (1989); Miller v. State, 259 Ga. 296, 297, 380 S.E.2d 690, 692 (1989); Potts v. State, 259 Ga. 96, 101, 376 S.E.2d 851, 856 (1989); Blankenship v. State, 258 Ga. 43, 43, 365 S.E.2d 265, 267 (1988); Skipper v. State, 257 Ga.

addressed yet another serious controversy over the proper boundaries of capital voir dire. Ellington was convicted and sentenced to death in 2008 for murdering his wife and their twin two-year-old sons with a hammer.[10] Prior to jury selection, Ellington had insisted on his right to question potential jurors about their biases resulting from the fact that two of the victims were young children.[11] The prosecution "strongly objected," and, after having indicted Ellington in a manner not revealing this fact to potential jurors, managed to secure a ruling from the Superior Court of DeKalb County that precluded the defense counsel from mentioning "that two of these deceased people are children in voir dire."[12]

Observing near the outset that "[m]uch like cross-examination is the engine of truth in our justice system, voir dire is the engine of selecting a jury that will be fair and impartial,"[13] the supreme court concluded that the trial court abused its discretion by prohibiting Ellington from informing potential jurors that the case involved children, particularly in the context of questioning the jurors about the various sentencing options.[14] In reaching this conclusion, the court provided some much-needed guidance to lawyers and judges regarding the proper scope of section 15-12-133 of the Official Code of Georgia Annotated (O.C.G.A.)[15] and the parameters of a defendant's constitutional right to adequate voir dire, especially in the context of a death penalty trial.[16] The court

---

802, 806, 364 S.E.2d 835, 839 (1988); Childs v. State, 257 Ga. 243, 249, 357 S.E.2d 48, 55 (1987); Ford v. State, 257 Ga. 461, 464, 360 S.E.2d 258, 261 (1987); Legare v. State, 256 Ga. 302, 303, 348 S.E.2d 881, 881-82 (1986); Alderman v. State, 254 Ga. 206, 206, 327 S.E.2d 168, 171 (1985); Curry v. State, 255 Ga. 215, 218, 336 S.E.2d 762, 766 (1985); Devier v. State, 253 Ga. 604, 606, 323 S.E.2d 150, 154 (1984); Ingram v. State, 253 Ga. 622, 631, 323 S.E.2d 801, 811 (1984); Roberts v. State, 252 Ga. 227, 231, 314 S.E.2d 83, 90 (1984); Spivey v. State, 253 Ga. 187, 193, 319 S.E.2d 420, 428-29 (1984); Castell v. State, 250 Ga. 776, 784, 301 S.E.2d 234, 243 (1983); Henderson v. State, 251 Ga. 398, 400, 306 S.E.2d 645, 647 (1983); Padgett v. State, 251 Ga. 503, 504, 307 S.E.2d 480, 481 (1983); Mathis v. State, 249 Ga. 454, 455, 291 S.E.2d 489, 491 (1982); Godfrey v. State, 248 Ga. 616, 621, 284 S.E.2d 422, 427 (1981); Messer v. State, 247 Ga. 316, 323, 276 S.E.2d 15, 22 (1981); Waters v. State, 248 Ga. 355, 362, 283 S.E.2d 238, 246 (1981); Cobb v. State, 244 Ga. 344, 349, 260 S.E.2d 60, 66 (1979); Lamb v. State, 241 Ga. 10, 12, 243 S.E.2d 59, 61 (1978); Whitlock v. State, 230 Ga. 700, 705-06, 198 S.E.2d 865, 868 (1973); Curtis v. State, 224 Ga. 870, 870-71, 165 S.E.2d 150, 152 (1968).

9. 292 Ga. 109, 735 S.E.2d 736 (2012).
10. *Id.* at 109-10, 123, 144, 735 S.E.2d at 743, 752, 765.
11. *Id.* at 121, 735 S.E.2d at 750.
12. *Id.* at 121, 735 S.E.2d at 750-51.
13. *Id.* at 124, 735 S.E.2d at 752.
14. *Id.* at 131, 735 S.E.2d at 757.
15. O.C.G.A. § 15-12-133 (2012).
16. *See generally Ellington*, 292 Ga. 109, 735 S.E.2d 736.

announced that both parties have an absolute right to question potential jurors regarding any

> "critical facts" of the case that experience, reason, and common sense indicate will be so influential for at least some prospective jurors that they will be unable to consider all of the evidence in the case in light of the court's instructions on the law and render a fair and impartial verdict.[17]

The court clarified further by explaining that such questions "must . . . be based only on critical facts that are likely to be proved at trial or will genuinely be in dispute."[18] The court expressed little doubt that the age of Ellington's victims constituted such a critical fact.[19]

The court noted three limitations on its holding on case-specific voir dire.[20] First, the court pointed out that jurors who merely express that the critical fact at issue would "be very important or worthy of great weight"[21] will not be automatically disqualified from service.[22] Second, the court warned that the inquiry must be properly formulated and must not "seek to commit the juror to voting a certain way based on that fact."[23] In this regard, the court offered the following suggestions: "Would you automatically reject a life sentence if the evidence showed *x*?" and "Could you fairly consider a death sentence if the evidence showed *x*?"[24] Third, the court offered a reminder that trial courts generally retain broad discretion when it comes to voir dire, and that a decision about which facts are critical enough to warrant specific inquiry will "be given significant deference in appellate review."[25]

This opinion is likely to have a significant impact on jury selection in death penalty cases and will increase fairness in the process for both sides, ensuring that the jurors who are seated in a death penalty trial will be qualified to perform their duties without disqualifying attitudes.[26]

---

17. *Id.* at 135-36, 733 S.E.2d at 760.
18. *Id.* at 137, 733 S.E.2d at 760.
19. *Id.*
20. *Id.* at 136, 733 S.E.2d at 760.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 137, 733 S.E.2d at 760.
25. *Id.* at 137, 733 S.E.2d at 761. The court also suggested, in a footnote, that the question of whether a particular fact of the case is critical enough to warrant inquiry on voir dire would be an appropriate subject for interim, or even interlocutory, review in close cases. *Id.* at 137 n.8, 733 S.E.2d at 761 n.8.
26. The court observed in this regard that "our resolution of this issue should not be perceived as helpful in general to either party in criminal cases, including death penalty

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Three significant death penalty cases reached the court on issues of ineffective assistance of counsel. In *Barrett v. State*[27] and *Rice v. State*,[28] the court rejected claims of ineffective assistance of counsel raised on direct appeal,[29] and in *Humphrey v. Riley*,[30] the court reversed a state habeas court's decision to vacate a death sentence on the grounds of ineffective assistance of counsel at the sentencing phase.[31]

Barrett and Rice both contended broadly that their lawyers failed to provide them with effective assistance of counsel at either stage of their trials.[32] Although the majority of their complaints related to issues that were not specific to the death penalty, the analysis of their sentencing phase claims was noteworthy for the court's approach to evaluating ineffectiveness in situations where defendants are bent on obstructing their lawyers' efforts to develop and present mitigation evidence.[33]

The court cited to the American Bar Association (ABA) Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases[34] in both *Rice* and *Barrett* as a useful benchmark for assessing counsel's performance, holding in *Barrett* that "the relevant guideline in effect at the time of Barrett's trial [2005] stated that the sentencing phase investigation 'should be conducted regardless of any statement by the client that evidence bearing upon penalty is not . . . to be *collected or presented*.'"[35]

---

cases," as prosecutors also may uncover disqualifying biases that would otherwise work to their disadvantage, such as where the victims "may be less sympathetic." *Id.* at 133, 733 S.E.2d at 758.

27. 292 Ga. 160, 733 S.E.2d 304 (2012).

28. 292 Ga. 191, 733 S.E.2d 755 (2012).

29. *Barrett*, 292 Ga. at 174, 733 S.E.2d at 317; *Rice*, 292 Ga. at 211, 733 S.E.2d at 773.

30. 291 Ga. 534, 731 S.E.2d 740 (2012).

31. *Riley*, 291 Ga. at 535, 731 S.E.2d at 742.

32. *Barrett*, 292 Ga. at 173, 733 S.E.2d at 316; *Rice*, 292 Ga. at 204, 733 S.E.2d at 768.

33. Rice was described as "stubbornly uncooperative with a series of attorneys and . . . generally opposed to the preparation of mitigating evidence," 292 Ga. at 205, 733 S.E.2d at 769, and Barrett "was adamant that no mitigation evidence be presented" and "refused to assist counsel in locating mitigation witnesses." 292 Ga. at 185, 733 S.E.2d at 323.

34. Am. Bar Ass'n, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, reprinted in* 31 HOFSTRA L. REV. 913 (2003) [hereinafter *ABA 2003 Guidelines*].

35. *Barrett*, 292 Ga. at 185, 733 S.E.2d at 324 (quoting *ABA 2003 Guidelines*, *supra* note 34, at 1015).

The language cited by the court in *Barrett* continues to be the prevailing norm as to defense counsel's responsibilities in cases where clients obstruct, or attempt to obstruct, mitigation investigation.[36] It should, however, be noted that since Barrett's trial, the ABA has released its *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, further elaborating on the proper standard of care on the part of defense counsel in these complicated situations.[37]

Although the court cited to *Strickland v. Washington*[38] for a characterization of the ABA Guidelines as "only guides,"[39] it seemed nonetheless to accept the proposition that proceeding with a mitigation investigation over a defendant's objections is now the appropriate professional standard of care in a death penalty case.[40] As such, the court elected to approach this issue, at least with respect to Barrett,[41] "assuming arguendo" that trial counsel's mitigation investigation was deficient.[42]

Quoting from its recent opinion in *Perkins v. Hall*,[43] however, the court in *Barrett* reaffirmed that "reasonable attorney performance includes investigating mitigating evidence to the extent feasible given the defendant's willingness to cooperate and then, if the defendant insists, following his instructions regarding the ultimate defense to pursue."[44] In view of this holding, Barrett's claim of prejudice essentially rested on the argument that "perhaps [trial counsel] could have persuaded" Barrett to allow them to present a mitigation case had they "conducted a reasonable investigation."[45] This argument proved too speculative for the court, which observed that Barrett produced "no

---

36. *Id.*

37. Am. Bar Ass'n, *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, reprinted in* 36 HOFSTRA L. REV. 677 (2008) [hereinafter *ABA 2008 Supplementary Guidelines*].

38. 466 U.S. 668 (1984).

39. *Barrett*, 292 Ga. at 185-86, 733 S.E.2d at 324 (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)).

40. *Id.* at 185-86, 733 S.E.2d at 324.

41. Although there was no measureable discrepancy in the court's approach to these two cases, the *Barrett* opinion does treat this issue in somewhat greater detail—probably owing to a more compelling presentation of mitigation evidence at the motion for new trial—and so will be the focus of the remainder of the discussion here. *Compare Rice*, 292 Ga. at 204-08, 733 S.E.2d at 768-70, *with Barrett*, 292 Ga. at 184-90, 733 S.E.2d at 323-26.

42. *Barrett*, 292 Ga. at 186, 733 S.E.2d at 324.

43. 288 Ga. 810, 708 S.E.2d 335 (2011).

44. *Barrett*, 292 Ga. at 185, 733 S.E.2d at 324 (quoting Perkins v. Hall, 288 Ga. 810, 815, 708 S.E.2d 335, 341 (2011)).

45. *Id.* at 186, 733 S.E.2d at 324.

evidence" suggesting that he would have changed his mind and permitted the evidence to be used—at least with respect to the testimony of his family members.[46]

In both *Barrett* and *Rice*, the court gravitated strongly towards the prejudice prong of its *Strickland* analysis, assuming deficiencies in both cases but concluding that they did "not in reasonable probability [affect] the outcome of . . . trial."[47]

In *Humphrey v. Riley*, the court systematically broke down Riley's ineffective assistance of counsel claim into separate categories of evidence and proceeded to dismiss the significance of each, ultimately determining "that the habeas court erred by concluding that there is a reasonable probability that Riley's trial counsel's deficiencies changed the outcome of his trial and, therefore, erred by granting relief . . . ."[48]

The preponderance of Riley's claims involved mental health and arson experts that trial counsel either failed to develop or failed to call.[49] Although the court did cite to certain areas where it either found or assumed deficiencies, it concluded that any prejudice that Riley suffered, "considering the combined effect of counsel's actual and assumed deficiencies," was insufficient to support the habeas court's order granting relief.[50]

The court's treatment of these ineffective assistance claims reveals a decided preference for finding or assuming deficiencies in performance and focusing instead on the presence or absence of outcome-determinative prejudice. *Riley*, especially when read in conjunction with other recent habeas corpus cases,[51] seems also to reflect a decided disinclination to extend much deference to the findings and conclusions of habeas courts in the death penalty context.[52] This trend would seem to be especially acute in the area of ineffective assistance-of-counsel claims.

---

46. *Id.* at 187, 733 S.E.2d at 325.

47. *Barrett*, 292 Ga. at 189, 733 S.E.2d at 326; *see also Rice*, 292 Ga. at 211, 733 S.E.2d at 773.

48. *Riley*, 291 Ga. at 537, 731 S.E.2d at 744.

49. *Id.* at 538-42, 731 S.E.2d at 744-47.

50. *Id.* at 545, 731 S.E.2d at 749.

51. *See, e.g.*, Humphrey v. Nance, 293 Ga. 189, 744 S.E.2d 706 (2013); Humphrey v. Lewis, 291 Ga. 202, 728 S.E.2d 603 (2012); *Perkins*, 288 Ga. 810, 708 S.E.2d 335.

52. The court's proper role in these situations is to "accept the habeas court's findings of fact unless they are clearly erroneous, but [to] apply the facts to the law de novo." *Riley*, 291 Ga. at 537, 731 S.E.2d at 743. Although never specifically articulated in these cases, it appears that the court regards the question of whether or not there is a reasonable probability that deficiencies in representation would have led to a different result as something other than a finding of fact.

III. THE "(B)(2)" STATUTORY AGGRAVATING CIRCUMSTANCE

O.C.G.A. § 17-10-30(b)(2)[53] authorizes the death penalty in any case where the capital offense was committed "while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary in any degree or arson in the first degree."[54] In *Brockman v. State*,[55] the defendant was convicted of felony murder and criminal attempt to commit armed robbery in connection with a botched robbery attempt at a Muscogee County gas station in 1990.[56] Brockman was sentenced to death the next day based upon the jury's (b)(2) finding that the murder was committed while Brockman was engaged in the commission of an armed robbery.[57]

Brockman challenged this finding and his death sentence on the ground that "no evidence was presented that Brockman took anything during the incident," and, as such, that the technical elements of armed robbery were not met.[58] The court rejected this argument because the statute "does *not* require that the other felony be completed . . . [n]or does the statute require that the defendant be charged with or *convicted* of the other felony."[59] The court reiterated its conclusion from previous cases that the (b)(2) circumstance presents a question of fact for the jury whether "the murder was committed 'while the offender was engaged in the commission of' the other felony," and that this question is separate and distinct from the question of whether the defendant is guilty of the other felony.[60] The court also summarily rejected Brockman's argument that this construction of the (b)(2) circumstance would expand it to the extent that it could no longer serve its constitutionally mandated purpose "to limit the situations in which the death penalty can be sought and . . . to channel the sentencer's discretion by clear and objective standards."[61]

---

53. O.C.G.A. § 17-10-30(b)(2) (2013).
54. *Id.*
55. 292 Ga. 707, 739 S.E.2d 332 (2013).
56. *Id.* at 707-08, 739 S.E.2d at 339-40.
57. *See id.* at 707, 739 S.E.2d at 339.
58. *Id.* at 710-11, 739 S.E.2d at 341.
59. *Id.* at 711, 739 S.E.2d at 341 (internal citation omitted).
60. *Id.* (quoting O.C.G.A. § 17-10-30 (b)(2)).
61. *Id.* at 712, 739 S.E.2d at 342.

IV. THE "(B)(7)" STATUTORY AGGRAVATING CIRCUMSTANCE

In *Ellington*, the court also addressed a prevalent instructional error made in connection with O.C.G.A. § 17-10-30(b)(7).[62] The court stated, "As in several prior cases, the jury's sentencing verdict . . . referred to 'torture, depravity of mind, *or* an aggravated battery to the victim.'"[63] Since Georgia law requires a unanimous finding beyond a reasonable doubt as to *all* statutory aggravating circumstances, this disjunctive verdict form was found to be improper because it allowed for the possibility that Ellington's jurors may not have "agreed unanimously on any one of the three subparts."[64]

V. PROPORTIONALITY REVIEW

Both Barrett and Brockman made substantial efforts on direct appeal to demonstrate that their death sentences were disproportionate and arbitrary in comparison to the sentences imposed in similar cases.[65] The court considered these arguments pursuant to its mandatory review under O.C.G.A. § 17-10-35(c)(1) and (3).[66]

Barrett was convicted and sentenced to death for killing his close friend during the course of a drunken brawl that led to a shooting at Barrett's home in Towns County.[67] "Relying on [seventeen] cases that he claim[ed] [were] similar to his own in which the defendant[s] did not receive a death sentence, Barrett allege[d] that his death sentence [was] disproportionate to [the] sentences imposed in similar cases."[68] The court focused on the brutality of Barrett's assault to justify his death sentence, as well as the fact that Barrett himself appeared uninjured.[69] In support of its conclusion, the court cited to numerous, prior death penalty cases involving an aggravated battery or (b)(7) aggravating circumstance, several of which "also include[d] evidence that the victim had engaged in some provocative behavior."[70]

---

62. O.C.G.A. § 17-10-30(b)(7) (2013).

63. *Ellington*, 292 Ga. at 146, 735 S.E.2d at 766 (emphasis added by the court).

64. *Id.*

65. *See Brockman*, 292 Ga. at 738, 739 S.E.2d at 359; *Barrett*, 292 Ga. at 189, 733 S.E.2d at 326.

66. *See Brockman*, 292 Ga. at 740, 739 S.E.2d at 360; *Barrett*, 292 Ga. at 190, 733 S.E.2d at 327; *see also* O.C.G.A. § 17-10-35(c)(1), (3) (2013).

67. *See Barrett*, 292 Ga. at 160-61, 733 S.E.2d at 307-08.

68. *Id.* at 189, 733 S.E.2d at 326.

69. *Id.* at 189-90, 733 S.E.2d at 326-27.

70. *Id.* at 190, 733 S.E.2d at 327.

Brockman was convicted and sentenced to death for the botched armed robbery of a Muscogee County gas station, where Brockman pointed a gun at the manager from inside a car and demanded money.[71] The evidence at trial showed that, after a brief verbal exchange, Brockman shot the manager a single time "in the abdomen" with a .38 revolver and then drove away without getting any money.[72] On appeal, Brockman contended that "there is only one reported decision by this [c]ourt affirming the death sentence where the only statutory aggravating circumstance was the (b)(2) circumstance [of] armed robbery and the evidence showed that the defendant did not actually complete the armed robbery."[73]

The prior reported decision that Brockman referred to was *Amadeo v. State*,[74] and Brockman "point[ed] out that the death sentence in that case was subsequently reversed on federal habeas review."[75] The court, however, dismissed as irrelevant the fact that the sentence in *Amadeo* had been reversed on federal habeas review, observing that the reversal was "for reasons unrelated to the juries' reactions to the evidence."[76]

In addition to the claim that only one prior reported decision had affirmed a death sentence under similar circumstances, "Brockman also contend[ed] that juries in a number of recently tried cases involving murder and armed robbery with facts more egregious than those present in his case were not asked to return a death sentence."[77] The court ultimately looked to the circumstances surrounding Brockman's crime to support the death sentence, noting that Brockman "had participated in two burglaries and four completed armed robberies before the attempted armed robbery and murder" in this case, "had pointed a loaded gun at three robbery victims and demanded their money," and "was free on bond on charges stemming from one of these crimes at the time of this incident."[78] The court also noted Brockman's conduct following the murder, characterizing it as "bragg[ing]."[79]

The treatment of these proportionality arguments reveals that the court continues to be largely unimpressed by citation to comparison cases that did not result in a death sentence, and the court continues to

---

71. *Brockman*, 292 Ga. at 707-09, 739 S.E.2d at 339-40.
72. *Id.* at 709, 739 S.E.2d at 340.
73. *Id.* at 738, 739 S.E.2d at 359.
74. 243 Ga. 627, 255 S.E.2d 718 (1979).
75. *Brockman*, 292 Ga. at 738, 739 S.E.2d at 359.
76. *Id.* at 739, 739 S.E.2d at 359 (quoting Davis v. Turpin, 273 Ga. 244, 246, 539 S.E.2d 129, 131 (2000)).
77. *Id.*
78. *Id.* at 739, 739 S.E.2d at 359-60.
79. *Id.* at 739, 739 S.E.2d at 360.

be untroubled by the subsequent reversal of the death sentences it relies on so long as those reversals are "for reasons unrelated to the juries' reactions to the evidence."[80] Although both proportionality claims were disposed of in relatively short order,[81] the court's detailed treatment of them reflects a concern about this issue in general. Specific reference to Brockman's crime spree and braggadocio,[82] as well as a graphic discussion of the gruesome injuries suffered by Barrett's victim,[83] give rise to an inference that the court could have reached a different conclusion in the absence of these significant factors.

VI. JURY POOL LITIGATION

In *Ellington*, the court addressed a jury pool challenge alleging under-representation of certain groups.[84] The court once again sanctioned the approach of "forced balancing" a jury list,[85] but observed in a footnote that the Jury Composition Reform Act of 2011[86] has now "replaced the forced balancing approach with a new system for creating grand and traverse jury pools,"[87] signaling that jury pool litigation going forward will take place on an entirely new footing.[88]

Two other aspects of the court's treatment of Ellington's jury pool composition claims bear brief mention. First, the supreme court explicitly disapproved of the superior court's conclusion that Georgia's Unified Appeal Procedure 's five percentage point under-representation limit is merely a "prophylactic rule and [an] aspirational goal," but noted that the court's "authority to remedy this issue is unsettled."[89] Second,

---

80. *Id.* at 739-40, 739 S.E.2d at 359-60 (quoting *Davis*, 273 Ga. at 246, 539 S.E.2d at 131).

81. *See id.* at 738-40, 739 S.E.2d at 359-60; *Barrett*, 292 Ga. at 189-90, 733 S.E.2d at 326-27.

82. *Brockman*, 292 Ga. at 739, 739 S.E.2d at 359-60.

83. *Barrett*, 292 Ga. at 162, 733 S.E.2d at 309.

84. *Ellington*, 292 Ga. at 118, 735 S.E.2d at 748-49.

85. Forced balancing is a method of selecting jurors that requires that the jury pool reflect a certain identifiable demographics mix based on the most recent decennial census. *Id.* at 117-18, 735 S.E.2d at 748.

86. Ga. H.R. Bill 415, Reg. Sess., 2011 Ga. Laws 59 (codified in scattered sections of O.C.G.A. tits. 15, 16, 21, 40, 45, and 50 (Supp. 2013)).

87. *Ellington*, 292 Ga. at 118 n.2, 735 S.E.2d at 748 n.2.

88. The new method for compiling jury lists in Georgia is as yet untested in the appellate courts but generally involves creating a much more inclusive list that "should be no less than 85% inclusive of the number of persons in the county population age [eighteen] years or older." *See* GEORGIA SUPREME COURT, JURY COMPOSITION RULE, *available at* http://www.gasupreme.us/rules/JURY%20COMPOSITION%20RULE%20-%2007_01_13.pdf.

89. *Ellington*, 292 Ga. at 119-20, 735 S.E.2d at 749-50 (alteration in original) (quoting unreported trial court order).

the court described evidence that Ellington's grand jury list "included no persons under the age of [twenty]" as "anomalous," but ultimately held that no constitutional violation had occurred because Ellington failed to establish that "persons under [twenty] years old were a cognizable group in DeKalb County."[90]

VII. SPEEDY TRIAL

The court addressed two speedy trial claims on opposite ends of the spectrum in the context of death penalty prosecutions. In *State v. Buckner*,[91] the supreme court affirmed the Superior Court of Chatham County's dismissal of a murder case on constitutional speedy trial grounds.[92] Also, in *Sosniak v. State*,[93] the court resoundingly affirmed the Superior Court of Forsyth County's denial of a speedy trial motion for dismissal and, at the same time, overruled prior supreme court precedent guaranteeing defendants the right to pre-trial review of adverse rulings on speedy trial motions.[94]

Buckner's case had been pending in the trial court for just over four-and-a-half years at the time he filed his original motion to dismiss,[95] while Sosniak's case had been pending for more than five years.[96] However, the similarities end there. The most salient factors in the court's analysis of these two claims were the finding of actual prejudice suffered by Buckner because of the delay[97] and the finding that Sosniak, on the other hand, had moved for numerous continuances, one of which had been denied only shortly before the speedy trial motion at issue was filed.[98]

The court's *Barker v. Wingo*[99] analysis in both cases ran along familiar lines, with two exceptions of note. As mentioned above, the court took the opportunity presented by *Sosniak* to reverse course on the question of whether "a defendant has the right to bring a direct appeal from a denial of a pre-trial motion for a constitutional speedy trial,"[100] ultimately concluding that the cases authorizing such appeals were

90. *Id.* at 120, 735 S.E.2d at 750.
91. 292 Ga. 390, 738 S.E.2d 65 (2013).
92. *Id.* at 391, 738 S.E.2d at 69.
93. 292 Ga. 35, 734 S.E.2d 362 (2012).
94. *Id.* at 35, 40, 734 S.E.2d at 364, 368.
95. *Buckner*, 292 Ga. at 393, 738 S.E.2d at 69.
96. *Sosniak*, 292 Ga. at 41, 734 S.E.2d at 368.
97. *Buckner*, 292 Ga. at 393-94, 738 S.E.2d at 70.
98. *Sosniak*, 292 Ga. at 36, 734 S.E.2d at 365.
99. 407 U.S. 514 (1972).
100. *Sosniak*, 292 Ga. at 40, 734 S.E.2d 367-68.

wrongly decided.[101] A stern concurring opinion by Justice Nahmias characterized Sosniak's motion as "entirely meritless" and intimated that many, if not most, pre-trial appeals of speedy trial motions have been deliberate tactical manipulations of the law by defendants seeking to achieve even further delays.[102]

The most noteworthy aspect of the court's decision in *Buckner*, at least as it pertains to the death penalty, was its endorsement of the superior court's conclusion that the ten-month period of delay attributed to the late filing—and subsequent withdrawal—of a notice of intent to seek the death penalty should be weighed "more heavily" against the State, since it "was the result of a deliberate decision by the State and something more than mere negligence."[103] The superior court had characterized this period of delay as "altogether unnecessary" and criticized the State for making its decision to seek the death penalty only after the case "had already been outstanding for forty months."[104]

In sharp contrast to the trend discussed above with respect to the character of deference granted to habeas courts' findings on the question of ineffective assistance of counsel, this court continues to appear willing to extend significant deference to trial courts' determinations on the question of whether a defendant's speedy trial rights have been violated.

VIII. CONCLUSION

The most significant development in the area of death penalty jurisprudence over this past year was undoubtedly the court's clarification of the proper scope of "death qualification" voir dire under Georgia law, but the court also offered important further guidance on counsel's proper role in cases where clients obstruct mitigation investigation, and reaffirmed its interpretation of certain aspects of the (b)(2) and (b)(7) statutory aggravating circumstances that have generated confusion in the trial courts. The court also finds itself dealing with increasingly sophisticated and nuanced arguments on proportionality—possibly percolating up in response to Justice Stevens's recent criticism of the court's proportionality review in his statement respecting the denial of certiorari in *Walker v. Georgia*.[105]

---

101. *Id.*

102. *Id.* at 44, 734 S.E.2d at 370 (Nahmias, J., concurring) ("No longer will defendants in Georgia be able to invoke the right to a *speedy* trial to achieve exactly the opposite of the constitutional guarantee—lengthy and unnecessary *delays* in criminal trials.").

103. *Buckner*, 292 Ga. at 394-95, 738 S.E.2d at 71 (quoting unreported trial court order).

104. *Id.* (quoting unreported trial court order).

105. 555 U.S. 979, 982 (2008).

***