

# **UNIFIED APPEAL**

## OUTLINE OF PROCEEDINGS

### INTRODUCTION

The revised Unified Appeal [effective January 27, 2000] should be followed in all cases for which the notice that the state intends to seek the death penalty is given after the effective date.

The proceedings outlined here shall be applicable only in cases in which the death penalty is sought.

### NOTE

*All* proceedings in the Superior Court shall be recorded and transcribed. The defendant shall be present during all proceedings in the Superior Court.

### RULE I. STATEMENT OF PURPOSES

**A. Purposes of the Outline of Proceedings.** The Outline of Proceedings is a procedure to be followed before, during and after trial, having as its purposes:

1. Insuring that all legal issues which ought to be raised on behalf of the defendant have been considered by the defendant and defense counsel and asserted in a timely and correct manner.
2. Minimizing the occurrence of error and correcting as promptly as possible any error that nonetheless may occur.
3. Making certain that the record and transcripts of the proceedings are complete for unified review by the sentencing court and by the Supreme Court.

### **B. Purposes of the Checklist**

1. Appended to the Outline of Proceedings is a *Checklist* of legal issues which may arise in a death-penalty case. Its purpose is to remind the court, defense counsel and the prosecuting attorney of these issues and to provide a quick reference to case authority on them. The parties may raise any issue, whether or not it is listed on the checklist. The checklist shall be revised and updated periodically.
2. Proper use of the *Checklist* as a means of avoiding or promptly correcting error will require the court to schedule conferences (see Sections II and III) during which defense counsel and the prosecuting attorney will be given an opportunity to present, or to schedule for presentation, issues which would be waived if not asserted in the proper and timely fashion. These conferences shall be transcribed by the official court reporter.

Adopted effective September 1, 1989; amended effective January 27, 2000.

## **RULE II. PRE-TRIAL PROCEEDINGS**

**A. Qualifications of Appointed Counsel.** In order to insure that persons are adequately represented in death penalty cases, any attorney appointed to serve as either lead or co-counsel is required to meet the following minimum qualifications:

1. *Trial:* Two attorneys shall be appointed to handle matters in death penalty cases:
  - a. *Lead Counsel*
    - (1) must be a member in good standing of the State Bar or admitted to practice pro hac vice, and must have at least five years criminal litigation experience as a defense attorney or a prosecuting attorney; and
    - (2) must have been lead counsel on at least one death-penalty murder trial to verdict or three capital (non-death penalty) trials to verdict, one of which must have been a murder case, or been co-counsel on two death penalty cases; and
    - (3) must be familiar with the unified appeal procedures; and
    - (4) must be familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and
    - (5) must have attended within twelve months previous to appointment at least ten hours of specialized training or educational programs in death-penalty defense or, upon appointment agree to take ten hours of such training or educational programs and maintain annually during the pendency of the case ten hours of such training or educational programs. This requirement may be met by viewing video-tape instruction and written materials and certifying to the trial court that the materials have been reviewed; and
    - (6) must have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.
  - b. *Co-counsel*
    - (1) must be a member in good standing of the State Bar with combined three years criminal trial experience either as a criminal defense attorney or prosecuting attorney; and
    - (2) must have been lead or co-counsel in at least one (non-death penalty) murder trial to verdict, or in at least two felony jury trials; and
    - (3) must have attended within twelve months previous to appointment at least ten hours of specialized training or educational programs in death-penalty defense or, upon appointment, agree to take ten hours of such training or educational programs and maintain annually during the pendency of the case 10 hours of such training or educational programs. This requirement may be met by viewing video-tape instruction and written materials and certifying to the trial court that the materials have been reviewed.
2. *Direct Appeal.* It is recommended that two attorneys be appointed to handle matters on a direct appeal, unless the appointing authority decides for good cause that it is not necessary to have co-counsel.

- a. Lead Counsel
  - (1) must be a member in good standing of the State Bar or admitted to practice pro hac vice and must have at least five years criminal litigation experience as a defense attorney or a prosecuting attorney; and
  - (2) must have been co-counsel, or have actively assisted in the direct appeal of at least one death penalty case and have been counsel of record in at least three felony appeals; and
  - (3) must have attended within twelve months previous to appointment at least ten hours of specialized training or educational programs relating to post-conviction appeals and appellate procedures relating to post-conviction appeals, or upon appointment agree to take ten hours of such training or educational programs and maintain annually during the pendency of the case ten hours of such training or educational programs. This requirement may be met by viewing video- tape instruction and written materials and certifying to the trial court that the materials have been reviewed
- b. Co-counsel
  - (1) must be a member in good standing of the State Bar with combined three years criminal trial experience either as a criminal defense attorney or prosecuting attorney; and
  - (2) must have experience as counsel of record in three felony appeals either as a defense attorney or prosecuting attorney; and
  - (3) must have attended within twelve months previous to appointment at least ten hours of specialized training or educational programs relating to post-conviction appeals and appellate procedures relating to post-conviction appeals, or upon appointment agree to take ten hours of such training or educational programs and maintain annually during the pendency of the case ten hours of such training or educational programs. This requirement may be met by viewing video- tape instruction and written materials and certifying to the trial court that the materials have been reviewed.
3. *Exceptions for Good Cause.* The enforcement of these minimum qualifications rests with the trial courts and the Supreme Court. If a trial judge finds that an attorney is otherwise-competent but does not meet these standards, the judge shall petition the Supreme Court prior to the First Proceeding (Part II, B) under the Unified Appeal Procedure for authorization to appoint the attorney by specifying the attorney's qualifications and stating the reasons the trial judge has determined that the attorney is competent to serve as either lead or co-counsel.

## **B. Fees for Appointed Counsel**

1. Attorneys handling appointed cases shall receive reasonable and adequate compensation for their labor, based on hourly rates and time spent as documented in records submitted by the attorneys, and in addition shall be reimbursed for all expenses, reasonable and necessary to the individual case. Local indigent defense committees, or the judge or judges of a multi-judge circuit in those circuits without an indigent defense committee,

shall set a standard hourly fee schedule and shall give due weight to the following factors in determining the hourly fee to be paid to attorneys handling appointed cases:

- a. Attorneys' hourly overhead. "Overhead" is intended to include those expenses inherent in running the attorney's office on a daily basis, including but not limited to rent, utilities, support staff compensation and benefits, insurance, bar and professional association membership dues, office supplies, amortized capital expenditures and maintenance. Overhead does not include the expense of expert witnesses, investigators, record retrieval, travel, or other expenses incurred only in conjunction with a particular case.
  - b. Hourly rates in fee-paying cases for attorneys handling similar work and practicing in the general geographic area where the appointment is made.
  - c. The rate of inflation, as measured by an objective index such as the Consumer Price Index or other generally accepted measure of inflation.
2. In no case shall the hourly rates set pursuant to this rule be less than the minimum schedule set out in Georgia Indigent Defense Guideline 2.6. In individual cases, the judge or committee may deviate upward from the standard fee schedule set in the circuit, in order to take into account the particular seriousness or complexity of the case, or other factors deemed relevant by the court or the committee. Reasonable and necessary expenses incurred in conjunction with a particular case, including but not limited to fees for expert witnesses, investigators, record retrieval, and travel, shall be calculated and paid separately from the compensation which is paid to the attorney in return for the attorney's labor. Attorneys shall be required to submit itemized statements for payment and reimbursement. In instances where the invoice submitted by an attorney for payment is reduced, the judge, administrator, or committee shall indicate in writing the reason(s) for the reduction.
  3. Compensation for a **capital felony case in which the death penalty** is sought shall be set at a higher rate than the rate in non-death penalty cases, in consideration of the seriousness, complexity, and longevity of death penalty cases. Each case shall be examined by the court, and the fee total shall be based on a complete examination of the individual case. Counsel in death penalty cases shall be compensated for attorney fees and, **if necessary**, reimbursed for expenses on no less than a monthly basis throughout the case, and special attention shall be given to continuing counsel obligations in death penalty cases when conviction and imposition of the death penalty occur.
  4. In counties that do not have local indigent defense committees, the court may establish a committee composed of a designee of the chief judge, the local county governing authority and the local bar association to perform the functions of establishing fee guidelines and approval of fees.

**C. First Proceeding.** At the earliest possible opportunity after indictment and before arraignment, the court shall confer with the prosecuting attorney and defense counsel. The defendant shall be present during the conference. The conference shall be recorded and transcribed.

The following matters shall be concluded during the first proceeding:

1. The prosecuting attorney shall state whether he or she intends to seek the death penalty. If the prosecuting attorney intends to seek the death penalty, a written notice of such intentions shall be prepared and filed with the clerk of the superior court. Within ten days of receiving this notice, the clerk of the superior court shall send a copy to the clerk of the Supreme Court. (If the prosecuting attorney does not seek the death penalty, these procedures and the checklist are not applicable. If the prosecuting attorney later abandons seeking the death penalty or the sentencing jury returns a verdict of life imprisonment, these procedures and the checklist are no longer applicable.)
2. Defense counsel shall be identified and it shall be made a matter of record whether they are retained or appointed, and, if appointed, the qualifications required by Section II, part A(1), or that an exception for good cause has been granted under Section II, part A(3) shall be specifically reported.
3. The Unified Appeal Procedure, as amended, shall be published in the Georgia Court and Bar Rules. Copies of this procedure shall be given to the defendant, defense counsel and the prosecuting attorney, all of whom shall be instructed to read and adhere to its provisions. A copy also shall be given to the reporter for inclusion in the record. The reporter shall be reminded that the trial shall be completely transcribed as set forth in Rule IV (A). Counsel for the defense shall be instructed that the outline and checklist are intended to assist them in protecting the defendant's rights, but it remains the responsibility of defense counsel to protect those rights; the outline and checklist do not take the place of diligent counsel actively representing the defendant.
4. Defense counsel shall be reminded of defendant's option to invoke the provisions of Georgia's Criminal Procedure Discovery Act, OCGA § 17-16-1 et seq. If defendant elects to participate in reciprocal discovery, both parties shall be reminded that the information provided shall be accurate and complete.
5. The court shall determine whether the defendant intends to challenge the arrays of the grand or traverse juries. Challenges to the composition of the boxes from which the grand or traverse jury is drawn, and challenges to the manner in which the grand or traverse jury is drawn, shall be presented and heard at the earliest possible time consistent with the court's calendar and with the right of the defendant to seek a continuance. If a challenge is presented, the court shall hear the asserted factual and legal basis of challenge although under law the right to challenge may have been waived.
6. Whether or not a challenge is presented, the court shall nonetheless review the grand and traverse jury lists to determine whether all of the cognizable groups in that county are fairly represented.
  - a. To establish a "cognizable group" under the sixth amendment, the defendant must show (1) that the group is defined and limited by some factor; (2) that a common thread or basic similarity in attitude, ideas, or experience runs through the group; and (3) that there is a community of interest among members of the group such that the group's interests cannot adequately be represented if the group is excluded from the jury selection process. Whether a "cognizable group" exists is a question of fact, which is dependent upon the time and location of the trial.

*Potts v. State*, 259 Ga. 812, 813 (1990), quoting *Willis v. Zant*, 720 F2d 1212, 1216 (11th Cir. 1983), cert. denied, 467 U.S. 1256 (1984).

- b. The court shall compare the percentages of each cognizable group in the county, according to the most recent official decennial census figures, with the percentages represented on the grand and traverse jury lists. Significant under-representation of any such group on either jury list shall be corrected prior to trial. This rule shall not be construed to deprive the defendant of any rights under the constitutions of the United States and the State of Georgia or OCGA § 15-12-40.

The court's findings shall be included in the trial judge's report in the form specified by Rule II (C).

7. The court shall give the defendant an opportunity to state any objections to defense counsel or to the manner in which defense counsel have conducted or are conducting the defense.
8. The court shall review Section I of the checklist with defense counsel and the prosecuting attorney to determine which pre-trial issues the defendant intends to raise. Hearings shall be scheduled for any issues the defense wishes to present. The defendant shall be reminded that issues not raised may be waived if not timely presented.
9. The court shall instruct defense counsel to locate and interview all persons whose testimony might be helpful in discovering or supporting available theories of (1) defense or in (2) mitigation of punishment.
10. The court shall schedule for an appropriate time an arraignment and plea on the merits of the indictment.

**D. Motion Hearing.** At an appropriate time consistent with the court's calendar and with the right of the defendant to seek a continuance, the court shall conduct a motion hearing. The defendant shall be present, accompanied by defense counsel. The hearing shall be recorded and transcribed. The hearing shall precede trial of the case.

The following matters shall be concluded during the motion hearing:

1. All motions previously filed shall be heard.
2. The court shall review Section I of the checklist with defense counsel and the prosecuting attorney to determine if there are possible pre-trial issues that have not been raised. The court shall determine during this conference whether defense counsel intend to allow the deadline for raising of any such issue to pass without presenting the issue for decision. If so, the court shall question defense counsel in the presence of the defendant to determine whether defense counsel have explained the defendant's rights regarding that issue and whether defense counsel and the defendant have agreed not to assert the issue.
3. The court shall remind defense counsel to be prepared to present evidence during the sentencing phase as well as the guilt-innocence phase of the trial.
4. The court shall give the defendant an opportunity to state any objections to defense counsel or to the manner in which defense counsel have conducted or are conducting the defense.

5. The court reporter shall be advised that all pre-trial proceedings and hearings should be transcribed prior to trial.

**E. Forms For Required Jury Certificates.** The grand and traverse jury certificates required by Rule II (B) (6) shall comply with the following forms, and shall be included in the trial judge's report specified by OCGA § 17-10-35 (a).

(Note: To convert a decimal number to percentage notation, move the decimal point two places to the right. Example: .055 = 5.5%)

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### Grand Jury Certificate

This court has reviewed the Grand Jury List for \_\_\_\_\_ County from which the grand jury was selected that rendered the indictment in this case. This Grand Jury List was last revised in the year \_\_\_\_\_.

The following categories are "cognizable groups" in this county within the meaning of the Unified Appeal and current state and federal law:

- A. Males                      B. Females      C. African Americans D. Whites  
E. \_\_\_\_\_ F. \_\_\_\_\_

The total county population according to the most recent decennial census is \_\_\_\_\_ .

The total county population over 18 years old, according to the most recent census is \_\_\_\_\_.

The total number of persons on the grand jury list is \_\_\_\_\_.

For each "cognizable group" listed above, calculate the percentage of the over-18 population of the county represented by the cognizable group, as follows:

A. Males

1. The total population over 18 years old in the county is \_\_\_\_\_.
2. The total population of cognizable group A (males) is \_\_\_\_\_.
3. Divide answer 2 by answer 1, move the decimal 2 places to the right: \_\_\_\_\_%
4. The number of people on the grand jury list is \_\_\_\_\_.
5. The number of males on the grand jury list is \_\_\_\_\_.
6. Divide answer 5 by answer 4, move the decimal 2 places to the right: \_\_\_\_\_%
7. Subtract the larger from the smaller; the difference must be less than 5%:  
\_\_\_\_\_%

B. Females

1. The total population over 18 years old in the county is \_\_\_\_\_
2. The total population of cognizable group B (females) is \_\_\_\_\_
3. Divide answer 2 by answer 1, move the decimal 2 places to the right: \_\_\_\_\_%
4. The number of people on the grand jury list is \_\_\_\_\_.
5. The number of females on the grand jury list is \_\_\_\_\_.
6. Divide answer 5 by answer 4, move the decimal 2 places to the right: \_\_\_\_\_%
7. Subtract the larger from the smaller; the difference must be less than 5%:  
\_\_\_\_\_%

C. African Americans

1. The total population over 18 years old in the county is \_\_\_\_\_
2. The total population of cognizable group C (African Americans) is \_\_\_\_\_
3. Divide answer 2 by answer 1, move the decimal 2 places to the right: \_\_\_\_\_%
4. The number of people on the grand jury list is \_\_\_\_\_.
5. The number of African Americans on the grand jury list is \_\_\_\_\_.
6. Divide answer 5 by answer 4, move the decimal 2 places to the right: \_\_\_\_\_%
7. Subtract the larger from the smaller; the difference must be less than 5%: \_\_\_\_\_%

D. Whites

1. The total population over 18 years old in the county is \_\_\_\_\_
2. The total population of cognizable group D (whites) is \_\_\_\_\_
3. Divide answer 2 by answer 1, move the decimal 2 places to the right: \_\_\_\_\_%
4. The number of people on the grand jury list is \_\_\_\_\_.
5. The number of whites on the grand jury list is \_\_\_\_\_.
6. Divide answer 5 by answer 4, move the decimal 2 places to the right: \_\_\_\_\_%
7. Subtract the larger from the smaller; the difference must be less than 5%: \_\_\_\_\_%

E. \_\_\_\_\_

1. The total population over 18 years old in the county is \_\_\_\_\_
2. The total population of cognizable group E is \_\_\_\_\_
3. Divide answer 2 by answer 1, move the decimal 2 places to the right: \_\_\_\_\_%
4. The number of people on the grand jury list is \_\_\_\_\_.
5. The number of cognizable group E on the grand jury list is \_\_\_\_\_.
6. Divide answer 5 by answer 4, move the decimal 2 places to the right: \_\_\_\_\_%
7. Subtract the larger from the smaller; the difference must be less than 5%: \_\_\_\_\_%

F. \_\_\_\_\_

1. The total population over 18 years old in the county is \_\_\_\_\_.
2. The total population of cognizable group F is \_\_\_\_\_.
3. Divide answer 2 by answer 1, move the decimal 2 places to the right: \_\_\_\_\_%
4. The number of people on the grand jury list is \_\_\_\_\_.
5. The number of cognizable group F on the grand jury list is \_\_\_\_\_.
6. Divide answer 5 by answer 4, move the decimal 2 places to the right: \_\_\_\_\_%
7. Subtract the larger from the smaller; the difference must be less than 5%: \_\_\_\_\_%

This court is satisfied that the identified cognizable groups are adequately represented on the grand jury list.

## Traverse Jury Certificate

This court has reviewed the Traverse Jury List for \_\_\_\_\_ County from which the defendant's traverse jury panel will be selected. This Traverse Jury List was last revised in the year \_\_\_\_\_.

The following categories are "cognizable groups" in this county within the meaning of the Unified Appeal and current state and federal law:

A. Males                      B. Females      C. African Americans D. Whites

E. \_\_\_\_\_ F. \_\_\_\_\_

The total county population according to the most recent decennial census is \_\_\_\_\_ .

The total county population over 18 years old, according to the most recent census is \_\_\_\_\_.

The total number of persons on the traverse jury list is \_\_\_\_\_.

For each "cognizable group" listed above, calculate the percentage of the over-18 population of the county represented by the cognizable group, as follows:

### A. Males

1. The total population over 18 years old in the county is \_\_\_\_\_
2. The total population of cognizable group B (males) is \_\_\_\_\_
3. Divide answer 2 by answer 1, move the decimal 2 places to the right: \_\_\_\_\_%
4. The number of people on the traverse jury list is \_\_\_\_\_.
5. The number of males on the traverse jury list is \_\_\_\_\_.
6. Divide answer 5 by answer 4, move the decimal 2 places to the right: \_\_\_\_\_%
7. Subtract the larger from the smaller; the difference must be less than 5%:  
\_\_\_\_\_%

### B. Females

1. The total population over 18 years old in the county is \_\_\_\_\_
2. The total population of cognizable group B (females) is \_\_\_\_\_
3. Divide answer 2 by answer 1, move the decimal 2 places to the right: \_\_\_\_\_%
4. The number of people on the traverse jury list is \_\_\_\_\_.
5. The number of females on the traverse jury list is \_\_\_\_\_.
6. Divide answer 5 by answer 4, move the decimal 2 places to the right: \_\_\_\_\_%
7. Subtract the larger from the smaller; the difference must be less than 5%:  
\_\_\_\_\_%

### C. African Americans

1. The total population over 18 years old in the county is \_\_\_\_\_
2. The total population of cognizable group is C (African Americans) \_\_\_\_\_
3. Divide answer 2 by answer 1, move the decimal 2 places to the right: \_\_\_\_\_%

4. The number of people on the traverse jury list is \_\_\_\_\_.
5. The number of African Americans on the traverse jury list is \_\_\_\_\_.
6. Divide answer 5 by answer 4, move the decimal 2 places to the right: \_\_\_\_\_%
7. Subtract the larger from the smaller; the difference must be less than 5%:  
\_\_\_\_\_%

**D. Whites**

1. The total population over 18 years old in the county is \_\_\_\_\_
2. The total population of cognizable group is D (whites) \_\_\_\_\_
3. Divide answer 2 by answer 1, move the decimal 2 places to the right: \_\_\_\_\_%
4. The number of people on the traverse jury list is \_\_\_\_\_.
5. The number of whites on the traverse jury list is \_\_\_\_\_.
6. Divide answer 5 by answer 4, move the decimal 2 places to the right: \_\_\_\_\_%
7. Subtract the larger from the smaller; the difference must be less than 5%:  
\_\_\_\_\_%

**E. \_\_\_\_\_**

1. The total population over 18 years old in the county is \_\_\_\_\_
2. The total population of cognizable group is E \_\_\_\_\_
3. Divide answer 2 by answer 1, move the decimal 2 places to the right: \_\_\_\_\_%
4. The number of people on the traverse jury list is \_\_\_\_\_.
5. The number of cognizable group E on the traverse jury list is \_\_\_\_\_.
6. Divide answer 5 by answer 4, move the decimal 2 places to the right: \_\_\_\_\_%
7. Subtract the larger from the smaller; the difference must be less than 5%:  
\_\_\_\_\_%

**F. \_\_\_\_\_**

1. The total population over 18 years old in the county is \_\_\_\_\_
2. The total population of cognizable group is F \_\_\_\_\_
3. Divide answer 2 by answer 1, move the decimal 2 places to the right: \_\_\_\_\_%
4. The number of people on the traverse jury list is \_\_\_\_\_.
5. The number of cognizable group F on the traverse jury list is \_\_\_\_\_.
6. Divide answer 5 by answer 4, move the decimal 2 places to the right: \_\_\_\_\_%
7. Subtract the larger from the smaller; the difference must be less than 5%:  
\_\_\_\_\_%

This court is satisfied that the identified cognizable groups are adequately represented on the traverse jury list.

**F. Pre-trial Review Hearing**

1. After the completion of all pre-trial proceedings, the court shall conduct a hearing to determine if an interim appellate review of pre-trial rulings is appropriate. The court shall hear from the state and the defense as to whether the delay to be caused by interim appellate review outweighs the need for such review. If the court concludes that interim appellate review would not serve the ends of justice in the case, the court shall enter an order so stating and declaring the case stands ready for trial. An order obviating interim appellate review shall not be appealable. See OCGA § 17-10-35.1.

2. If the court concludes that interim appellate review of the pre-trial proceedings is appropriate, the court shall order such review and initiate the procedure by filing in the office of the clerk of superior court and deliver to the parties a report certifying that all pre-trial proceedings in the case have been completed. The report of the trial judge shall state whether there is arguably any reversible error with respect to any of the following matters:
  - a. Any proceedings with respect to change of venue;
  - b. Any proceedings with respect to recusal of the trial judge;
  - c. Any challenge to the jury array;
  - d. Any motion to suppress evidence;
  - e. Any motion to exclude statements by the defendant;
  - f. Any motion for psychiatric or other mental or physical evaluation;
  - g. Any motion for additional legal, investigative, or expert assistance; and
  - h. Any other pre-trial matter which may arguably result in reversible error.
  - i. If the trial judge determines that there is arguably any reversible error with respect to any ex parte proceedings, the report of the trial judge shall so state and shall identify the issue in a manner which does not disclose ex parte communications.
3. Within 10 days after the filing of the report or the filing of the transcripts of the proceedings, whichever is later, the prosecutor and the defendant may each seek review of any areas of the pre-trial proceedings in which reversible error may arguably have occurred by filing with the clerk of the Supreme Court an application to appeal any order, decision, or judgment entered in the case. The application for appeal shall be in the form of a petition and shall set forth the need for such an appeal and the issue or issues to be resolved.
  - a. The applicant shall identify with specificity those portions of the record which pertain to each of the issues as to which review is sought;
  - b. The applicant shall file an original and seven copies, which shall also include copies of the order or orders to be reviewed;
  - c. No certificate of immediate review shall be required for the filing of such application for appeal.
  - d. Copies of the application shall be served upon the opposing party and the Attorney General in the manner prescribed by OCGA § 5-6-32, except that such service shall be perfected at or before the filing of the application. A copy shall also be filed in the superior court.
4. The opposing party may file with the clerk of the Supreme Court an original response and seven copies within ten days from the date on which the application is filed in the Supreme Court. The response shall include specific reference to any additional portions of the record which the respondent deems pertinent to the issues addressed. Service shall be perfected as described above.
5. Any application for appeal which seeks review of any order, decision, or judgment entered ex parte shall so state and shall identify the issue in a manner which does not disclose confidential information. Such application shall be accompanied by a separate ex parte application in the form described above. Copies of the separate ex parte application

shall not be served on the opposing party or the Attorney General, but a copy thereof shall be filed under seal in the superior court.

6. Upon the filing of a copy of the application, the clerk of superior court shall immediately transmit to the Supreme Court the report of the trial judge and the portions of the record relevant to the issues to be addressed. A copy of all of the foregoing shall also be delivered by the clerk of superior court to the Attorney General. The clerk of the superior court shall transmit to the Supreme Court under seal any ex parte proceedings in the record without furnishing a copy to the Attorney General.

### **G. Forms for Pre-trial Reports**

Report of the \_\_\_\_\_ (Judge, District Attorney, or Defense Attorney)

Is there arguably reversible error with respect to any of the following matters? If so, describe the pertinent factual and legal issues:

- (1) Any proceedings with respect to change of venue;
- (2) Any proceedings with respect to recusal of the trial judge;
- (3) Any challenge to the jury array;
- (4) Any motion to suppress evidence;
- (5) Any motion to exclude statements by the defendant;
- (6) Any motion for psychiatric or other mental or physical evaluation;
- (7) Any motion for additional legal, investigative, or expert assistance;
- (8) Any other pre-trial matter which may arguably result in reversible error.
- (9) If the trial judge determines that there is arguably any reversible error with respect to any ex parte proceedings, the report of the trial judge shall so state and shall identify the issue in a manner which does not disclose ex parte communications.

### **H. Pre-trial Review in the Supreme Court**

1. The Supreme Court shall issue an order granting review of the pre-trial proceedings, or portions thereof, or denying review within 20 days of the date on which the case is docketed. The order of the Supreme Court shall identify the matters which shall be subject to review, and such matters may include, but need not be limited to, any matters called to the court's attention in any of the reports or in any application for appeal. If such review is granted, no notice of appeal need be filed. The order granting review shall specify the period of time within which each party shall file briefs and responsive briefs as to matters identified in the order granting review. Oral argument must be requested and shall be discretionary with the court.
2. If requested by the district attorney, the Attorney General shall assist in the review and appeal.
3. Pre-trial review of any matter as provided for herein, as to any question passed on in such review, shall be res judicata as to such question and shall be deemed to be the law of the case.

4. This pre-trial review procedure shall not apply to any ruling or order made, invoked, or sought subsequent to the filing of the report of the trial judge.
5. The failure of either party to assert their rights under this pre-trial review procedure, or the failure of the Supreme Court to grant review, shall not waive the right to post-trial review of any question which could be raised under this procedure, and shall not constitute an adjudication as to such question.

Adopted effective September 1, 1989; amended effective June 18, 1992; January 27, 2000.

### **RULE III. TRIAL PROCEEDINGS**

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

1. *Before commencement of trial.* Immediately before trial, the court shall confer with the prosecuting attorney and defense counsel. The defendant shall be present during the conference. The conference shall be recorded and transcribed.

The following matters shall be concluded during the conference:

- a. All pending motions shall be heard.
  - b. The court shall determine whether there are any last-minute motions the defense wishes to present and give the prosecuting attorney and defense counsel an opportunity to present any stipulations to which they have agreed.
  - c. The court shall ascertain whether counsel for both sides have reviewed Part II (A) through (H) of the checklist and are prepared to raise any possible trial issues in a timely manner.
  - d. The court shall give the defendant an opportunity to state any objections he or she may have to defense counsel or to the manner in which defense counsel have conducted or are conducting the defense.
2. *After close of the evidence.* After close of the evidence, but before closing arguments, the court shall confer with the prosecuting attorney and defense counsel. The defendant shall be present during the conference. The conference shall be recorded and transcribed.

The following matters shall be concluded during the conference after close of the evidence:

- a. Written requests to charge shall be presented to the court for rulings.
- b. The court shall make a final ruling on any issues as to which a tentative ruling or no ruling was made during presentation of the evidence.
- c. The court shall hear any timely and otherwise- proper motions or objections the defense wishes to present. Defense counsel shall be given an opportunity to perfect the record by making a tender of proof as to any evidence that was excluded by the court.

- d. The court shall ascertain whether the parties have reviewed Part II (I) through (Q) of the checklist and are prepared to raise these issues in a timely manner. Defense counsel shall be advised that objections to the state's closing argument will be waived if not raised as soon as grounds for such objection arise, unless explicit permission is granted to reserve objection until the conclusion of argument.
  - e. The court shall give the defendant an opportunity to state any objections he or she may have to defense counsel, or to the manner in which defense counsel have conducted or are conducting the defense.
3. *After charge of the court.* After charge of the court, the court shall confer with the prosecuting attorney and defense counsel. The defendant shall be present during the conference. The conference shall be recorded and transcribed.

The following matters shall be concluded during the conference after charge of the court:

- a. Any issue as to arguments of counsel or as to the charge of the court shall be presented and decided.
- b. The court shall hear any timely and otherwise proper motions or objections the defense wishes to present.
- c. The court shall give the defendant an opportunity to state any objections he or she may have to defense counsel, or to the manner in which defense counsel have conducted or are conducting the defense.

## **B. Sentencing Phase**

1. *Before Commencement of Sentencing Phase.* Immediately before the commencement of the sentencing phase of the trial, the court shall confer with the prosecuting attorney and defense counsel. The defendant shall be present during the conference. The conference shall be recorded and transcribed.

The following matters shall be taken up during the conference:

- a. All pending motions shall be heard.
- b. The court shall review Part III of the checklist with defense counsel and the prosecuting attorney. Defense counsel shall be given the opportunity to raise in limine any objections to the state's anticipated evidence in aggravation. However, failure to object in limine shall not amount to a waiver of otherwise- timely objections to the introduction of evidence. The court shall give the prosecuting attorney and defense counsel an opportunity to present any stipulations to which they have agreed.
- c. In the event of a retrial as to sentence, the court shall also review Part VI of the checklist with defense counsel and the prosecuting attorney.

2. *After Close of the Evidence.* After the close of the evidence, but before closing arguments, the court shall confer with the prosecuting attorney and defense counsel. The defendant shall be present during the conference. The conference shall be recorded and transcribed.

The following matters shall be concluded during the conference:

- a. Written requests to charge shall be presented to the court for rulings.
- b. The court shall make a final ruling on any issues raised during the sentencing phase of the trial as to which a tentative ruling or no ruling was made during the presentation of the evidence.
- c. The court shall again review Part III of the checklist with defense counsel and the prosecuting attorney and shall hear any timely and otherwise proper motions or objections the defense wishes to present. Defense counsel shall be given an opportunity to perfect the record by making a tender of proof as to any evidence that was excluded by the court. If the court determines that a mistake was made in the exclusion of potentially-mitigating evidence, the court shall reopen the evidence and allow its presentation to the jury.
- d. Defense counsel shall be advised that objections to the state's sentencing phase closing argument will be waived if not raised as soon as grounds for such objection arise, unless explicit permission is granted to reserve objection until the conclusion of argument.
- e. The court shall give the defendant an opportunity to state any objections he or she may have to defense counsel or to the manner in which defense counsel have conducted or are conducting the defense.

3. *After Charge of the Court.* After charge of the court at the sentencing phase of the trial, the court shall confer with the prosecuting attorney and defense counsel. The defendant shall be present during the conference. The conference shall be recorded and transcribed.

The following matters shall be concluded during the conference after the charge of the court:

- a. The court shall review Part III (C) and (D) with the prosecuting attorney and defense counsel. Any issue as to arguments of counsel or as to the charge of the court shall be presented and decided. Defense counsel shall be advised that any such issue not timely raised shall be waived. Reservations of objections to the sentencing-phase charge will not be permitted.
- b. The court shall also review Part III (E) of the checklist with the prosecuting attorney and defense counsel. Defense counsel shall be advised that objections to the form of the verdict must be raised when the verdict is returned. The court shall note that a poll of the jurors is required.
- c. The court shall give the defendant an opportunity to state any objections he or she may have to defense counsel or to the manner in which defense counsel have conducted or are conducting the defense.

## **RULE IV. REVIEW PROCEEDINGS**

### **A. In the Superior Court**

1. Within forty-five (45) days from the jury's verdict in the sentencing phase of the proceedings, the court reporter shall file with the superior court a *complete transcript* of all phases of the case unless the reporter has obtained an extension of time in writing from the judge who imposed the death sentence. No extension of time for filing the transcript shall exceed fifteen (15) days. For purposes of this rule, the term "complete transcript" shall include a complete transcription of: all pre-trial hearings; the selection of the jurors, including challenges for cause; the voir dire examination and the striking; the opening statements and closing arguments of counsel; the examination of the witnesses; all documentary evidence, including photographs; all oral motions (whether pre-trial, during trial or after trial) and all hearings on oral and written motions; all oral objections and all hearings on oral and written objections; all conferences and hearings of every description and for every purpose conducted between court and counsel, including all bench and chamber conferences; all oral stipulations of counsel; the charges of the court to the jury during the guilt-innocence and sentencing phases of the proceedings; the publication of the verdict and the polling of the jury; the pronouncement of sentence; and all oral comments, instructions, directions, admonitions, rulings and orders of the court in the case from the first proceeding through conclusion of the trial.
  - a. The filing of a motion for new trial is not a procedural prerequisite for review by the superior court and Supreme Court. A defendant may, but is not required to file a motion for new trial. A defendant may elect to proceed either by motion for new trial or direct appeal, or may allow the case to be presented directly to the Supreme Court for review. The case nevertheless shall be considered by the Supreme Court.
  - b. These rules shall not be construed so as to limit or restrict the grounds of review available through motion for new trial, motion to withdraw a guilty plea, direct appeal, writ of habeas corpus, or any other writ, motion, or proceeding cognizable in the courts of this state. It is, however, the purpose of these rules to insure that as many issues as possible which heretofore could be raised by writ of habeas corpus or other post-trial procedure are timely raised before or during trial.
  - c. The procedures governing the writ of habeas corpus may be employed by any defendant to assert rights and seek remedies if the procedures established by these rules are inadequate or ineffective in any constitutional sense.
  - d. It is not the intent of these rules to permit any issues to be raised or presented in the superior court or the Supreme Court that previously have been waived, procedurally defaulted, or abandoned pursuant to the laws of this state or of the United States.
2. *Motion for New Trial*. The sole function of a motion for new trial shall be to bring to the attention of the superior court after imposition of sentence such grounds as defense counsel may wish the trial court to decide.

- a. When the court reporter files the complete transcript, as described above, he or she shall notify the trial judge and counsel. The hearing on the motion for new trial shall be taken down and transcribed by the reporter.
  - b. Additional evidence may be heard under the rules applicable to extraordinary motions for new trial or otherwise as necessary to perfect the record and to rule upon the motion for new trial.
  - c. The hearing on the motion for new trial shall not be limited to the grounds asserted by the defendant.
  - d. Every defendant shall have the right to be represented by appointed or retained counsel in all matters and at all times during the pendency of a motion for new trial.
  - e. Within twenty (20) days of the hearing by the trial court, the court reporter shall file with the trial court a complete transcript of the proceedings on the motion for new trial, unless the reporter has obtained an extension of time in writing from the judge who imposed the death sentence. No extension of time for filing the transcript shall exceed fifteen (15) days.
3. *Transmission to the Supreme Court.*
- a. It shall be the duty of the superior court to transmit the entire record, the trial judge's questionnaire required by OCGA § 17-10-35 (a) (*attached as appendix B to these rules*) and the complete transcript, as defined in Section IV(A) above, to the Supreme Court for review regardless of whether a notice of appeal has been filed.
    - (1) If no review proceedings have been commenced in the superior court, the superior court shall transmit the case to the Supreme Court for review within ten (10) days of the filing by the official reporter of the complete transcript of trial.
    - (2) The superior court shall transmit the case to the Supreme Court for review within thirty (30) days from entry of an order denying a motion for new trial.
  - b. Except as provided in these rules, the appeal shall be presented, heard and determined in accordance with the rules of the Supreme Court and the Appellate Practice Act.

**B. In the Supreme Court.** Review proceedings in the Supreme Court shall be conducted in accordance with the following rules:

1. At any time after the case is docketed in the Supreme Court, the superior court may be directed by the Supreme Court to conduct further hearings, to hold additional conferences for specified purposes, or to make additional findings of facts or conclusions of law in respect to issues raised by the parties on appeal or perceived by the Supreme Court although not asserted by the defendant or the state. Any such matter may be referred to the superior court for disposition according to a timetable established by order of the Supreme Court. The Supreme Court shall retain jurisdiction of the entire appeal, unless otherwise specified by order, notwithstanding the referral to the superior court, and may

take such actions in respect thereto as are necessary or proper pending a decision by the superior court on the matter or matters referred.

2. In all cases, the Supreme Court shall determine whether the verdicts are supported by the evidence according to law. The Supreme Court shall review each of the assertions of error timely raised by the defendant during the proceedings in the trial court regardless of whether an assertion of error was presented to the trial court by motion for new trial and regardless of whether error is enumerated in the Supreme Court. However, except in cases of plain error, assertions of error not raised on appeal shall be waived. The Supreme Court may direct defense counsel and the state to brief and argue any or all additional grounds.

## **CHECKLIST**

### Categories of Some Possible Errors

#### **PART I. PRE-TRIAL**

Some possible errors arising or complained of prior to trial:

##### **A. Arrest: OCGA Title 17, Chapter 4.**

1. *With warrant.* OCGA § 17-4-40; *Devier v. State*, 253 Ga. 604 (5) (323 SE2d 150)(1984)
2. *Without warrant.* OCGA § 17-4-20; *Durden v. State*, 250 Ga. 325 (1) (297 SE2d 237)(1982)
  - a. In public place: *United States v. Watson*, 423 US 411 (96 SC 820, 46 LE2d 598) (1976); *Ellis v. State*, 248 Ga. 414 (283 SE2d 870) (1981)
  - b. In home: *Payton v. New York*, 445 US 573 (100 SC 1371, 63 LE2d 639) (1980); *Carranza v. State*, 266 Ga. 263 (467 SE2d 315)(1996)
3. *Investigative detentions.*
  - a. Must be supported by reasonable and articulable suspicion: *Vansant v. State*, 264 Ga. 319 (2) (443 SE2d 474) (1994); *Lee v. State*, 270 Ga. 798 (7) (514 SE2d 1) (1999)
  - b. Limited in Scope: *Terry v. Ohio*, 392 US 1 (88 SC 1868, 20 LE2d 889) (1968); *Smith v. State*, 216 Ga. App. 453 (2) (454 SE2d 635) (1995)

##### **B. Search and Seizure: OCGA Title 17, Chapter 5**

1. *With warrant.*
  - a. Sufficiency of description: *Anderson v. State*, 249 Ga. 132 (5) (287 SE2d 195) (1982)
  - b. Sufficiency of probable cause: *Illinois v. Gates*, 462 US 213 (103 SC 2317, 76 LE2d 527) (1983); *DeYoung v. State*, 268 Ga. 780 (7) (493 SE2d 157) (1997)
  - c. Scope of permissible search: *Landers v. State*, 250 Ga. 808 (301 SE2d 633) (1983)
2. *Without warrant.*
  - a. Expectation of privacy -- standing: *Rakas v. Illinois*, 439 US 128 (99 SC 421, 58 LE2d 387) (1978); *Barnes v. State*, 269 Ga. 345 (4) (496 SE2d 674) (1998); *Sears v. State*, 268 Ga. 759 (4) (493 SE2d 180) (1997)
  - b. Search of person
    - (1) Incident to arrest: *United States v. Robertson*, 414 US 21 (94 SC 467, 38 LE2d 427) (1973); *Chimel v. California*, 395 US 752 (89 SC 2034, 23 LE2d 685) (1969); *Paxton v. State*, 160 Ga. App. 19 (1) (285 SE2d 741) (1981); *Banks v. State*, 246 Ga. 178 (2) (269 SE2d 450) (1980); *Batton v. State*, 260 Ga. 127 (3) (391 SE2d 914) (1990)

(2) Inventory search of personal effects prior to incarceration: *Illinois v. Lafayette*, 462 US 640 (103 SC 2605, 77 LE2d 65) (1983)

(3) Limited search during investigative detention: *Florida v. Royer*, 460 US 491 (103 SC 1319, 75 LE2d 229) (1983)

(4) Consent search: *Schneckloth v. Bustamante*, 412 US 218 (93 SC 2041, 36 LE2d 854) (1973)  
c. Search of vehicle

(1) Protective search during lawful investigative stop: *Michigan v. Long*, 463 US 1032 (103 SC 3469, 77 LE2d 1201) (1983)

(2) The “plain view” doctrine: *Texas v. Brown*, 460 US 730 (103 SC 1535, 75 LE2d 502) (1983); *United States v. Ross*, 456 US 798 (102 SC 2157, 72 LE2d 572) (1982); *State v. David*, 269 Ga. 533 (501 SE2d 494) (1998); *Pickens v. State*, 225 Ga. App. 792 (484 SE2d 731) (1997)

(3) Incident to arrest: *New York v. Belton*, 453 US 454 (101 SC 2860, 69 LE2d 768) (1981); *Banks v. State*, 246 Ga. 178 (2) (269 SE2d 450) (1980)

(4) Inventory search of seized automobile: *South Dakota v. Opperman*, 428 US 364 (96 SC 3092, 49 LE2d 1000) (1976); *Hansen v. State*, 168 Ga. App. 304 (3) (308 SE2d 643) (1983)

d. Search of premises

(1) Incident to arrest: *Chimel v. California*, 395 US 752 (89 SC 2034, 23 LE2d 685) (1969); *Maryland v. Buie*, 494 US 325 (110 SC 1093, 108 LE2d 276) (1990)

(2) Probable cause and exigent circumstances: *Warden v. Hayden*, 387 US 294 (87 SC 1642, 18 LE2d 782) (1967); *Cates v. State*, 232 Ga. App. 262 (501 SE2d 262) (1998); *Clare v. State*, 135 Ga. App. 281 (217 SE2d 638) (1975)

(3) Arrest warrant for third party: *Steagald v. United States*, 451 US 204 (101 SC 1642, 68 LE2d 38) (1981); *King v. State*, 217 Ga. App. 889 (459 SE2d 605) (1995)

3. *Electronic surveillance*

a. Federal Statutes: 18 USCA 2516 et seq.

b. Georgia statutes: OCGA Title 16, Ch. 11, Art. 3, Part 1

(1) By law enforcement: OCGA § 16-11-64; *State v. Toomey*, 134 Ga. App. 343 (214 SE2d 421) (1975); *Dobbins v. State*, 262 Ga. 161 (2) (a) (415 SE2d 168) (1992)

(2) By private party: OCGA § 16-11-62; *Mitchell v. State*, 239 Ga. 3 (235 SE2d 509) (1977)

4. *Motion to suppress: OCGA § 17-5-30.*

a. Scope: *State v. Johnston*, 249 Ga. 413 (291 SE2d 543) (1982)

b. File before trial if grounds known: *Thomas v. State*, 118 Ga. App. 359 (163 SE2d 850) (1968)

c. Should be in writing: *Hiatt v. State*, 132 Ga. App. 289 (208 SE2d 163) (1974)

d. Sufficiency of form of motion: *Lavelle v. State*, 250 Ga. 224 (3) (297 SE2d 234) (1982)

### **C. Identification of Defendant.**

1. *Reliability/Admissibility.* *Manson v. Brathwaite*, 432 US 98 (97 SC 2243, 53 LE2d 140) (1977); *Neil v. Biggers*, 409 US 188 (93 SC 375, 34 LE2d 401) (1972); *Thomason v. State*, 268 Ga. 298 (3) (486 SE2d 861) (1997)

a. Of defendant’s voice: *Jefferson v. State*, 206 Ga. App. 544 (2) (425 SE2d 915) (1992)

### **D. Confessions and Admissions.**

1. *Applicability Of.* *Miranda v. Arizona*, 384 US 436 (86 SC 1602, 16 LE2d 694) (1966); *Cook v. State*, 270 Ga. 820 (2) (514 SE2d 657) (1999); *Findley v. State*, 251 Ga. 222 (1) (304 SE2d 898) (1983)

2. *Assertion of Right to Counsel.* *Davis v. United States*, 512 US 450 (114 SC 2350, 129 LE2d 362) (1994); *Edwards v. Arizona*, 451 US 477 (101 SC 1880, 68 LE2d 378) (1981); *Jordan v.*

State, 267 Ga. 442 (1) (480 SE2d 18) (1997); *Allen v. State*, 259 Ga. 63 (377 SE2d 150) (1989); *Gissendaner v. State*, 269 Ga. 495 (500 SE2d 577) (1998)

3. *Invocation of Right to Remain Silent*. *Michigan v. Mosley*, 423 US 96 (96 SC 321, 46 LE2d 313) (1975); *Fields v. State*, 266 Ga. 241 (1) (466 SE2d 202) (1996); *Hatcher v. State*, 259 Ga. 274 (2) (379 SE2d 775) (1989)

4. *Confessions and Admissions of Co-Conspirators*. OCGA § 24-3-52; *Bruton v. United States*, 391 US 123 (88 SC 1620, 20 LE2d 476) (1968); *Hanifa v. State*, 269 Ga. 797 (2) (505 SE2d 731) (1998); *Gray v. Maryland*, 523 US 185 (118 SC 1151, 140 LE2d 294) (1998)

5. *Confessions and Admissions During Psychiatric Examination*. *Estelle v. Smith*, 451 US 454 (101 SC 1866, 68 LE2d 359) (1981); *Hicks v. State*, 256 Ga. 715 (14) (352 SE2d 762) (1987); *Stephens v. State*, 270 Ga. 354 (4) (309 SE2d 605) (1998)

6. *Confessions Obtained After Illegal Arrest*. *Dunaway v. New York*, 442 US 200 (99 SC 2248, 60 LE2d 824) (1979); *Devier v. State*, 253 Ga. 604 (7) (323 SE2d 150) (1984)

7. *Voluntariness of Confession*. OCGA § 24-3-50; *Lee v. State*, 270 Ga. 798 (2) (514 SE2d 1) (1999); *State v. Ritter*, 268 Ga. 108 (485 SE2d 492) (1997)

#### **E. Bail: OCGA Title 17, Chapter 6**

1. *Ayala v. State*, 262 Ga. 704 (425 SE2d 282) (1993); *Lane v. State*, 247 Ga. 387 (276 SE2d 644) (1981)

#### **F. Representation by Counsel**

1. *Right to Counsel*. OCGA Title 17, Chapter 12; *Gideon v. Wainwright*, 372 US 335 (83 SC 792, 9 LE2d 799) (1963)

2. *Right of Self-Representation*. *Faretta v. California*, 422 US 806 (95 SC 2525, 45 LE2d 562) (1975); *Thaxton v. State*, 260 Ga. 141 (2) (390 SE2d 841) (1990); *Seagraves v. State*, 259 Ga. 36 (376 SE2d 670) (1989)

3. *No Absolute Right of Indigent to Appointment of Attorney of Own Choosing*. *Lipham v. State*, 257 Ga. 808 (2) (364 SE2d 840) (1988); *Kesler v. State*, 249 Ga. 462 (12) (291 SE2d 497) (1982)

4. *Appointment of Counsel*. *Amadeo v. State*, 259 Ga. 469 (384 SE2d 181) (1989); *Clarke v. Zant*, 247 Ga. 194 (275 SE2d 49) (1981)

5. *Effective Assistance of Counsel*.

a. General standard: *Strickland v. Washington*, 466 US 668 (104 SC 2052, 80 LE2d 674) (1984); *Smith v. Francis*, 253 Ga. 782 (1) (325 SE2d 362) (1985)

b. Includes meaningful access to attorney: *Wright v. State*, 250 Ga. 570 (1) (300 SE2d 147) (1983)

c. Conflicts of interest: *Chapel v. State*, 264 Ga. 267 (443 SE2d 271) (1994); *Sallie v. State*, 269 Ga. 446 (499 SE2d 897) (1998)

#### **G. Demurrers, Motions to Quash and Special Pleas: OCGA §§ 17-7-111, 17-7-113, 17-9-63**

1. *Special Versus General Demurrers*. *Bramblett v. State*, 239 Ga. 336 (1) (236 SE2d 580) (1977)

#### **H. Arraignment: OCGA § 17-7-5**

1. *Notice*. OCGA § 17-7-91; *Smith v. State*, 235 Ga. 620 (221 SE2d 41) (1975)

2. *Guilty Plea*.

a. Competency: *Boykin v. Alabama*, 395 US 238 (89 SC 1709, 23 LE2d 274) (1969); *Godinez v. Moran*, 509 US 389 (113 SC 2680, 125 LE2d 321) (1993); *Goodman v. Davis*, 249 Ga. 11 (287 SE2d 26) (1982); *State v. Germany*, 245 Ga. 326 (265 SE2d 13) (1980)

- b. Plea to lesser offense: *Wharton v. Anderson*, 270 Ga. 22 (504 SE2d 670) (1998); *Breland v. Smith*, 247 Ga. 690 (279 SE2d 204) (1981)
- c. Jury trial as to sentence after guilty plea: *Browner v. State*, 257 Ga. 321 (357 SE2d 559) (1987)
- d. Withdrawal of plea: *Henry v. State*, 269 Ga. 851 (2) (507 SE2d 419) (1998); *Browner v. State*, 257 Ga. 321 (357 SE2d 559) (1987); *Fair v. State*, 245 Ga. 868 (8) (268 SE2d 316) (1980)

#### **I. Pleas in Bar**

1. *Double Jeopardy*. 1983 Const., Art 1, Sec. 1, Par. XVII; OCGA § 16-1-8 (c); *Blockburger v. United States*, 284 US 299 (52 SC 180, 76 LE 306) (1932); *Torres State*, 270 Ga. 79 (1) (508 SE2d 171) (1998)
  - a. Denial of timely-filed plea of double jeopardy appealable prior to trial: *Patterson v. State*, 248 Ga. 875 (287 SE2d 7) (1982)
  - b. Aggravating circumstances: OCGA § 17-10-30; *Spraggins v. State*, 255 Ga. 195 (336 SE2d 227) (1985)
2. *Statute of Limitations*. OCGA § 17-3-1, 2; *Hall v. Hopper*, 234 Ga. 625 (1) (216 SE2d 839) (1975)
3. *Speedy Trial*.
  - a. OCGA § 17-7-171
  - b. US Constitution, Amendments 6 and 14: *Barker v. Wingo*, 407 US 574 (92 SC 2182, 33 LE2d 101) (1972); *Pruitt v. State*, 270 Ga. 745 (3) (514 SE2d 639)(1999); *Brown v. State*, 264 Ga. 803 (2) (450 SE2d 821) (1994)
4. *Prevent Seeking of Death Penalty Due to Alleged Racial or Gender Bias*. *Rower v. State*, 264 Ga. 323 (1) (443 SE2d 839) (1994); *Perkins v. State*, 269 Ga. 791 (2) (505 SE2d 16) (1998)

#### **J. Defendant's Mental Condition**

1. *Motion for Independent Mental Examination*. *Ake v. Oklahoma*, 470 US 68 (105 SC1087, 84 LE2d 53) (1985); *Bright v. State*, 265 Ga. 265 (2) (455 SE2d 37) (1995) (to develop mitigation evidence); *Holloway v. State*, 257 Ga. 620 (361 SE2d 794) (1987); *Lindsey v. State*, 254 Ga. 444 (330 SE2d 563) (1985)
2. *Defendant's Competence to Stand Trial*. OCGA § 17-7-130; *Pate v. Robinson*, 383 US 375 (86 SC 836, 15 LE2d 815) (1966); *Meders v. State*, 260 Ga. 49 (1) (238 SE2d 334) (1990); *Holloway v. State*, 257 Ga. 620 (361 SE2d 794) (1987)
3. *Defendant's Mental Condition at Time of Offense*.
  - a. Presumption of sanity: *Durham v. State*, 239 Ga. 697 (1) (238 SE2d 334) (1977)
  - b. Insane at time of crime defined: OCGA § 17-7-131 (a) (1); OCGA §16-3-2 and 3; *Clark v. State*, 245 Ga. 629 (1) (266 SE2d 466) (1980)
  - c. "Mentally ill" defined: OCGA § 17-7-131 (a) (2)
  - d. "Mentally retarded" defined: OCGA § 17-7-131 (a) (3); *Fleming v. Zant*, 259 Ga. 687 (386 SE2d 339) (1989); *Burgess v. State*, 264 Ga. 777 (36) (450 SE2d 680) (1994)
  - e. Charge/form of verdict: OCGA § 17-7-131 (b) and (c); *Spraggins v State*, 258 Ga. 32 (364 SE2d 861) (1988)
  - f. Burden of proof as to sanity: *Brown v. State*, 250 Ga. 66 (2) (295 SE2d 727) (1982)
  - g. Burden of proof as to mental retardation: *Burgess v. State*, 264 Ga. 777 (36) (450 SE2d 680) (1994); *Stephens v. State*, 270 Ga. 354 (2) (509 SE2d 605) (1998)

#### **K. Discovery**

1. *Generally*. OCGA § 17-16-1 et seq.; *State v. Lucious*, 271 Ga.361 (518 SE2d 677) (1999)

2. *State's disclosure of evidence favorable to defendant.* Brady v. Maryland, 373 US 83 (83 SC 1194, 10 LE2d 215) (1963); United States v. Agurs, 427 US 97 (96 SC 2392, 49 LE2d 342) (1976); Williams v. State, 250 Ga. 463 (298 SE2d 492) (1983); Mize v. State, 269 Ga. 646 (2) (501 SE2d 219) (1998); Gulley v. State, 271 Ga. 337 (5) (519 SE2d 655) (1999)
3. *Witness List.* OCGA § 17-16-8
4. *Witness statements.* OCGA §§ 17-16-4 (a) (1), 17-16-7
  - a. Plea arrangements with witness: Giglio v. United States, 405 US 150 (92 S. Ct. 763, 31 LE2d 104) (1972); Owen v. State, 265 Ga. 67 (2) (453 SE2d 728) (1995); Patillo v. State, 258 Ga. 255 (4) (368 SE2d 493) (1988)
5. *Failure to Preserve Evidence - Bad Faith.* Arizona v. Youngblood, 488 US 51 (109 SC 333, 102 LE2d 281) (1988)
6. *In-camera Inspection by Trial Court.* Reed v. State, 249 Ga. 52 (3) (287 SE2d 205) (1982); Tribble v. State, 248 Ga. 274 (280 SE2d 352) (1981)
7. *Discovery of the Defendant's Statements.* OCGA §§ 17-16-4 (a) (1), 17-16-7; Walraven v. State, 250 Ga. 401 (2) (297 SE2d 278) (1982)
  - a. Statements made by co-defendant: OCGA § 17-16-4 (a) (1); OCGA § 17-16-7
8. *Scientific Reports.* OCGA § 17-16-4 (a) (4) and (b) (2); Brady v. State, 233 Ga. App. 287 (2) (503 SE2d 906) (1998)
9. *Notice to Produce.* OCGA §§ 24-10-26, 24-10-29; Wilson v. State, 246 Ga. 62 (1) (268 SE2d 895) (1980)
10. *Independent Examination of Evidence by a Defense Expert.* OCGA § 17-16-4 (a) (3)

#### **L. Motion for Severance**

1. *Severance of Co-Defendant's Case a Matter of Right When Death Penalty Sought.* OCGA § 17-8-4
2. *Severance of Offenses.* OCGA § 16-1-7 (c); Cooper v. State, 253 Ga. 736 (3) (325 SE2d 137) (1985); Jarrell v. State, 234 Ga. 410 (1) (216 SE2d 258) (1975)

#### **M. Other Pre-Trial Motions**

1. *Bruton Motion.* Bruton v. United States, 391 US 123 (88 SC 1620, 20 LE2d 476) (1968); Hanifa v. State, 269 Ga. 797 (2) (505 SE2d 731) (1998)
2. *Motion to Disclose Plea Bargain Agreements Between State and Its Witnesses.* Giglio v. United States, 405 US 150 (92 SC 763, 31 LE2d 104) (1972); Owens v. State, 251 Ga. 313 (1) (305 SE2d 102) (1983)
3. *Motions in Limine – Discretion of Court to Rule on Admissibility of Evidence Prior to Trial.* State v. Johnston, 249 Ga. 413 (3) (291 SE2d 543) (1982)

#### **N. Motion to Recuse**

1. *Judge.* Pope v. State, 257 Ga. 32 (354 SE2d 429) (1987); Romine v. State, 251 Ga. 208 (2) (305 SE2d 93) (1983); Smith v. State, 250 Ga. 438 (1) (298 SE2d 492) (1983); Speed v. State, 270 Ga. 688 (55) (512 SE2d 896) (1999)
2. *Prosecutor.* Frazier v. State, 257 Ga. 690 (9) (362 SE2d 357) (1987); Rutledge v. State, 245 Ga. 768 (1) (267 Ga. 199) (1980); Pruitt v. State, 270 Ga. 745 (19) (514 SE2d 639) (1999)

#### **O. Continuances: OCGA § 17-8-2**

1. *Absence of Witness.* OCGA § 17-8-25; Wilson v. State, 250 Ga. 630 (8) (300 SE2d 640) (1983); Romine v. State, 251 Ga. 208 (11) (298 SE2d 492) (1983)
2. *Absence of Attorney.* OCGA § 17-8-24; Putman v. State, 251 Ga. 605 (5) (308 SE2d 145) (1983); Shaw v. State, 251 Ga. 109 (303 SE2d 448) (1983)

3. *Other Reasons*. OCGA § 17-8-22; *Johnson v. State*, 271 Ga. 375 (8) (519 SE2d 221 ) (1999)

### **P. Motions Regarding Publicity**

1. *Change of Venue*. OCGA § 17-7-150; *Kesler v. State*, 249 Ga. 462 (7) (291 SE2d 497) (1982); *Jenkins v. State*, 269 Ga. 282 (3) (498 SE2d 502) (1998); *Barnes v. State*, 269 Ga. 345 (2) (496 SE2d 674) (1998)

2. *"Gag Orders"*. *Nebraska Press Assn. v. Stuart*, 427 US 539 (96 SC 2791, 49 LE2d 683) (1976)

3. *Motion for Closed Hearing*. *R. W. Page Corp. v. Lumpkin*, 249 Ga. 576 (292 SE2d 815) (1982); *Rockdale Citizen Publishing Co. v. State*, 266 Ga. 579 (468 SE2d 764) (1996)

### **Q. Jury Challenges (to the Array)**

1. *Distinguish Challenges to the "Poll"*. *Jordan v. State*, 247 Ga. 328 (6) (276 SE2d 224) (1981)

2. *Statutory Fair Cross-Section Requirement*. OCGA § 15-12-40

a. Applicable to grand and traverse jury pools: *Devier v. State*, 250 Ga. 652 (300 SE2d 480) (1983)

b. Violation of OCGA § 15-12-40 regarding grand jury pool is not cured by subsequent conviction by properly constituted traverse jury: *West v. State*, 252 Ga. 156 (1) (313 SE2d 67) (1984)

3. *Sixth Amendment*.

a. Requires that traverse jury array constitute a fair cross-section of the community: *Duren v. Missouri*, 439 US 357 (99 SC 664, 58 LE2d 579) (1979)

b. Purposeful discrimination irrelevant: *Walraven v. State*, 250 Ga. 401 (3) (297 SE2d 278) (1982)

4. *Equal Protection Clause of Fourteenth Amendment*.

a. Applicable to grand and traverse jury venires: *Castaneda v. Partida*, 430 US 482 (97 SC 1272, 51 LE2d 498) (1977)

b. Substantial under representation of race or identifiable group, resulting from purposeful discrimination, is a denial of equal protection: *Swain v. Alabama*, 380 US 202 (85 SC 824, 13 LE2d 759) (1965)

c. Violation of equal protection regarding the grand jury is not cured by subsequent conviction by properly constituted traverse jury: *Vasquez v. Hillery*, 474 US 254 (106 SC 617, 88 LE2d 598) (1986)

5. *Measuring Under Representation*. *Cook v. State*, 255 Ga. 565 (11) (340 SE2d 843) (1986); *Mobley v. State*, 262 Ga 808 (1) (426 SE2d 150) (1993)

6. *Cognizability of Under Represented Group*. *Parks v. State*, 254 Ga. 403 (6)(b) (330 SE2d 686) (1985); *Bryant v. State*, 268 Ga. 664 (2) (492 SE2d 868) (1997)

7. *Time for Interposing Challenge*.

a. Announcement of intention to challenge should be made at first hearing: Unified Appeal Procedure, Rule II (B) (5); *Walraven v. State*, 250 Ga. 401 (1) (297 SE2d 278) (1982)

b. After trial is too late: *Young v. State*, 232 Ga. 285 (206 SE2d 439) (1974)

8. *Prospective Jurors May Be Excused from Jury Duty by Trial Court*. OCGA § 15-12-1 (a)

a. Disregard of this code section may vitiate the array: *Joyner v. State*, 251 Ga. 84 (303 SE2d 106) (1983)

## **Part II. Trial Proceedings: Guilt-Innocence Phase**

### **A. Voir Dire**

1. *Individual Voir Dire*. OCGA § 15-12-133; *State v. Hutter*, 251 Ga. 615 (307 SE2d 910) (1983)

2. *Sequestered Voir Dire Discretionary*. Sanborn v. State, 251 Ga. 169 (3) (304 SE2d 377) (1983)
3. *Scope of Examination*. Curry v. State, 255 Ga. 215 (2) (b) (336 SE2d 762) (1985); Henderson v. State, 251 Ga. 398 (306 SE2d 645) (1983)
4. *Challenges for Cause*.
  - a. Generally: Jordan v. State, 247 Ga. 328 (6) (276 SE2d 224) (1981); OCGA § 15-12-163
  - b. Death penalty bias - for or against: Greene v. State, 268 Ga. 47 (485 SE2d 741) (1997); Wainwright v. Witt, 469 US 412 (105 SC 844, 83 LE2d 841) (1985); Alderman v. State, 254 Ga. 206 (4) (327 SE2d 168) (1985)
  - c. Required disqualification of police officers upon defense motion: Hutcheson v. State, 246 Ga. 13 (268 SE2d 643) (1980); Mosher v. State, 268 Ga. 555 (2) (491 SE2d 348) (1997)
  - d. Pretrial publicity: Speed v. State, 270 Ga. 688 (4) (512 SE2d 896) (1999); Norton v. State, 263 Ga. 448 (2) (435 SE2d 30) (1993)
5. *Peremptory Challenges*.
  - a. Parties entitled to panel of 42 qualified jurors: Harris v. State, 255 Ga. 464 (339 SE2d 712) (1986)
  - b. Racial discrimination: Georgia v. McCollum, 505 US 42 (112 SC 2348, 120 LE2d 33) (1992); Powers v. Ohio, 499 US 400 (111 SC 1364, 113 LE2d 411) (1991); Barnes v. State, 269 Ga. 345 (6) (496 SE2d 674) (1998); Batson v. Kentucky, 476 US 79 (106 SC 1712, 90 LE2d 69) (1986); Gamble v. State, 257 Ga. 325 (2) (357 SE2d 792) (1987)
  - c. Gender discrimination: JEB v. Alabama, 511 US 127 (114 SC 1419, 128 LE2d 89) (1994); Tedder v. State, 265 Ga. 900 (2) (463 SE2d 697) (1995)

## **B. Opening Statements**

1. *Order*. Berryhill v. State, 235 Ga. 549 (221 SE2d 185) (1975)
2. *Comments by State*. Alexander v. State, 270 Ga. 346 (2) (509 SE2d 56) (1998)

## **C. Sequestration of Witnesses: OCGA § 24-9-61**

1. *On Request, Invocation of Rule Mandatory*. Poultryland v. Anderson, 200 Ga. 549 (2) (37 SE2d 745) (1956)
  - a. Rule need not be invoked until presentation of evidence: Putman v. State, 251 Ga. 605 (6) (308 SE2d 145) (1983)
  - b. Court may allow exceptions to the Rule: Hill v. State, 250 Ga. 277 (8) (295 SE2d 518) (1982); Barnes v. State, 269 Ga. 345 (17) (496 SE2d 674) (1998)
2. *Violation of the Rule by a Witness Does Not Render Witness Incompetent*. Jordan v. State, 247 Ga. 328 (10) (276 SE2d 224) (1981)
3. *Violation of the Rule Outside the Courtroom is Relevant to the Credibility of the Violator*. Childress v. State, 266 Ga. 425 (2) (467 SE2d 865) (1996)

## **D. Hearings Outside the Presence of the Jury**

1. *Admissibility of Defendants' Statement*.
  - a. Upon objection by defendant to admissibility of custodial statement, trial court must conduct hearing outside the presence of the jury: Peinado v. State, 223 Ga. App. 271 (1) (477 SE2d 408) (1996); Jackson v. Denno, 378 US 368 (84 SC 1774, 12 LE2d 908) (1964)
    - (1) Trial court's ruling on voluntariness of statement must be clear: Walraven v. State, 250 Ga. 401 (4) (a) (297 SE2d 278) (1982)
  2. *Motion to Quash In-Court Identification*. Holcomb v. State, 128 Ga. App. 238 (196 SE2d 330) (1973)

3. *Hearing Outside Presence of Jury Contemplated by Motion In Limine Made Prior to Trial.* State v. Johnston, 249 Ga. 413 (3) (291 SE2d 543) (1982)

**E. Issues Which May Arise Regarding Admissibility of Evidence.**

1. *Relevancy Defined.* Williams v. State, 153 Ga. App. 890 (1) (267 SE2d 305) (1980); Smith v. State, 270 Ga. 240 (4) (510 SE2d 1) (1998)

2. *Videotapes.*

a. Motion pictures: Beasley v. State, 269 Ga. 620 (2) (502 SE2d 235) (1998) (motive, state of mind); Rushin v. State, 269 Ga. 599 (2) (502 SE2d 454) (1998) (bent of mind)

b. Reenactment videos: Pickren v. State, 269 Ga. 453 (2) (500 SE2d 566) (1998)

3. *Audiotapes.* Robertson v. State, 268 Ga. 772 (3) (493 SE2d 697) (1997) (enhanced copies, use of certified copies, partly inaudible); Washington v. State, 268 Ga. 598 (3) (492 SE2d 197) (1997) (certified court reporter did not prepare transcript); Johnson v. State, 271 Ga. 375 (4) (519 SE2d 221) (1999) (break in audiotape); Page v. State, 249 Ga. 648 (26) (292 SE2d 850) (1982)

4. *Photographs.*

a. Authentication: Bryan v. State, 206 Ga. 73 (2) (55 SE2d 547) (1949)

b. Autopsy photographs: Jenkins v. State, 269 Ga. 282 (20) (498 SE2d 502) (1998); Sears v. State, 268 Ga. 759 (14) (493 SE2d 180) (1997); Drane v. State, 265 Ga. 255 (10) (455 SE2d 27) (1995) (post -incision photographs sometimes admissible); Brown v. State, 250 Ga. 862 (5) (302 SE2d 347) (1983)

c. Trial court has discretion to exclude photos with marginal probative value: Hicks v. State, 256 Ga. 715 (13) (352 SE2d 762) (1987)

5. *Documents.*

a. Public: OCGA Title 24, Chapter 7, Article 2

b. Private: OCGA Title 24, Chapter 7, Article 1

c. Handwriting: OCGA § 24-7-6

6. *Tangible Objects.*

a. Chain of custody: Mize v. State, 269 Ga. 646 (5) (501 SE2d 219) (1998); Stephens v. State, 259 Ga. 820 (3) (388 SE2d 519) (1990); Harper v. State, 251 Ga. 183 (1) (304 SE2d 693) (1983)

7. *Best Evidence Rule.* OCGA § 24-5-1; Howard v. State, 204 Ga. App. 743 (1) (420 SE2d 594) (1992) (certified copy of conviction); In the Interest of F.L.P., 184 Ga. App. 164 (2) (361 SE2d 43) (1987) (BER does not apply to a tape recorded statement); Merrill Lynch v. Zimmerman, 248 Ga. 580 (285 SE2d 181) (1981)

8. *Character Evidence.* OCGA § 24-2-2 (character of parties usually not admissible); Walraven v. State, 250 Ga. 401 (4)(b) (297 SE2d 278) (1982)

a. Relevant evidence not inadmissible simply because it reflects defendant's bad character: Mize v. State, 269 Ga. 646 (3) (501 SE2d 219) (1998); Earnest v. State, 262 Ga. 494 (1) (422 SE2d 188) (1992)

b. Victim's character: Brown v. State, 270 Ga. 601 (2) (512 SE2d 260) (1999) (not admissible if not relevant); Owens v. State, 270 Ga. 199 (2) (509 SE2d 905) (1999) (admissible if relevant to justification defense)

c. Placing character "in issue": Head v. State, 195 Ga. App. 445 (2) (393 SE2d 730) (1990); Jones v. State, 257 Ga. 753 (323 SE2d 529) (1988)

9. *Scientific Evidence.*

a. Admissibility: Carr v. State, 267 Ga. 701 (1) (482 SE2d 314) (1997); Caldwell v. State, 260 Ga. 278 (393 SE2d 436) (1990) (DNA); Harper v. State, 249 Ga. 519 (1) (292 SE2d 389) (1982)

b. Polygraph evidence: *State v. Chambers*, 240 Ga. 76 (239 SE2d 324) (1977)

10. *Opinion Evidence.*

a. Lay witnesses: OCGA § 24-9-65; *Johnson v. Knebel*, 267 Ga. 853 (1) (485 SE2d 451) (1997)

(1) Emotional states: *Travelers Ins. Co. v. Sheppard*, 85 Ga. 751 (8) (12 SE2d 18) (1890)

(2) Lay testimony of defendant's mental condition: *Dix v. State*, 238 Ga. 209 (2) (232 SE2d 47) (1977); *Speed v. State*, 270 Ga. 688 (37) (512 SE2d 896) (1999)

b. Expert witnesses: OCGA 24-9-67; *Barlow v. State*, 270 Ga. 54 (507 SE2d 416) (1998); *Smith v. State*, 247 Ga. 612 (277 SE2d 678) (1981)

11. *Hearsay.*

a. Definition: OCGA § 24-3-1; *Hurston v. State*, 194 Ga. App. 226 (390 SE2d 119) (1990); *Reed v. State*, 249 Ga. 52 (4) n.3 (287 S.E.2d 205) (1982)

b. Explanation of conduct: OCGA § 24-3-2; *Mincey v. State*, 251 Ga. 255 (12) (304 SE2d 882) (1983)

c. Declarations of co-conspirators: OCGA § 24-3-5; *Copeland v. State*, 266 Ga. 664 (2) (469 SE2d 672) (1996); *Castell v. State*, 250 Ga. 776 (1) (301 SE2d 234) (1983)

d. Business records: OCGA § 24-3-14

12. *Privileged Communications.* OCGA §§ 24-9-21, 24-9-23, 24-9-24, 43-39-16; *Sweat v. State*, 226 Ga. App. 88 (2) (485 SE2d 259) (1997) (defendant cannot call witness knowing he will plead 5th); *Brown v. State*, 199 Ga. App. 188 (1) (404 SE2d 469) (1991) (husband and wife)

**F. Examination of Witnesses**

1. *Competency of Witnesses.*

a. Generally: OCGA § 24-9-1

b. Children: OCGA § 24-9-5; *Smith v. State*, 247 Ga. 511 (277 SE2d 53) (1981); *Sizemore v. State*, 262 Ga. 214 (416 SE2d 500) (1992); *Norton v. State*, 263 Ga. 448 (3) (435 SE2d 30) (1993)

c. Interpreters: OCGA § 24-9-4; *Reed v. State*, 249 Ga. 52 (1) (287 SE2d 205) (1982)

2. *Direct Examination.*

a. Leading questions

(1) Definition: *Ealey v. State*, 139 Ga. App. 110 (227 SE2d 902) (1976)

(2) Discretion to allow: *Hayes v. State*, 268 Ga. 809 (6) (493 SE2d 169) (1997); OCGA § 24-9-63; *Hamby v. State*, 158 Ga. App. 265 (1) (279 SE2d 715) (1981)

3. *Cross examination.* OCGA § 24-9-64

a. Cross examination of state witnesses regarding pending criminal charges: *Byrd v. State*, 262 Ga. 426 (2) (420 SE2d 748) (1992); *Beam v. State*, 265 Ga. 853 (4) (463 SE2d 347) (1995); *Davis v. Alaska*, 415 US 308 (94 SC 1105, 39 LE2d 347) (1974); *Kinsman v. State*, 259 Ga. 89 (7)(b) (376 SE2d 845) (1989)

b. Right to thorough and sifting cross examination not an exception to the hearsay rule: *Willett v. State*, 223 Ga. App. 866 (4) (479 SE2d 132) (1996); *Bell v. State*, 71 Ga. App. 430 (2) (31 SE2d 109) (1944)

4. *Redirect/Recross Examination.* *Mincey v. State*, 251 Ga. 255 (15) (304 SE2d 882) (1983)

5. *Impeachment by Prior Inconsistent Statement.*

a. Not hearsay: *Gibbons v. State*, 248 Ga. 858 (286 SE2d 717) (1982)

b. Showing of surprise unnecessary to impeach own witness: *Williams v. State*, 251 Ga. 749 (13) (312 SE2d 408) (1983); *Ranger v. State*, 249 Ga. 315 (2) (290 SE2d 63) (1982); *Davis v. State*, 249 Ga. 309 (3) (290 S.E.2d 273) (1982)

- c. Impeachment of defendant's testimony with statements taken in violation of Miranda  
(1) *Permissible if Statement Voluntary*. Harris v. New York, 401 US 222 (91 SC 643, 28 LE2d 1) (1971); Jones v. State, 265 Ga. 84 (3) (453 SE2d 716) (1995)  
(2) *Not Permissible if Statement Involuntary*. Mincey v. Arizona, 437 US 385 (98 SC 2408, 57 LE2d 290) (1978)

#### **G. Motions for Mistrial and for Curative Instructions**

1. *Time for Motion*. Cochran v. State, 213 Ga. 706 (5) (100 SE2d 919) (1957)
2. *Discretion of the Trial Court*. White v. State, 268 Ga. 28, 32 (486 SE2d 338) (1997); Sabel v. State, 250 Ga. 640 (5) (300 SE2d 663) (1983)

#### **H. Motion for Directed Verdict (Sufficiency of the Evidence)**

1. OCGA § 17-9-1; Brown v. State, 269 Ga. 67 (1) (495 SE2d 289) (1998); State v. Royal, 247 Ga. 309 (1) (275 SE2d 646) (1981); Graham v. State, 250 Ga. 473 (1) (298 SE2d 499) (1983)

#### **I. Reopening the Evidence**

1. Carruth v. State, 267 Ga. 221 (476 SE2d 739) (1996); Castell v. State, 250 Ga. 776 (9) (301 SE2d 234) (1983); State v. Roberts, 247 Ga. 456 (277 SE2d 644) (1981)

#### **J. Closing Argument: OCGA § 17-8-70 thru 17-8-76**

1. *In General*. Conner v. State, 251 Ga. 113 (6) (303 SE2d 266) (1983)
2. *Injection by State of Matters Not in Evidence*. Bell v. State, 263 Ga. 776 (439 SE2d 480) (1994)
3. *Restriction of Argument of Defense Counsel*. Hayes v. State, 268 Ga. 809 (7) (493 SE2d 169) (1997)
4. *Prosecutorial Comment on Pre-Trial Silence of Accused*. Mallory v. State, 261 Ga. 625 (5) (409 SE2d 839) (1991); Barnes v. State, 269 Ga. 345 (12) (496 SE2d 674) (1998)
5. *Prosecutorial Comment on Defendant's Failure to Testify*. Ranger v. State, 249 Ga. 315 (3) (290 SE2d 63) (1982); Shirley v. State, 245 Ga. 616 (1) (266 SE2d 218) (1980)
6. *Prosecutorial Comment on the Failure of the Defendant's Wife to Testify*. OCGA § 24-9-23; Ferry v. State, 161 Ga. App. 795 (1) (287 SE2d 732) (1982)
7. *Expression of Personal Opinion As to Defendant's Guilt*. McClain v. State, 267 Ga. 378 (3) (b) (477 SE2d 814) (1996); Hoerner v. State, 246 Ga. 374 (4) (271 SE2d 458) (1980)
8. *Reference to the Possibility of Parole or Other Clemency*. OCGA § 17-8-76
9. *Reading Law*. Kirkland v. State, 271 Ga. 217 (3) (518 SE2d 687) (1999); Conklin v. State, 254 Ga. 558 (10) (b) (331 SE2d 532) (1985)
10. *Defendant's Failure to Object to Improper Argument by the State in Death Penalty Cases*. Mullins v. State, 270 Ga. 450 (2) (511 SE2d 165) (1999)
11. *Improper to Argue Future Dangerousness*. McClain v. State, 267 Ga. 378 (3) (a) (477 SE2d 814) (1996); Sterling v. State, 267 Ga. 209 (2) (477 SE2d 807) (1996)
12. *Time Allowed*. OCGA § 17-8-73; Hayes v. State, 268 Ga. 809 (7) (493 SE2d 169) (1997)
13. *Order of Argument*. Kennebrew v. State, 267 Ga. 400 (4) (480 SE2d 1) (1996)
14. *"Golden Rule" Violation (Asking Jury to Assume Victim's Position)*. Horne v. State, 192 Ga. App. 528 (2) (385 SE2d 704) (1989); McClain v. State, 267 Ga. 378 (3) (477 SE2d 814) (1996)

#### **K. Charge of the Court.**

1. *Requests to Charge*.
  - a. Trial court must inform counsel of its charge before closing argument: OCGA § 5-5-24 (b); Speed v. State, 270 Ga. 688 (42) (512 SE2d 896) (1999)
  - b. Trial court shall file with clerk all written requests to charge: OCGA § 5-5-24 (b)

## 2. *Lesser Included Offenses.*

- a. Failure to charge not error absent request: *State v. Stonaker*, 236 Ga. 1 (222 SE2d 354) (1976)
- b. Or when evidence fails to warrant such a charge: *Hopper v. Evans*, 456 US 605 (102 SC 2049, 72 LE2d 367) (1982); *Edwards v. State*, 264 Ga. 131 (442 SE2d 444) (1994)
- c. Defined: *State v. Estevez*, 232 Ga. 316 (206 SE2d 475) (1974); *Haynes v. State*, 249 Ga. 119 (288 SE2d 185) (1982); *State v. Burgess*, 263 Ga. 143 (429 SE2d 252) (1993)
- d. Improper sequential charges: *Hill v. State*, 269 Ga. 23 (3) (499 SE2d 661) (1998); *Edge v. State*, 261 Ga. 865 (2) (414 SE2d 463) (1992)

## 3. *Presumptions.*

- a. Except for sanity and innocence, charge should not be cast in terms of presumptions: *Rose v. State*, 249 Ga. 628 (3) (292 SE2d 678) (1982); *State v. Moore*, 237 Ga. 269 (227 SE2d 241) (1976)
- b. Mandatory presumptions: *Bridges v. State*, 268 Ga. 700 (2) (492 SE2d 877) (1997); *Francis v. Franklin*, 471 US 307 (105 SC 1965, 85 LE2d 344) (1985); *Sandstrom v. Montana*, 442 US 510 (99 SC 2450, 61 LE2d 39) (1979); See Doyel, *Burden Shifting Criminal Jury Instructions in Georgia*, 38 Mercer Law Review 1 (1986).
- c. Permissible inferences: *Williamson v. State*, 248 Ga. 47 (281 SE2d 512) (1981)
- d. Sanity presumed, burden to prove contrary on defendant: *Brown v. State*, 250 Ga. 66 (2) (295 SE2d 727) (1982)

## 4. *Charges on Confessions and Admissions.*

- a. Word “confession” best avoided: *Golden v. State*, 250 Ga. 428 (4) (297 SE2d 479) (1982)
- b. Definitions: *Lowe v. State*, 267 Ga. 180 (4) (476 SE2d 583) (1996)

## 5. *Exceptions to Charges.*

- a. Generally: *Freeman v. State*, 269 Ga. 337 (1) (d) (496 SE2d 558) (1998); *McCoy v. State*, 262 Ga. 699 (2) (425 SE2d 646) (1993)
- b. “Substantial error” in charge reviewable, regardless of whether objection entered: OCGA § 5-5-24 (c); *Medina v. State*, 234 Ga. App. 13 (2) (505 SE2d 558) (1998); *Parker v. State*, 230 Ga. App. 578 (2) (497 SE2d 62) (1998)
- c. General reservation of objections for appeal and/or new trial: *McCoy v. State*, 262 Ga. 699 (2) (425 SE2d 646) (1993)

## **L. Conduct of the Judge: See ABA Standards for Criminal Justice - Trial by Jury 5.6**

1. *Expression of Opinion by Trial Court.* OCGA § 17-8-57; *Sims v. State*, 266 Ga. 417 (2) (467 S.E.2d 574) (1996) (general reservation of right to object to jury charge preserves for review alleged OCGA § 17-8-57 violation which occurs during the charge); *Cook v. State*, 270 Ga. 820 (6) (514 SE2d 657) (1999); *Barnes v. State*, 269 Ga. 345 (16) (496 SE2d 674) (1998)

## 2. *Control of Counsel.*

- a. Correction of misstatement of law by defense counsel: *Davis v. State*, 234 Ga. 730 (2) (218 SE2d 20) (1975)
- b. Rebuke of counsel for improper conduct: *Defreese v. State*, 232 Ga. 739 (14) (208 SE2d 832) (1974)

3. *Physical Control of Defendant.* OCGA § 15-1-3 (1), (4); *Young v. State*, 269 Ga. 478 (2) (499 SE2d 60) (1998) (shock belt); *Pace v. State*, 212 Ga. App. 489 (442 SE2d 307) (1994) (shackles); *Illinois v. Allen*, 397 US 337 (90 SC 1057, 25 LE2d 353) (1970); *Potts v. State*, 259 Ga. 96 (3) (376 SE2d 881) (1989)

4. *Examination of the Witness by the Trial Court.* Ashley v. State, 263 Ga. 820 (3) (439 SE2d 914) (1994); Thomas v. State, 240 Ga. 393 (3) (242 SE2d 1) (1977)
5. *Coercion of Jury.* Sears v. State, 270 Ga. 834 (1) (514 SE2d 426) (1999); Riggins v. State, 226 Ga. 381 (3) (174 SE2d 908) (1970)
6. *Comments on Post-Trial Remedies.* Hollis v. State, 215 Ga. App. 35 (6) (450 SE2d 247) (1994); Floyd v. State, 135 Ga. App. 217 (2) (217 SE2d 452) (1975)
7. *Judicial Comment on the Defendant's Failure to Testify.* Earnest v. State, 262 Ga. 494 (4) (422 SE2d 188) (1992); OCGA § 24-9-20
8. *Power of the Court.* OCGA § 15-1-3 and 4; In the Matter of Inquiry Concerning a Judge No. 94-70, 265 Ga. 326 (454 S.E.2d 780) (1995) (judicial discipline)
  - a. Summary contempt power: Farmer v. Strickland, 652 F2d 427 (5th Cir. 1981); Martin v. Waters, 151 Ga. App. 149 (259 SE2d 153) (1979)

#### **M. Conduct of Counsel**

1. *Duties of attorneys.* OCGA § 15-19-4
2. *Attorney-Client Privilege.* OCGA § 24-9-21, 24, 25; Williams v. State, 258 Ga. 281 (5) (368 SE2d 742) (1988); Cazanav v. State, 270 Ga. 130 (1) (508 SE2d 412) (1998)

#### **N. Conduct of Jurors**

1. *Jury's Knowledge of Co-Defendant's Guilty Plea.* Hayes v. State, 136 Ga. App. 746 (1) (222 SE2d 193) (1975); Hendrix v. State, 202 Ga. App. 54 (4) (413 SE2d 232) (1991)
2. *Communications with Non-Jurors.* Maltbie v. State, 139 Ga. App. 342 (1) (228 SE2d 368) (1976); Wellmaker v. State, 124 Ga. App. 37 (1) (183 SE2d 62) (1971); McIlwain v. State, 264 Ga. 382 (3) (445 SE2d 261) (1994) (with bailiff); Hanifa v. State, 269 Ga. 797 (6) (505 SE2d 731) (1998) (communications with judge outside presence of counsel)
3. *Unauthorized Dispersal of Jurors.* Huey v. State, 263 Ga. 840 (6) (439 SE2d 656) (1994); Legare v. State, 243 Ga. 744 (11) (257 SE2d 247) (1979)
4. *Waiver of Jury Sequestration.* Jones v. State, 243 Ga. 820 (3) (256 SE2d 907) (1979)
5. *Jurors Not Permitted to Directly Question Witness.* Matchett v. State, 257 Ga. 785 (2) (364 SE2d 565) (1988); State v. Williamson, 247 Ga. 685 (279 SE2d 203) (1981)
6. *Jury Request to Rehear Evidence.* Johns v. State, 239 Ga. 681 (2) (238 SE2d 372) (1977); Stephens v. State, 261 Ga. 467 (4) (405 SE2d 483) (1991)
7. *Jury Request to Be Recharged.* Williams v. State, 263 Ga. 135 (4) (429 SE2d 512) (1993); Williams v. State, 249 Ga. 6 (6) (287 SE2d 31) (1982)
8. *Alternate Jurors Not to Deliberate With Jury.* OCGA § 15-12-171, 172; Lonchar v. State, 258 Ga. 447 (5) (369 SE2d 749) (1988); Jarrells v. State, 258 Ga. 833 (6) (375 SE2d 842) (1989)

#### **O. Conduct of Witness**

1. *Violation of the Rule of Sequestration Does Not Render the Witness Incompetent.* OCGA § 24-9-61; Jordan v. State, 247 Ga. 328 (10) (276 SE2d 224) (1981); Johnson v. State, 258 Ga. 856 (4) (376 SE2d 356) (1989); Childress v. State, 266 Ga. 425 (2) (467 SE2d 865) (1996)

#### **P. Conduct of the Defendant**

1. *Voluntary Absence of the Defendant.* Speed v. State, 270 Ga. 688 (2) (512 SE2d 896) (1999); Lonchar v. State, 258 Ga. 447 (2) (369 SE2d 749) (1988); State v. Phillips, 247 Ga. 246 (275 SE2d 323) (1981)
2. *Disruptive Defendant.* Illinois v. Allen, 397 US 337 (90 SC 1057, 25 LE2d 353) (1970)

3. *Right to Assist in the Defense*. *Cargill v. State*, 255 Ga. 616 (3) (340 SE2d 891) (1986); *Johnson v. State*, 266 Ga. 775 (9) (470 SE2d 637) (1996); *Miller v. State*, 219 Ga. App. 213 (1) (464 SE2d 621) (1995)

#### **Q. Verdict**

1. *Form*. *Rucker v. State*, 270 Ga. 431 (5) (510 SE2d 816) (1999)

2. *Poll of Jurors*. *Maddox v. State*, 233 Ga. 874 (2) (213 SE2d 654) (1975)

### **PART III. TRIAL PROCEEDINGS: SENTENCING PHASE**

#### **A. Issues Which May Arise Regarding the Admissibility of Evidence**

1. *General Considerations Applicable to Evidence in Mitigation and Aggravation*.

a. Jury may consider all facts and circumstances of the case: *Spivey v. State*, 241 Ga. 477 (2) (246 SE2d 288) (1978); *Eberheart v. State*, 232 Ga. 247, 253-54 (206 SE2d 12) (1974)

b. Evidence may not be excluded because it could have been presented in guilt- innocence phase: *Brown v. State*, 235 Ga. 644 (3) (220 SE2d 922) (1975)

c. Evidence may not be excluded as only relevant to guilt or innocence: *Blankenship v. State*, 251 Ga. 621 (308 SE2d 369) (1983)

2. *Admissibility of Proffered Mitigation Evidence*.

a. Generally: *Barnes v. State*, 269 Ga. 345 (27) (496 SE2d 674) (1998); *Woodson v. North Carolina*, 428 US 280 (96 SC 2978, 49 LE2d 944) (1976); *Lockett v. Ohio*, 438 US 586 (98 SC 2954, 57 LE2d 973) (1978); *Eddings v. Oklahoma*, 455 US 104 (102 SC 869, 71 LE2d 1) (1982)

b. Testimony of friend or relative asking for mercy: *Barnes v. State*, 269 Ga. 345 (27) (496 SE2d 674) (1998); *Childs v. State*, 257 Ga. 243 (19) (b) (357 SE2d 48) (1987); *Romine v. State*, 251 Ga. 208 (11) (305 SE2d 93) (1983)

c. Examples of testimony or other evidence irrelevant at sentencing phase

(1) *Death Penalty is Not a Deterrent*. *Stevens v. State*, 247 Ga. 698 (24) (278 SE2d 398) (1981); *Fleming v. State*, 265 Ga. 541 (458 SE2d 638) (1995)

(2) *Religious/Philosophical Approaches to Death Penalty*. *Franklin v. State*, 245 Ga. 141 (7) (263 SE2d 666) (1980)

(3) *Mechanics of Electrocutation*. *Horton v. State*, 249 Ga. 871 (5) (295 SE2d 281) (1982)

(4) *Penalties Imposed by Juries in Similar Cases*. OCGA § 17-10-35 (c) (3); *Wilson v. State*, 250 Ga. 630 (12) (300 SE2d 640) (1983); *Blake v. State*, 239 Ga. 292 (3) (236 SE2d 637) (1977)

3. *Admissibility of Aggravating Evidence*.

a. Notice: OCGA § 17-10-2

b. Non-statutory aggravating circumstances may be shown and considered by the jury: *Zant v. Stephens*, 250 Ga. 97 (2) (297 SE2d 1) (1982)

c. Matters relevant in aggravation: *Fair v. State*, 245 Ga. 868 (4) (268 SE2d 316) (1980); *Simpkins v. State*, 268 Ga. 219 (2) (486 SE2d 833) (1997)

d. Proof of prior crimes: *Jefferson v. State*, 256 Ga. 821 (8) (353 SE2d 468) (1987); *Bishop v. State*, 268 Ga. 286 (16) (486 SE2d 887) (1997); *Devier v. State*, 253 Ga. 604 (9) (323 SE2d 150) (1984)

e. Prior convictions based on guilty pleas: *Mize v. State*, 269 Ga. 646 (15) (501 SE2d 219) (1998); *Pope v. State*, 256 Ga. 195 (17) (345 SE2d 831) (1986)

f. Victim-impact evidence: OCGA § 17-10-1.2; *Turner v. State*, 268 Ga. 213 (2) (486 SE2d 839) (1997); *Pickren v. State*, 269 Ga. 453 (1) (500 SE2d 566) (1998)

## **B. Issues concerning specific statutory aggravating circumstances - OCGA § 17-10-30 (b)**

### *1. Aggravating Circumstance (b)(1).*

a. Notice of prior convictions: *Franklin v. State*, 245 Ga. 141 (5) (263 SE2d 666) (1980)

b. Invalid prior convictions: *Johnson v. Mississippi*, 486 US 578 (108 SC 1981, 100 LE2d 575) (1988)

c. (b) (1) status determined at time of sentencing rather than time of offense: *Stephens v. Hopper*, 241 Ga. 596 (4) (247 SE2d 92) (1978)

### *2. Aggravating Circumstance (b)(2).*

a. Phrase “Capital Felony” in (b) (2) Defined: *Waters v. State*, 248 Ga. 355 (13) (283 SE2d 238) (1981)

b. Aggravated battery -- must be separate from act causing instantaneous death: *Davis v. State*, 255 Ga. 588 (3) (c) (340 SE2d 862) (1986)

c. A finding of the (b) (2) circumstance does not require separate conviction of the capital felony: *Jones v. State*, 249 Ga. 605 (6) (293 SE2d 708) (1982); *Fair v. State*, 245 Ga. 868 (2) (268 SE2d 316) (1980)

d. The supporting felony should be specified: *Rivers v. State*, 250 Ga. 303 (8) (a) (298 SE2d 1) (1982); *Burger v. State*, 245 Ga. 458 (4) (265 SE2d 796) (1980)

e. Mutually supporting aggravating circumstances resulting from a double murder renders one aggravating circumstance invalid: *Jenkins v. State*, 269 Ga. 282 (23) (a) (498 SE2d 502) (1998); *Putman v. State*, 251 Ga. 605 (12) (308 SE2d 145) (1983)

f. Continuous course of conduct may establish “in commission of” element of (b) (2) aggravating circumstance: *Romine v. State*, 251 Ga. 208 (8) (305 SE2d 93) (1983)

### *3. Aggravating Circumstance (b)(3).*

a. Application: *Harrison v. State*, 257 Ga. 528 (6) (361 SE2d 149) (1987); *Pope v. State*, 256 Ga. 195 (18) (345 SE2d 831) (1986); *Philpot v. State*, 268 Ga. 168 (486 SE2d 158) (1997)

b. Jury Instructions: *Philpot v. State*, 268 Ga. 168 (3) (486 SE2d 158) (1997)

### *4. Aggravating Circumstance (b)(4).*

a. Distinction between (b)(4) and (b)(2) aggravating circumstances: *Simpkins v. State*, 268 Ga. 219 (2) (486 SE2d 833) (1997); *Jenkins v. State*, 269 Ga. 282 (23) (d) (498 SE2d 502) (1998)

### *5. Aggravating Circumstance (b)(5).*

6. *Aggravating Circumstance (b)(6)*. *Mize v. State*, 269 Ga. 646 (14) (501 SE2d 219) (1998); *Whittington v. State*, 252 Ga. 168 (313 SE2d 73) (1984)

### *7. Aggravating Circumstance (b)(7).*

a. Scope: *McMichen v. State*, 265 Ga. 598 (2) (404 SE2d 255) (1995); *Hance v. State*, 245 Ga. 856 (3) (268 SE2d 339) (1980); *Whittington v. State*, 252 Ga. 168 (313 SE2d 73) (1984)

b. Suggested Charge on (b)(7): *Taylor v. State*, 261 Ga. 287 (13) (404 SE2d 255) (1991); *West v. State*, 252 Ga. 156 (313 SE2d 67) (1984)

### *8. Aggravating Circumstance (b)(8).*

### *9. Aggravating Circumstance (b)(9).*

a. Evidence to prove lawful custody or confinement: *Franklin v. State*, 245 Ga. 141 (6) (263 SE2d 666) (1980)

### *10. Aggravating Circumstance (b)(10).*

## **C. Issues Which May Arise in Connection With Closing Argument.**

1. *Scope of Closing Argument Generally*. *Conner v. State*, 251 Ga. 113 (5), (6) (303 SE2d 266) (1983); *Brooks v. Kemp*, 762 F2d 1383 (11th Cir. 1985)

2. *Prosecutorial Reference to Appellate Review.* Smith v. State, 270 Ga. 240 (11) (510 SE2d 1) (1998); Caldwell v. Mississippi, 472 US 320 (105 SC 2653, 86 LE2d 231) (1985); Prevatte v. State, 233 Ga. 929 (6) (214 SE2d 365) (1975)
3. *Reading Law.* Kirkland v. State, 271 Ga. 217 (3) (518 SE2d 687) (1999); Conklin v. State, 254 Ga. 558 (10) (331 SE2d 532) (1985)
4. *Arguments Regarding Lack of Remorse, Future Dangerousness and Deterrence.* Jenkins v. State, 269 Ga. 282 (27) (c) (498 SE2d 502) (1998); Pye v. State, 269 Ga. 779 (19) (505 SE2d 4) (1998); McClain v. State, 267 Ga. 378 (4) (a) (477 SE2d 814) (1996)
5. *Parole Argument Permissible.* OCGA § 17-10-31.1; Jenkins v. State, 265 Ga. 539 (1) (458 SE2d 477) (1995)

**D. Issues Which May Arise in Connection With the Court’s Charge**

1. *Charge on Mitigating Circumstances.*

- a. Generally: Romine v. State, 251 Ga. 208 (10) (305 SE2d 93) (1983)
- b. Jury can consider all the evidence presented in both phases of the trial: Spivey v. State, 241 Ga. 477, 481 (246 SE2d 288) (1978)
- c. Jury should be instructed that it is authorized to consider mitigating evidence but the trial court is not required to identify specific mitigating circumstances: Jenkins v. State, 269 Ga. 282 (24), (25) (498 SE2d 502) (1998); Hawes v. State, 240 Ga. 327 (9) (240 SE2d 833) (1977)
- d. Jury should be informed that it may recommend a life sentence even if it finds one or more statutory aggravating circumstances: Fleming v. State, 240 Ga. 142 (7) (240 SE2d 37) (1977); Jenkins v. State, 269 Ga. 282 (24) (498 SE2d 502) (1998)
- e. Charge that jury should not base its verdict on sympathy disapproved: Legare v. State, 250 Ga. 875 (2) (302 SE2d 351) (1983)

2. *Necessity to Define Legal Words of Art.* Rivers v. State, 250 Ga. 303 (8) (a), (b) (298 SE2d 1) (1982); Gilreath v. State, 247 Ga. 814 (16) (279 SE2d 650) (1981)

3. *“Allen” Charge.* Romine v. State, 256 Ga. 521 (1) (350 SE2d 446) (1986); Sears v. State, 270 Ga. 834 (1) (514 SE2d 426) (1999)

4. *Statutory Instructions to Be Provided to Jury in Writing.* OCGA § 17-10-30 (c); Spraggins v. State, 243 Ga. 73 (2) (252 SE2d 620) (1979)

**E. Issues Which May Arise in Connection With the Verdict**

1. *Form.* Potts v. State, 259 Ga. 96 (22) (376 SE2d 851) (1989); Romine v. State, 251 Ga. 208 (7) (305 SE2d 93) (1983); Ledford v. State, 264 Ga. 60 (22) (430 SE2d 917) (1994) ((b) (7) aggravating circumstance)

2. *Substance.* Gibson v. State, 236 Ga. 874 (2) (226 SE2d 63) (1976)

3. *Poll of Jurors.*

Adopted effective September 1, 1990; amended effective January 27, 2000.

**PART IV. MOTION FOR NEW TRIAL**

**A. Necessity for Presence of Defendant at Hearing.**

1. Brown v. State, 250 Ga. 66 (7) (295 SE2d 727) (1982)

**B. Supplementation of the Record.**

1. Rule IV(A)(5)(b) of the Unified Appeal Procedure; Romine v. State, 251 Ga. 208 (11) (305 SE2d 93) (1983); Castell v. State, 250 Ga. 776 (11) (301 SE2d 234) (1983); Carr v. State, 267 Ga. 547 (2) (480 SE2d 583) (1997)

**C. Newly Discovered Evidence Regarding Sentence.**

- 1. *Mincey v. State*, 251 Ga. 255 (18) (304 SE2d 882) (1983); *Horton v. State*, 249 Ga. 871 (9) (295 SE2d 281) (1982)

Adopted effective September 1, 1990; amended effective January 27, 2000.

**PART V. REVIEW IN THE SUPREME COURT**

**A. Superior Court Can Be Directed to Conduct Further Hearings**

- 1. *Hammond v. State*, 260 Ga. 591 (10) (398 SE2d 168) (1990)

**B. “Plain Error” Review in Death Penalty Cases**

- 1. *Lynd v. State*, 262 Ga. 58 (8) (414 SE2d 5) (1992)

**C. Mandatory Review of Sentence Whenever Death Penalty Imposed**

- 1. OCGA § 17-10-35

Adopted effective September 1, 1990; amended effective January 27, 2000.

**PART VI. RETRIAL AS TO SENTENCE**

**A. When Permitted**

- 1. *Permitted*. *Brooks v. State*, 259 Ga. 562 (1) (385 SE2d 81) (1989); *Griffin v. State*, 266 Ga. 115 (3) (464 SE2d 371) (1995)
- 2. *Not Permitted*. *Bullington v. Missouri*, 451 US 430 (101 SC 1852, 68 LE2d 270) (1981); *Hill v. State*, 250 Ga. 821 (301 SE2d 269) (1983)

**B. Evidence**

- 1. *State Not Limited to Statutory Aggravating Circumstances Found at First Trial*. *Spraggins v. State*, 255 Ga. 195 (336 SE2d 227) (1985); *Poland v. Arizona*, 476 US 147 (106 SC 1749, 90 LE2d 123) (1986)
- 2. *Defendant May Introduce Exculpatory Evidence Even Though He Stands Convicted*. *Blankenship v. State*, 251 Ga. 621 (308 SE2d 369) (1983)

Adopted effective September 1, 1990; amended effective January 27, 2000.

REPORT OF THE TRIAL JUDGE  
OF THE

SUPERIOR COURT OF \_\_\_\_\_ COUNTY, GEORGIA

THE STATE v. \_\_\_\_\_

(A case in which the death penalty was imposed)

A. DATA CONCERNING THE DEFENDANT

- 1. Name \_\_\_\_\_ 2. Date of Birth \_\_\_\_\_  
Last First Middle MM/DD/YY
- 3. Sex: M [ ] 4. Race: African American [ ]  
F [ ] White [ ]  
Other \_\_\_\_\_
- 5. Marital Status: Never married [ ] Married [ ]  
Separated [ ] Divorced [ ]  
Spouse deceased [ ]

6. Number of children: \_\_\_\_\_; and ages:\_\_\_\_\_.

7. Father living: Yes [ ] No [ ], died \_\_\_\_\_.

Mother living: Yes [ ] No [ ], died \_\_\_\_\_.

8. Number of brothers and sisters\_\_\_\_\_.

9. Education completed:\_\_\_\_\_.

10. Intelligence level: (IQ below 70) Low [ ]  
(IQ 70 to 100) Medium [ ]  
(IQ above 100) High [ ]

11. Psychiatric evaluation performed? Yes [ ] No [ ]

If performed is defendant:

	Yes	No
a. Able to distinguish right from wrong?	[ ]	[ ]
b. Able to adhere to the right?	[ ]	[ ]
c. Able to cooperate intelligently in his own defense?	[ ]	[ ]

12. If examined, were character or behavior disorders found?

Yes [ ] No [ ]

13. What other pertinent psychiatric (and psychological) information was revealed?

14. Prior work record of defendant:

	Type job	Salary	Dates held	Reason for termination
a.	_____	_____	_____	_____
b.	_____	_____	_____	_____
c.	_____	_____	_____	_____
d.	_____	_____	_____	_____
e.	_____	_____	_____	_____

### B. DATA CONCERNING THE TRIAL

1. How did the defendant plead?\_\_\_\_\_

2. Was the guilt-phase of the case tried before a jury?\_\_\_\_\_

3. Was the sentencing phase tried before a jury?\_\_\_\_\_

### C. OFFENSE RELATED DATA

1. Offense(s) for which the defendant received a death sentence:

a.\_\_\_\_\_ b.\_\_\_\_\_

c.\_\_\_\_\_ d.\_\_\_\_\_

2. If other offenses were tried in the same trial list those offenses:

a.\_\_\_\_\_ b.\_\_\_\_\_

c.\_\_\_\_\_ d.\_\_\_\_\_

3. Which of the following statutory aggravating circumstances were instructed and which were found?

	Instructed	Found
a. The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony.	[ ]	[ ]
b. (1) The offense of murder, rape, armed robbery or kidnapping was committed while the offender	[ ]	[ ]

was engaged in the commission of another capital felony or aggravated battery or

(2) The offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

c. The offender by his act of murder, armed robbery or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

d. The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

e. The murder of a judicial officer, former judicial officer, district attorney or solicitor-general or former district attorney or solicitor-general during or because of the exercise of his official duty.

f. The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

g. The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

h. The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

i. The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

j. The murder was committed for the purpose of avoiding, interfering with, or preventing, a lawful arrest or custody in a place of lawful confinement, of himself or another.

4. List significant nonstatutory aggravating circumstances indicated by the evidence:

a. \_\_\_\_\_

b. \_\_\_\_\_

c. \_\_\_\_\_

d. \_\_\_\_\_

5. Which, if any, of the following mitigating circumstances was in evidence?

a. The defendant has no significant history of prior criminal activity.

b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

c. The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

- d. The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct. [ ]
- e. The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor. [ ]
- f. The defendant acted under duress or under the domination of another person. [ ]
- g. At the time of the murder, the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication. [ ]
- h. The youth of the defendant at the time of the crime. [ ]
- i. The evidence, although sufficient to sustain the conviction, does not foreclose all doubt respecting the defendant's guilt. [ ]
- j. Other. [ ]
- Please explain if (j) is checked:
6. If tried with a jury, was the jury instructed to consider mitigating circumstances? Yes [ ] No. [ ]
7. Does the defendant's physical or mental condition call for special consideration? Yes [ ] No. [ ]
8. Was the victim related by blood or marriage to defendant? Yes [ ] No. [ ]  
If yes, what relationship?
9. Was the victim an employer or employee of defendant? No [ ]  
Employer [ ] Employee [ ]
10. Was the victim acquainted with the defendant? No [ ]  
Casual acquaintance [ ] Friend [ ]
11. Was the victim a local resident or transient in the community? Resident [ ] Transient [ ]
12. Was the victim the same race as defendant? Yes [ ] No. [ ]
13. Was the victim the same sex as the defendant? Yes [ ] No. [ ]
14. Was the victim held hostage during the crime? No [ ]  
yes - less than an hour [ ] yes - more than an hour [ ]
15. The victim's reputation in the community was:  
Good [ ] Bad [ ] Unknown [ ]
16. Was the victim tortured? Yes [ ] No. [ ]  
If yes, state extent of torture: \_\_\_\_\_
17. What was the age of the victim? \_\_\_\_\_
18. If a weapon was used in commission of the crime, was it:  
No weapon used [ ] Blunt instrument [ ] Poison [ ]  
Motor vehicle [ ] Sharp instrument [ ] Firearm [ ]
19. Does the defendant have a record of prior convictions? Yes [ ] No. [ ]
20. If answer is yes, list the offenses, the dates of the offenses, and the sentences imposed.
- | Offense | Date of offense | Sentence imposed |
|---------|-----------------|------------------|
|---------|-----------------|------------------|

- a. \_\_\_\_\_
- b. \_\_\_\_\_
- c. \_\_\_\_\_
- d. \_\_\_\_\_

21. Was there evidence the defendant was under the influence of narcotics or dangerous drugs at the time of the offense? Yes [ ] No [ ]

**D. REPRESENTATION OF DEFENDANT**

(If more than one counsel served, answer these questions as to each counsel and attach to this report.)

- 1. Date counsel secured: \_\_\_\_\_
- 2. How was counsel secured:
  - a. retained by defendant [ ]
  - b. appointed by court [ ]
- 3. If counsel was appointed by court was it because
  - a. Defendant was unable to afford counsel? [ ]
  - b. Defendant refused to secure counsel? [ ]
  - c. Other (explain) \_\_\_\_\_
- 4. How many years has counsel practiced law?
  - a. 0 to 5 [ ]
  - b. 5 to 10 [ ]
  - c. over 10 [ ]
- 5. What is the nature of counsel's practice?
  - a. mostly civil [ ]
  - b. general [ ]
  - c. mostly criminal [ ]
- 6. Did the same counsel serve throughout the trial? Yes [ ] No [ ]
- 7. If not, explain in detail.

**E. GENERAL CONSIDERATIONS**

- 1. Did race appear as an issue in the trial? Yes [ ] No [ ]
- 2. Was there extensive publicity in the community concerning the case?
  - Yes [ ] No [ ]
- 3. Was the jury impermissibly influenced by passion, prejudice, or any other arbitrary factor when imposing sentence? Yes [ ] No [ ]
- 4. In answer is yes, explain: \_\_\_\_\_
- 5. In your opinion, was the death sentence imposed in this case appropriate?
  - Yes [ ] No [ ]
- General comments concerning your answer: \_\_\_\_\_

**F. FORMS FOR REQUIRED JURY CERTIFICATES**

These certificates are required by Rule II (A) (6) of the Unified Appeal Procedure.

(NOTE: To convert a decimal number to percentage notation, move the decimal point two places to the right. Example: .055 = 5.5%)

**Grand Jury Certificate**

This court has reviewed the Grand Jury List for \_\_\_\_\_ County from which the grand jury was selected that rendered the indictment in this case. This Grand Jury List was last revised in the year \_\_\_\_.

The following categories are “cognizable groups” in this county within the meaning of the Unified Appeal and current state and federal law:

- A. Males      B. Females      C. African Americans      D. Whites  
E. \_\_\_\_\_      F. \_\_\_\_\_

The total county population according to the most recent decennial census is \_\_\_\_\_ .

The total county population over 18 years old, according to the most recent census is \_\_\_\_\_.

The total number of persons on the grand jury list is \_\_\_\_\_.

For each “cognizable group” listed above, calculate the percentage of the over-18 population of the county represented by the cognizable group, as follows:

A. Males

1. The total population over 18 years old in the county is \_\_\_\_\_.
2. The total population of cognizable group A (males) is \_\_\_\_\_.
3. Divide answer 2 by answer 1, move the decimal 2 places to the right: \_\_\_\_\_%
4. The number of people on the grand jury list is \_\_\_\_\_.
5. The number of males on the grand jury list is \_\_\_\_\_.
6. Divide answer 5 by answer 4, move the decimal 2 places to the right: \_\_\_\_\_%
7. Subtract the larger from the smaller; the difference must be less than 5%: \_\_\_\_\_%

B. Females

1. The total population over 18 years old in the county is \_\_\_\_\_
2. The total population of cognizable group B (females) is \_\_\_\_\_
3. Divide answer 2 by answer 1, move the decimal 2 places to the right: \_\_\_\_\_%
4. The number of people on the grand jury list is \_\_\_\_\_.
5. The number of females on the grand jury list is \_\_\_\_\_.
6. Divide answer 5 by answer 4, move the decimal 2 places to the right: \_\_\_\_\_%
7. Subtract the larger from the smaller; the difference must be less than 5%: \_\_\_\_\_%

C. African Americans

1. The total population over 18 years old in the county is \_\_\_\_\_
2. The total population of cognizable group C (African Americans) is \_\_\_\_\_
3. Divide answer 2 by answer 1, move the decimal 2 places to the right: \_\_\_\_\_%
4. The number of people on the grand jury list is \_\_\_\_\_.
5. The number of African Americans on the grand jury list is \_\_\_\_\_.
6. Divide answer 5 by answer 4, move the decimal 2 places to the right: \_\_\_\_\_%
7. Subtract the larger from the smaller; the difference must be less than 5%: \_\_\_\_\_%

D. Whites

1. the total population over 18 years old in the county is \_\_\_\_\_
2. the total population of cognizable group D (whites) is \_\_\_\_\_
3. Divide answer 2 by answer 1, move the decimal 2 places to the right: \_\_\_\_\_%
4. The number of people on the grand jury list is \_\_\_\_\_.
5. The number of whites on the grand jury list is \_\_\_\_\_.
6. Divide answer 5 by answer 4, move the decimal 2 places to the right: \_\_\_\_\_%
7. Subtract the larger from the smaller; the difference must be less than 5%: \_\_\_\_\_%

E. \_\_\_\_\_

1. The total population over 18 years old in the county is \_\_\_\_\_
2. The total population of cognizable group E is \_\_\_\_\_
3. Divide answer 2 by answer 1, move the decimal 2 places to the right: \_\_\_\_\_%
4. The number of people on the grand jury list is \_\_\_\_\_.
5. The number of cognizable group E on the grand jury list is \_\_\_\_\_.
6. Divide answer 5 by answer 4, move the decimal 2 places to the right: \_\_\_\_\_%
7. Subtract the larger from the smaller; the difference must be less than 5%: \_\_\_\_\_%

F. \_\_\_\_\_

1. The total population over 18 years old in the county is \_\_\_\_\_.
2. The total population of cognizable group F is \_\_\_\_\_.
3. Divide answer 2 by answer 1, move the decimal 2 places to the right: \_\_\_\_\_%
4. The number of people on the grand jury list is \_\_\_\_\_.
5. The number of cognizable group F on the grand jury list is \_\_\_\_\_.
6. Divide answer 5 by answer 4, move the decimal 2 places to the right: \_\_\_\_\_%
7. Subtract the larger from the smaller; the difference must be less than 5%: \_\_\_\_\_%

....

This court is satisfied that the identified cognizable groups are adequately represented on the grand jury list.

### Traverse Jury Certificate

This court has reviewed the Traverse Jury List for \_\_\_\_\_ County from which the defendant's traverse jury panel will be selected. This Traverse Jury List was last revised in the year \_\_\_\_\_.

The following categories are "cognizable groups" in this county within the meaning of the Unified Appeal and current state and federal law:

- A. Males      B. Females      C. African Americans      D. Whites  
E. \_\_\_\_\_      F. \_\_\_\_\_

The total county population according to the most recent decennial census is \_\_\_\_\_.

The total county population over 18 years old, according to the most recent census is \_\_\_\_\_.

The total number of persons on the traverse jury list is \_\_\_\_\_.

For each "cognizable group" listed above, calculate the percentage of the over-18 population of the county represented by the cognizable group, as follows:

A. Males

1. The total population over 18 years old in the county is \_\_\_\_\_.
2. The total population of cognizable group A (males) is \_\_\_\_\_.
3. Divide answer 2 by answer 1, move the decimal 2 places to the right: \_\_\_\_\_%
4. The number of people on the traverse jury list is \_\_\_\_\_.
5. The number of males on the traverse jury list is \_\_\_\_\_.
6. Divide answer 5 by answer 4, move the decimal 2 places to the right: \_\_\_\_\_%
7. Subtract the larger from the smaller; the difference must be less than 5%: \_\_\_\_\_%

B. Females

1. The total population over 18 years old in the county is \_\_\_\_\_
2. The total population of cognizable group B (females) is \_\_\_\_\_
3. Divide answer 2 by answer 1, move the decimal 2 places to the right: \_\_\_\_\_%
4. The number of people on the traverse jury list is \_\_\_\_\_.
5. The number of females on the traverse jury list is \_\_\_\_\_.
6. Divide answer 5 by answer 4, move the decimal 2 places to the right: \_\_\_\_\_%
7. Subtract the larger from the smaller; the difference must be less than 5%: \_\_\_\_\_%

C. African Americans

1. The total population over 18 years old in the county is \_\_\_\_\_
2. The total population of cognizable group C (African Americans) is \_\_\_\_\_
3. Divide answer 2 by answer 1, move the decimal 2 places to the right: \_\_\_\_\_%
4. The number of people on the traverse jury list is \_\_\_\_\_.
5. The number of African Americans on the traverse jury list is \_\_\_\_\_.
6. Divide answer 5 by answer 4, move the decimal 2 places to the right: \_\_\_\_\_%
7. Subtract the larger from the smaller; the difference must be less than 5%: \_\_\_\_\_%

D. Whites

1. the total population over 18 years old in the county is \_\_\_\_\_
2. the total population of cognizable group D (whites) is \_\_\_\_\_
3. Divide answer 2 by answer 1, move the decimal 2 places to the right: \_\_\_\_\_%
4. The number of people on the traverse jury list is \_\_\_\_\_.
5. The number of whites on the traverse jury list is \_\_\_\_\_.
6. Divide answer 5 by answer 4, move the decimal 2 places to the right: \_\_\_\_\_%
7. Subtract the larger from the smaller; the difference must be less than 5%: \_\_\_\_\_%

E. \_\_\_\_\_

1. The total population over 18 years old in the county is \_\_\_\_\_.
2. The total population of cognizable group E is \_\_\_\_\_.
3. Divide answer 2 by answer 1, move the decimal 2 places to the right: \_\_\_\_\_%
4. The number of people on the traverse jury list is \_\_\_\_\_.
5. The number of cognizable group E. on the traverse jury list is \_\_\_\_\_.
6. Divide answer 5 by answer 4, move the decimal 2 places to the right: \_\_\_\_\_%
7. Subtract the larger from the smaller; the difference must be less than 5%: \_\_\_\_\_%

F. \_\_\_\_\_

1. The total population over 18 years old in the county is \_\_\_\_\_.
2. The total population of cognizable group F is \_\_\_\_\_.
3. Divide answer 2 by answer 1, move the decimal 2 places to the right: \_\_\_\_\_%
4. The number of people on the traverse jury list is \_\_\_\_\_.
5. The number of cognizable group F on the traverse jury list is \_\_\_\_\_.
6. Divide answer 5 by answer 4, move the decimal 2 places to the right: \_\_\_\_\_%
7. Subtract the larger from the smaller; the difference must be less than 5%: \_\_\_\_\_%

....

This court is satisfied that the identified cognizable groups are adequately represented on the traverse jury list.

G. CHRONOLOGY OF CASE

	Elapsed Days
1. Date of offense	_____
2. Date of arrest	_____
3. Date trial began	_____
4. Date sentence imposed	_____
5. Date motion for new trial ruled on	_____
6. Date trial judge's report completed	_____
7. Date received by Supreme Court <sup>1</sup>	_____
8. Date sentence review completed	_____
9. Total elapsed days <sup>1</sup>	_____

(<sup>1</sup>To be completed by Supreme Court.)

This report was submitted to the defendant's counsel for such comments as counsel desired to make concerning the factual accuracy of the report, and

- 1. Defense counsel's comments are attached [ ]
- 2. Defense counsel offered no comments [ ]
- 3. Defense counsel has not responded [ ]

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
Judge, Superior Court of  
\_\_\_\_\_ County

Adopted effective January 27, 2000.