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Are Capital Defense Lawyers Educable - A Moderately Hopeful Report from the Trenches

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ARE CAPITAL DEFENSE LAWYERS EDUCABLE? A MODERATELY HOPEFUL REPORT FROM THE TRENCHES

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I. INTRODUCTION

The most common claim asserted by death row inmates is ineffective assistance of trial counsel.[1] However, as this Article will demonstrate, courts rarely find ineffective assistance of counsel and, consequently, they uphold death sentences in capital cases. The purpose of this Article is to investigate whether, as Supreme Court capital punishment law has become more familiar and understood, capital lawyers have made fewer egregious mistakes during their representation of capital defendants.

Research for this Article centered on the State of Georgia because that state has a moderately-sized volume of death penalty cases, which enabled a detailed analysis of each capital defendant's ineffectiveness argument. Some Georgia capital defendants' claims, however, could not be analyzed because they did not assert an ineffectiveness claim.[2]

To test this Article's thesis—that capital lawyers have, over the course of twenty-five years, made fewer egregious mistakes during their representation of capital defendants—three separate periods of time will be examined in order to assess whether attorneys are making the same mistakes during representation of a capital defendant, and whether those mistakes are egregious, or are mere technicalities. The time periods include 1973 through 1983, 1985 through 1990, and 1992 through 1998. This Article uses 1973 as the beginning point from which to evaluate ineffective assistance of counsel claims because this date marks the beginning of modern death penalty law.[3] The primary reason for choosing 1985 through 1990 was to take into account the effect that the 1984 promulgation of

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1. *See* Brad Snyder, Note, *Disparate Impact on Death Row: M.L.B. and the Indigent's Right to Counsel at Capital State Postconviction Proceedings*, 107 YALE L.J. 2211, 2247 n.202 (1998).

2. To see the complete list of defendants sentenced to death in Georgia, see Tonya D. McClary, NAACP Legal Defense and Educational Fund, Inc., Director of Research Criminal Justice Project, (on file with author). The author took each name on this list and conducted a WestLaw search as follows: "ti(defendant's full name) & effective ineffective /s assistance /s counsel & death /s convict! sentenced."

3. In 1972, the Court in *Furman v. Georgia* held that the imposition of the death penalty under the Georgia and Texas death penalty statutes constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *See* Furman v. Georgia, 408 U.S. 238, 239-40 (1972). *Furman* invalidated many states' death penalty statutes; following *Furman*, 34 states, including Georgia, adopted revised statutes that provided guidelines for the sentencing authority. *See* Marion T. Pope, Jr., *A Study of the Unified Appeal Procedure in Georgia* 23 GA. L. REV. 185, 218 (1988).

Strickland v. Washington[4] may have had on capital lawyering. Additionally, it was necessary to analyze ineffective assistance claims between 1992 and 1998 so as to provide a more accurate and thorough understanding of the true trend and current state of capital lawyering.

The issue thus becomes: What are egregious mistakes? Although it is difficult to distinguish between egregious and merely technical errors, one commentator, Professor William Geimer, has proposed a checklist of minimum standards by which courts should address ineffective assistance of counsel claims more effectively than the method imposed by *Strickland*.[5] Professor Geimer offered the following checklist of minimal duties of capital defense counsel:

> (1) To read and become familiar with every capital opinion by the Supreme Court, the appropriate federal circuit court, and appropriate state courts since 1972.
> (2) To collect every document relevant to the life of the client, and to the offense with which he is charged. For example: medical records, school records, social service reports, military records, prison records.
> (3) To ensure that the following persons are interviewed:
> a. The client.
> b. All members of the client's family, employers, teachers, friends, and all private or government personnel who have or at one time had a legally recognized obligation to the client. For example: doctors, social workers, public assistance officials, jail personnel.
> c. All law enforcement officers involved in the case.
> d. If they consent, all prospective prosecution witnesses, including family members of the victim.
> e. All prospective defense witnesses identified by client and by investigative steps outlined in this checklist.
> (4) To secure every resource to which the client is entitled, without reciprocal obligation, by rule, statute, or constitution.
> (5) To secure all information regarding the prosecution's case and all exculpatory evidence to which the client is entitled, without reciprocal obligation, by rule, statute, or constitution.
> (6) In every case that an investigation leads counsel to conclude that the prosecution can prove some criminal offense, to seek to negotiate a non-capital disposition of the case.
> (7) To refrain from entering on client's behalf a plea of guilty to an offense for which death is a possible penalty without formal or strong informal prior assurances that death will not be the sentence.

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4. Strickland v. Washington, 466 U.S. 668 (1984). Prior to *Strickland*, lower courts had no guidance as to the appropriate test for ineffectiveness claims. In 1984, however, the United States Supreme Court in *Strickland* provided that guidance. *Strickland* changed the way by which courts began to approach ineffective assistance of counsel claims. Thus, it was imperative that the author take a sampling of capital defendants both prior to *and* immediately after this landmark decision was handed down.

5. *See* William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91 (1995).

(8) To examine every prospective juror regarding attitude toward imposition of the death penalty and, where applicable, exposure to pre-trial publicity; thereafter, to challenge for cause or peremptorily every prospective juror whose responses indicate to counsel that the prospective juror would be substantially impaired in considering the particular evidence to be offered in mitigation on behalf of the client, or whose responses disclose a bias toward imposition of the death penalty. To direct further questions to all jurors who express reservations about imposition of the death penalty, with a view toward ensuring that no such jurors are excused for cause unless, under existing law, they are truly unqualified to sit.

(9) To refrain at all times from distancing himself from the client in the presence of others, or communicating in any manner to the judge or the jurors anything less than complete commitment to the client's cause.

(10) At the guilt or innocence phase of trial, to advance by affirmative evidence, cross-examination, or other challenge to the prosecution's evidence, some theory of defense suggesting that the client is not guilty or is guilty of a non-capital offense or offenses.

(11) Where the client is convicted of an offense punishable by death, to put on evidence and argument, not solely argument, in support of an articulable theory of mitigation developed from prior investigation.[6]

This checklist is not exclusive because it does not address pre-trial motions practice or timely objections and motions during trial that may be necessary to preserve the rights of the client on appeal. Professor Geimer's guidelines provide minimum duties or responsibilities that should be imposed on capital counsel. Thus, the checklist will function as the basis on which this Article will distinguish between egregious mistakes of counsel and those that are mere technicalities.

There is also a significant question about how to judge whether ineffective assistance of counsel claims of defendants on appeal are arguably meritorious—thus reflecting possible trial attorney ineffectiveness—or whether they are frivolous, in which case they should count for nothing in the analysis because a frivolous claim of egregious ineffectiveness constitutes no evidence of ineffective performance. Because trial court records are inaccessible, this Article relies on appellate opinions, which are often skimpy on details of the claims. In light of this difficulty, this Article will proceed on the assumption that the appellate defense lawyers were acting in good faith; i.e., that there is a plausible (although rarely persuasive to the Georgia Supreme Court) basis for each allegation of ineffective assistance of counsel.

It is significant to note that this Article's analysis is not rendered meaningless by virtue of the fact that the Georgia Supreme Court rejected virtually all of the ineffectiveness claims. It is still possible to draw conclusions about whether Georgia capital defense lawyers have "smartened up" over time by examining the *claims* of ineffective assistance, whether those claims ultimately succeeded or

6. *See id.* at 168-71.

not. If it appears the claims of ineffective assistance of counsel, which zealous appellate lawyers have regarded as plausible to raise, have become fewer and/or of a more marginal nature over time, this is an indication that capital defense trial lawyering has, in general, improved in Georgia over the time periods examined.

II. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS: 1973 THROUGH 1983[7]

A. Summary of Cases

1. Terry Lee Goodwin[8] (8/27/75):

Goodwin was convicted of murder and sentenced to death. He then appealed the denial of his habeas petition, alleging ineffective assistance of counsel. Specifically, he argued that his former counsel failed to: (1) challenge the arrays of the grand and petit juries; (2) challenge the defendant's illegal arrest; (3) perfect proper *Witherspoon*[9] objections; (4) object to the failure of the court to charge mitigation and to request such a charge; (5) object to the defendant's prior convictions being admitted; (6) object to the victim's family being seated inside the bar; (7) interview some prosecution witnesses; (8) object to leading questions; and (9) impeach certain prosecution witnesses.

The court held that Goodwin's former counsel rendered effective assistance of counsel. Specifically, the court held the failure to challenge the arrays of grand and traverse juries was not, in itself, ground for ineffective assistance of counsel. Furthermore, failing to make *Witherspoon* objections was moot because the relevant prospective jurors were dismissed. Finally, the court held the attorneys did not need to interview all of the state's witnesses because they had the state's files involving the case.

2. Jerome Bowden[10] (12/9/76):

Bowden, an indigent, was sentenced to death for murder. He alleged ineffective assistance of counsel claiming that his attorney: (1) should have paid out of his own pocket for expert psychiatric witnesses; (2) should have spent about four hours investigating for each prospective juror, in preparation for voir dire; and (3) failed to push more aggressively on the issue of possible mental defect or insanity.

The court found no evidence of ineffectiveness, stating that the leading defense attorney, Mr. Oates, was assisted by two other attorneys—Mr. Cain, who visited the defendant before trial and helped in the conduct of the defense at trial, and Mr. Collins, who specialized in criminal law and assisted in most aspects of the

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7. According to records provided by the NAACP, 168 defendants were sentenced to death between 1973 and 1983. Of these defendants, 43 were re-sentenced to death during this period of time. As one would naturally expect, nearly all 168 defendants appealed their death sentence.

8. Goodwin v. Hopper, 253 S.E.2d 156 (Ga. 1979).

9. In *Witherspoon*, the United States Supreme Court held that a juror may be excused for cause where he makes it clear that he would automatically vote against a sentence of death without regard to any evidence that might be developed at the trial of the case before him. *See* Witherspoon v. Illinois, 391 U.S. 510, 514 (1968).

10. Bowden v. Zant, 260 S.E.2d 465 (Ga. 1979).

pre-trial, trial, and post-trial phases. The court held that the law did not require defense counsel to pay out of his own pocket for expert witnesses for an indigent defendant, nor did it require counsel to spend three or four hours of investigation for each prospective juror, in preparation for voir dire. Finally, the court ruled there existed no evidence of incapacity which defense counsel failed to uncover.

3. John Young[11] (1/9/76):

Young was convicted of three counts of murder and sentenced to death. On appeal, he alleged he was denied a fair trial due to the ineffective assistance of counsel during trial.

The court explained that the right to effective assistance of counsel does not mean errorless counsel or counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. Consequently, the court held that defendant's allegation of ineffective assistance of counsel was without merit in that defendant's trial counsel filed several motions and special pleas before trial and ably supported them with argument. Furthermore, defense counsel made additional motions during trial, interposed objections, and conducted thorough cross-examinations of the state's witnesses. Defendant's death sentence was thus affirmed.

4. Jack Alderman[12] (6/15/75):

Alderman was convicted for murder by a jury and sentenced to death. On appeal, the defendant alleged he was denied effective assistance of counsel for the following three reasons: (1) counsel's motion for continuance was denied on grounds of absence of a witness who was subpoenaed but not served; (2) counsel's failure to object at trial to the state's revealing to the jury that, during an interview with a Georgia Bureau of Investigation (GBI) agent, the defendant exercised his right to an attorney and remained silent; and (3) counsel's allowing the state, through the testimony of a GBI agent, to fortify the testimony of a key witness by reference to the propounded use of a polygraph test.

The defendant's trial counsel failed to set out the eight statutory requirements that should have been shown for the granting of a continuance during pre-trial, and said motion was thus denied. Because defendant's trial counsel did not object at trial to the GBI's testimony, this failure to object to the admission of the complained-of testimony constituted a waiver. Finally, the court noted that the GBI agent's reference to a polygraph examination had no probative value and did not bolster the witness's credibility.

The court held, without much comment and based upon the standard set forth in *Pitts v. Glass*,[13] that the defendant was not denied his constitutional right to effective assistance of counsel.

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11. Young v. State, 236 S.E.2d 1 (Ga. 1977).

12. Alderman v. State, 246 S.E.2d 642 (Ga. 1978).

13. Pitts v. Glass, 203 S.E.2d 515, 516-17 (Ga. 1974) (stating the standard of effective counsel as not errorless counsel, and not counsel judged ineffective by hindsight, but counsel "reasonably likely to render and rendering reasonably effective assistance").

5. Charlie Young[14] (2/19/76):

Young was convicted of murder and sentenced to death. On appeal, he argued ineffective assistance of counsel, in that his counsel: (1) failed to investigate the case properly and prepare for trial; (2) deprived him of a fair trial by deliberately waiving his right to an independent Jackson-Denno hearing;[15] (3) refused to allow the defendant to take the stand to testify in his own defense, particularly during the sentencing phase; and (4) failed to request a charge by the court during the sentencing phase that as a mitigating circumstance Young had no previous criminal record.

The court did not find any evidence supporting Young's ineffective assistance of counsel claim. First, the court found that the defendant did not set forth evidence that the investigations by his attorney were inadequate to determine legal defenses available or to prepare for trial. Second, the defendant failed to show prejudice or cause for relief resulting from counsel's waiver. Third, trial counsel discussed the implications of the defendant's taking the stand and the defendant's voluntary relinquishment of that right. However, the court did note that in some circumstances, where counsel refused to put the defendant on the stand, such action would require a finding of ineffectiveness of counsel. Finally, the defendant's retained attorney repeatedly solicited testimony from state witnesses that Young had no prior criminal record, had good character before the crime, and that Sheriff Wyatt had personally written a recommendation for the defendant previously. As a result, the court concluded that the habeas court was correct in holding that defense counsel provided reasonably effective assistance of counsel.

6. Charles Corn[16] (2/26/76) and (5/29/76):

Corn was convicted of robbery and murder and sentenced to death for each offense. On appeal, the defendant argued ineffective assistance of counsel claiming that his counsel did not spend enough time on his case.

Corn filed his motion for continuance on May 24, 1976, the day of trial. There was some indication that he had been represented by the same two attorneys since August 21, 1975, and the record was clear that they had represented him since his arraignment on October 28, 1975. The defendant's attorneys had been furnished copies of psychiatric evaluations conducted by the state and had two state-paid private psychiatric evaluations. Counsel was informed of the list of the state's witnesses on October 29, 1975. On November 13, 1975, the state served defense counsel with a complete list of names and addresses of witnesses to be used in the sentencing phase of Corn's trial. A continuance was granted on Corn's motion for further psychiatric evaluation. A hearing on his special plea of insanity was held and evidence was produced by each party. Both attorneys for

14. Young v. Ricketts, 250 S.E.2d 404 (Ga. 1978).

15. A Jackson-Denno hearing is a pre-trial hearing at which a judge determines the constitutionality of seized evidence or received confessions. The Supreme Court articulated the rule establishing these hearings as the constitutional norm in *Jackson v. Denno*, 378 U.S. 368 (1964).

16. Corn v. State, 240 S.E.2d 694 (Ga. 1977).

Corn were present at the sentencing trial following an earlier plea to the charges in this case. Thirteen state's witnesses appeared and defense counsel had the opportunity to make a thorough and sifting examination of each. Consequently, the court denied the defendant's ineffective assistance of counsel claim and upheld defendant's death sentence, explaining that defense counsel had ample time to prepare for trial.

7. Gary Lee Hawes[17] (12/9/76):

Hawes was convicted of murder, armed robbery, aggravated assault, and possession of a firearm during commission of a felony. As a result of the murder conviction, Hawes received the death sentence. On appeal, the defendant alleged the convictions and death sentence should be vacated because he was given inadequate representation by court-appointed counsel. Specifically, Hawes argued that his former counsel failed: (1) to file a motion to suppress evidence; (2) to cross-examine the state's key witnesses as to their credibility and reliability; (3) to request a charge on circumstantial evidence; (4) to give an adequate closing argument; (5) to interview witnesses testifying on behalf of a motion for change of venue; and (6) to raise the issue of the composition of the grand and traverse juries.

The court explained that defense counsel had about five years of legal experience, had two, more experienced attorneys assisting him, demanded a copy of an indictment and list of witnesses, asserted several well-argued motions, and interjected numerous objections to the introduction of evidence and testimony of witnesses at trial. As a result, the court stated "'the decisions on which witnesses to call, whether and how to conduct cross-examinations, what jurors to accept or strike, what trial motions should be made, and all other strategies and tactical decisions [were] the exclusive province of the lawyer after consultation with his client.'"[18] Thus, because trial counsel's conduct was considered tactical in nature, the court held that the defendant was not denied his constitutional right to effective assistance of counsel.

8. Ivon Ray Stanley[19] (1/15/77):

Stanley was convicted and sentenced to death on charges of felony-murder, armed robbery, and kidnapping with bodily injury. The defendant contended that he was denied effective assistance of counsel because counsel should have been appointed upon his arrest, since his indigency was apparent and he was available for interrogation while in jail.

However, the court explained that all of the evidence indicated Stanley never requested appointment of counsel and that he declined offers of assistance of counsel. In fact, the court went on to state that the defendant waived acceptance of counsel at his arrest. Thus, the court held that the delay in appointing counsel

17. Hawes v. State, 240 S.E.2d 833 (Ga. 1977).
18. *Id.* at 836 (quoting Reid v. State, 219 S.E.2d 740, 742 (Ga. 1975)).
19. Stanley v. State, 241 S.E.2d 173 (Ga. 1977).

did not deprive Stanley of the effective assistance of counsel and his death sentence was consequently affirmed.

9. Robert Franklin Godfrey[20] (3/13/78) and (11/20/80):

Godfrey was convicted of murder and aggravated assault and received two sentences of death. He argued ineffective assistance of counsel on appeal, saying that his counsel: (1) did not file a challenge to the traverse jury pool, and (2) did not timely file a challenge to the composition of the grand jury.

Prior to the defendant's first trial, trial counsel filed several motions, including a challenge to the composition of the grand jury. However, the habeas court dismissed this motion as untimely because Godfrey had already been indicted. First, the Georgia Supreme Court held that where no cause was shown, mere allegation that a jury challenge was untimely filed will not support a claim of ineffective assistance of counsel. Second, Godfrey's counsel testified that he had considered a challenge to the traverse jury but believed it would be dismissed and thus, unsuccessful. The court held that counsel's failure to file a challenge to the traverse jury was a tactical decision and thus, not ineffective assistance of trial counsel. Therefore, the court concluded that "neither defense counsel's failure to timely challenge the composition of the grand jury nor his tactical decision not to challenge the traverse jury array resulted in denial of [defendant's] Sixth and Fourteenth Amendment right to effective assistance of counsel."[21] Godfrey's death sentence was thus affirmed.

10. Roland Paul Hamilton[22] (8/1/78) and (9/8/80):

Hamilton was convicted of murder and sentenced to death. The habeas court set aside the defendant's murder conviction and death sentence on the grounds of ineffective assistance of counsel. The Georgia Supreme Court affirmed the superior court's conclusion that counsel was ineffective at both the guilt-innocence and sentencing stages of his trial for the following reasons: (1) although counsel knew four or five members of the traverse jury panel, he questioned only three jurors on voir dire, and only as to a matter unrelated to capital punishment; (2) counsel made no application for investigative funds and conducted no independent investigation; (3) counsel failed to personally interview any witnesses prior to their testimony; (4) counsel failed to cross-examine the defendant's girlfriend about the autopsy report and other expert medical evidence that revealed two types of wounds inflicted upon the deceased, supporting the defendant's statement that his girlfriend hit the victim on the head with a bottle; (5) counsel did not investigate the deceased's known propensity for violence; (6) counsel failed to investigate the grounds of the girlfriend's testimony and to question her credibility; (7) counsel failed to investigate a prior criminal conviction entered against

20. Godfrey v. Francis, 308 S.E.2d 806 (Ga. 1983).
21. *Id.* at 810.
22. Zant v. Hamilton, 307 S.E.2d 667 (Ga. 1983).

the defendant when he was eighteen years old, even though defense counsel knew that this would be offered against the defendant if he were convicted; (8) counsel never contacted any member of the defendant's family before trial, even though family members could have given evidence of mitigation; and (9) counsel did not require the state to disclose its agreement not to prosecute defendant's girlfriend.

The court thus concluded that evidence supported holding that the defendant received ineffective assistance of counsel at the penalty stage of his trial, but did not support the conclusion that he received ineffective assistance of counsel at the guilt-innocence stage. Therefore, the court affirmed the setting aside of the defendant's death sentence, but reversed the setting aside of the murder conviction.

11. William Spicer Lewis[23] (7/19/79):

Lewis was convicted of murder, armed robbery, and motor vehicle theft and was sentenced to death for murder. On appeal, the defendant argued ineffective assistance of counsel.

The court, finding no evidence of ineffective assistance of counsel, explained that defense counsel was familiar with the facts, filed several pre-trial motions and argued those motions vigorously, conducted an extensive voir dire examination, objected and moved to excuse certain prospective jurors, objected during trial, and presented evidence in mitigation during the sentencing phase. Moreover, the defendant previously tried to plead in return for a recommendation of a life sentence. Furthermore, the court noted that evidence of guilt was overwhelming and defense counsel cross-examined witnesses when the opportunity arose and when he could elicit favorable responses.

Lewis was indicted for malice murder, but the jury was not instructed that if it found felony murder it could not also convict on the underlying felony, which was a lesser included offense of felony murder. Therefore, despite not finding ineffectiveness of trial counsel, the court vacated his death penalty due to improper jury instructions.

12. Van Roosevelt Solomon[24] (9/27/79):

Solomon was convicted for the murder of a manager of a gasoline station and was sentenced to death. On appeal, the defendant contended that his retained trial counsel failed to render reasonably effective assistance during trial. Solomon argued that his trial counsel should have objected to the introduction of prior convictions during the pre-sentencing hearing because one of his convictions was rendered when he was fifteen years old. He also argued that trial counsel should have questioned prospective jurors about racial prejudice during voir

23. Lewis v. State, 268 S.E.2d 915 (Ga. 1980).
24. Solomon v. State, 277 S.E.2d 1 (Ga. 1980).

dire, and should have stricken a juror who said during voir dire that he had heard privileged information about the case, but could not remember it.

The court noted that defense counsel was familiar with the facts of the defendant's case, filed and vigorously argued several pre-trial motions, conducted an extensive voir dire examination, cross-examined witnesses, argued in defense of his client, objected during trial, and presented evidence in mitigation during sentencing. Moreover, the court noted that trial counsel vigorously represented his client and sought in every manner to avoid the death penalty. The court also found that counsel was faced with overwhelming evidence of guilt. As noted in *Pitts v. Glass*,[25] effective counsel does not mean "errorless counsel and not counsel judged ineffective by hindsight but counsel reasonably likely to render and rendering reasonably effective assistance."[26] As a result, the court held that counsel did not render ineffective assistance, primarily because trial counsel made many difficult decisions, all of which were tactical and thus not subject to ineffective assistance of counsel claims.

13. Larry Romine[27] (4/3/82) and (8/29/85):

Romine was convicted and sentenced to death for the murder of his parents and the armed robbery of his mother. On appeal, the defendant contended the fast pace of the trial denied him effective assistance of counsel.

The defendant's trial began with voir dire on Monday morning and ended on Saturday evening. Court was allegedly in session until 8:30 p.m. Monday, 9:00 p.m. Tuesday, 6:30 p.m. Wednesday, 7:00 p.m. Thursday, 10:00 p.m. Friday, and 5:00 p.m. Saturday. Counsel was appointed almost one year prior to trial. Counsel's investigation was assisted by a private investigator retained with funds furnished by the trial court. Counsel was also assisted by his associate throughout trial.

The court held that Romine's ineffective assistance of counsel claim was without merit because he "ha[d] not shown in what way his attorney would have been more effective had the case been tried at a slower pace."[28] The court, however, did set aside the defendant's death sentences on different grounds.[29]

14. William Alvin Smith[30] (9/15/81):

Smith was convicted of murder and sentenced to death. At trial, the defendant elected to plead not-guilty to the murder and armed robbery charges, and it was

25. Pitts v. Glass, 203 S.E.2d 515 (Ga. 1974).
26. *Id.* at 516-17.
27. Romine v. State, 305 S.E.2d 93 (Ga. 1983).
28. *Id.* at 98.
29. The court reversed the defendant's death sentences due to the trial court's denial of his motion for continuance. The largest factor in the court's denial of continuance was its belief that the defendant's father's testimony would have been inadmissible in mitigation. However, Georgia courts have "consistently refused to place unnecessary restrictions on the evidence that can be offered in mitigation at the sentencing phase of a death penalty case." *Id.* at 101. The Georgia Supreme Court found this denial by the trial court clearly erroneous and required reversal of defendant's death sentences.
30. Smith v. Francis, 325 S.E.2d 362 (Ga. 1985).

counsel's duty to provide assistance to him in the guilt-innocence and sentencing phases of the trial. On appeal, defendant complained of ineffective assistance of counsel, claiming his trial counsel asserted an unfounded defense of insanity. However, the court held that counsel's actions were reasonable under the circumstances due to a not-guilty plea, a confession, and a witness who arrived during the commission of the crimes and could positively identify the defendant.

15. Norman Darnell Baxter[31] (9/30/83):

Baxter was convicted of murder and sentenced to death. He then argued ineffective assistance of counsel for his counsels' failure to investigate, discover, and present evidence of his allegedly impaired mental condition. The court disagreed with the defendant's argument, explaining that his counsel testified that while the defendant was uncooperative on a few occasions, they had no difficulty communicating with the defendant, that the defendant understood the nature and objective of proceedings against him, and that the defendant was capable of assisting them in the preparation of his defense.

B. Conclusions

Of the 168 defendants sentenced to death in Georgia between 1973 and 1983, only fifteen death row inmates argued ineffective assistance of counsel.[32] As a result, only 11.2% of capital defendants sentenced between 1973 and 1983 asserted the ineffective assistance of counsel claim. Georgia death row inmates asserted a wide range of ineffective assistance of counsel arguments between 1973 and 1983. Based on the foregoing, trial counsel appear to have made repeated egregious blunders during this time period.

In only one instance prior to the promulgation of *Strickland* did a death row inmate successfully assert the ineffective assistance of counsel claim, thereby having his death sentence set aside.[33] The *Hamilton* court based its holding on counsel's extreme lack of investigation and preparation.[34] The court explained the following egregious errors were committed by trial counsel: failure to investigate the deceased's known propensity for violence and Hamilton's prior criminal conviction, failure to interview a single witness or any member of Hamilton's family, only questioning three jurors during voir dire (and only on matters unrelated to capital punishment), and making no request to the court for funds.[35]

Even though all other ineffective assistance of counsel claims made by capital defendants between 1973 and 1983 failed, there were several claims of ineffectiveness premised on egregious lapses. One such egregiousness claim included capital defendants who asserted a failure to examine every prospective juror regarding their attitudes on the death penalty during voir dire. Goodwin asserted

31. Baxter v. Kemp, 391 S.E.2d 754 (Ga. 1990).
32. *See infra* Part II.A.
33. Zant v. Hamilton, 307 S.E.2d 667 (Ga. 1983).
34. *Id.* at 669.
35. *Id.* at 668.

ineffective assistance of counsel based upon counsel's failure to make *Witherspoon* objections, in that counsel should have objected to two prospective jurors who revealed an inclination to vote for the death sentence regardless of the evidence presented. In addition, Solomon argued ineffectiveness of counsel because counsel did not question prospective jurors about racial prejudice during voir dire. Similarly, Solomon asserted ineffectiveness premised on an egregiousness claim due to counsel's failure to strike a prospective juror who stated that he had heard, but could not remember, privileged information regarding the case.

Another egregiousness claim included counsel's failure to interview appropriate witnesses. Goodwin argued ineffective assistance of counsel premised, among other allegations, upon counsel's failure to interview prosecution witnesses. Similar to failing to interview key witnesses, a fourth egregiousness claim of ineffectiveness made prior to *Strickland* was counsel's failure to conduct an adequate investigation. Charlie Young made such a claim when he argued that counsel failed to thoroughly investigate his case and prepare for trial. In addition, Hawes asserted that counsel did not interview witnesses who testified during a motion for change of venue.

The most repeated claim of ineffectiveness premised on an egregious lapse by counsel was, by far, counsel's failure to thoroughly investigate each prospective juror and to object to certain prospective jurors. Bowden asserted such a claim, specifically arguing that his counsel should have spent three or four hours investigating each prospective juror. However, the court noted that counsel had no duty to spend three or four hours of investigation for each prospective juror. Goodwin, Hawes, Godfrey, and Hamilton all asserted similar claims.

III. SUPREME COURT RULING IN *Strickland v. Washington*

Prior to the landmark decision in *Strickland v. Washington*,[36] promulgated by the United States Supreme Court in 1984, lower courts fought over the standards for defining ineffective assistance of counsel.[37] Courts employed a variety of stringent tests to determine whether counsel was ineffective: a "mockery of justice" test, a "sham" test, an "absence of judicial character" test, a "farce" test, and a "travesty of justice" test.[38] These tests provided little, if any, guidance to capital counsel in understanding the standard of effectiveness by which they would be judged.

Pursuant to the Sixth Amendment of the United States Constitution, every criminal defendant possesses the right to "Assistance of Counsel for his defence."[39] However, the United States Supreme Court has long recognized that

36. Strickland v. Washington, 466 U.S. 668 (1984).

37. *See* Ivan K. Fong, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 STAN. L. REV. 461, 467 (1987).

38. *See* Derrick Augustus Carter, *A Restatement of Exceptions to the Preservation of Error Requirement in Criminal Cases*, 46 U. KAN. L. REV. 947, 961 (1998) (citations omitted).

39. U.S. CONST. amend. VI.

this constitutional mandate includes that capital counsel must be effective.[40] In *Strickland*, the Supreme Court tried to define the type of attorney behavior that would violate the Sixth Amendment by establishing a two-prong test to evaluate ineffective assistance of counsel claims. To obtain reversal of a conviction, the defendant must prove: (1) that counsel's performance fell below an objective standard of reasonableness; and (2) that counsel's deficient performance prejudiced the defendant, resulting in an unreliable or fundamentally unfair outcome of the proceeding.[41] A defendant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other.[42] Moreover, courts presume effectiveness and avoid speculation through the application of hindsight.[43] Nevertheless, the defendant must point to *actual* ineffectiveness, either through specific errors or omissions of counsel, and may not rely solely on the surrounding circumstances in order to prove ineffective assistance.[44]

There are several reasons courts are reluctant to reverse a capital defendant's conviction based on ineffective assistance of counsel:

> (1) the state is not responsible for and hence not able to prevent attorney errors, (2) it would force the trial judge to intervene in the defendant's case and undermine defense counsel's strategy, (3) attorney errors occur in a variety of ways, but are basically harmless, (4) legal representation is an art, and an act or omission that is considered unprofessional in one context may be 'sound or even brilliant' strategy in another, and (5) it would discourage trial lawyers from accepting court assignments.[45]

"[D]espite the adoption of standards that suggest a greater receptiveness to claims of ineffective assistance, reversal of a conviction or sentence on grounds of ineffective assistance of counsel remains uncommon."[46] Courts often decline to scrutinize trial counsel's actions and omissions because they could be considered "tactical" or "strategic" decisions, and thus are nearly immune to reversal.[47] Other courts deny relief, sometimes without even reaching the issue of effectiveness, on the ground that the capital defendant did not establish that "actual prejudice" resulted from the challenged acts or omissions.[48] The *Strickland* test has been criticized as a "paper tiger": The courts' reluctance to engage in Monday-morning quarterbacking explains why many apparent lawyering errors are held to be within the range of competent conduct or are dismissed as harmless.[49]

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40. *See* Richard P. Rhodes, Jr., Strickland v. Washington: *Safeguard of the Capital Defendant's Right to Effective Assistance of Counsel?*, 12 B.C. THIRD WORLD L.J. 121 (1992). The Supreme Court first recognized the constitutional right to effective assistance of counsel in *Powell v. Alabama*, 287 U.S. 45, 71 (1932) and *Glasser v. United States*, 315 U.S. 60, 76 (1942).

41. *Strickland*, 466 U.S. at 687-89.

42. *Id.*

43. *Id.* at 689-90.

44. *See id.* (emphasis added).

45. Carter, *supra* note 38, at 961-62.

46. *See* Helen Gredd, Washington v. Strickland: *Defining Effective Assistance of Counsel at Capital Sentencing*, 83 COLUM. L. REV. 1544, 1552 (1983).

47. *See id.*

48. *See id.*

49. *See* James P. Fleissner, *Criminal Law and Procedure: A Two-Year Survey*, 48 MERCER L. REV. 219, 291 (1996).

IV. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS: 1985 THROUGH 1990[50]

A. Summary of Cases

1. Johnny B. Johnson[51] (7/17/85):

Johnson was convicted for murdering a police officer and sentenced to death. In his appeal from the denial of habeas corpus relief, the defendant contended that he was deprived effective assistance of counsel. Specifically, the defendant argued that his court-appointed counsel: (1) failed to interview key witnesses to ascertain the essential facts of the homicide; (2) did not devote sufficient time conferring with him before trial; (3) neglected to discuss with him possible defenses; (4) did not sit with the defendant during trial; (5) failed to introduce evidence as to lack of criminal intent; (6) failed to advise him about making his unsworn statement to the jury; (7) should not have waived a commitment hearing; and (8) was disloyal to him. In response, the defendant's trial counsel denied the defendant's claims and testified that he had provided the best representation possible under the adverse circumstances which then existed, and that he knew the essential facts and sought to use them to Johnson's best advantage under rules of law.

The court affirmed the habeas court, which held the defendant had failed to carry the burden in connection with his claim of ineffective assistance of counsel and that the claim was without merit. The court explained that the defendant's claims did not approach the criterion of whether the representation amounted to a sham or mockery of justice. "At most, the evidence shows that the claim here is mere hindsight."[52]

2. Robert Leonard Black[53] (5/10/88):

Black was convicted of murder and several other offenses and sentenced to death. On appeal, the court reversed his death sentence because the jury verdict failed to include an essential element, but the court remanded the issue of ineffective assistance of counsel. On remand, the court found that Black did not waive his right to assert ineffective assistance of trial counsel and an evidentiary hearing was held. The defendant then appealed the denial of his motions for a new trial and to quash the indictment. The defendant sought a new trial based upon his complaints of ineffective assistance of counsel.

Black asserted twenty-five allegations of ineffectiveness of trial counsel during the pre-trial, competency, guilt-innocence, sentencing, and post-conviction phases of his case. Black argued that his "trial counsel failed to develop the insanity defense relied on at trial, refused to present any self-defense claim, neglected to

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50. Sixty-five defendants were sentenced or re-sentenced to death between 1985 and 1990. As one would naturally expect, all defendants during this time period appealed their death sentence.

51. Johnson v. Caldwell, 187 S.E.2d 844 (Ga. 1972).

52. *Id.* at 847.

53. Black v. State, 448 S.E.2d 357 (Ga. 1994).

make proper requests for charge and reserve objections, and failed to present any defense in the sentencing phase."[54]

The court ruled that the performance of Black's attorney at the pre-trial, competency, and guilt-innocence phases was "not so defective as to render the trial unfair."[55] First, the court explained that trial counsel was an experienced criminal defense attorney who conferred frequently with Black about his defense, employed two investigators, and filed several motions. Furthermore, the court explained that Black had failed to fully cooperate with his trial counsel by not submitting to an independent psychiatric examination. Moreover, counsel's decision to pursue an insanity defense as opposed to self-defense was a legitimate trial strategy within the range of reasonable professional assistance. In addition, the court noted that Black failed to show the necessary prejudice from his attorney's failure to present evidence of mitigating factors during the sentencing phase and failed to show a reasonable probability that, but for his counsel's errors, the jury would have had a reasonable doubt regarding his guilt.[56] Therefore, the court held that Black was not entitled to a new guilt-innocence trial based on the ineffective assistance of counsel.

3. Exzavious Lee Gibson[57] (6/14/90):

Gibson was convicted of murder and armed robbery and was sentenced to death. On appeal, the defendant complained that the attorney general moved to quash subpoenas, to assess costs, and to find the defendant's attorney in contempt of court for filing the subpoenas. In response, defense counsel, stating he did not want to suffer the court's contempt and had no funds to pay the costs, withdrew the subpoenas. Gibson argued "that the state's 'bullyboy' tactics 'compelled' his withdrawal of the subpoenas and denied him effective assistance of counsel."[58]

The court stated that the threats in the motion to quash the subpoenas were distasteful, but held that the defendant was not compelled to withdraw his subpoenas, and that the state did not impair the defense attorney's representation of the defendant.

4. Eric Lynn Ferrell[59] (9/17/88):

Ferrell was convicted of murder in the death of his grandmother and cousin, armed robbery, and possession of a firearm by a convicted felon—he was sentenced to death. On appeal, Ferrell attacked nearly every decision made by trial counsel: (1) counsel was not sufficiently prepared for his Jackson-Denno testimony; (2) counsel did not consult the defendant about the genuineness of

54. *Id.* at 358.
55. *Id.*
56. The court explained that eyewitness testimony to the shooting and beating of the victim, and evidence that Black shot police officers who came to investigate, both support this conclusion.
57. Gibson v. State, 404 S.E.2d 781 (Ga. 1991).
58. *Id.* at 785.
59. Ferrell v. State, 401 S.E.2d 741 (Ga. 1991).

Ferrell's signature on his written statements; (3) the search warrant was not challenged even though the application was based on hearsay; (4) some of the state's witnesses were not interviewed; (5) cross-examination of several of the state's witnesses was cursory; and (6) expert witnesses were not objected to.

The court noted that trial counsel thoroughly investigated the case and prepared for trial. The defendant simply did not set forth any evidence that would demonstrate that his trial counsel failed to exercise reasonable, professional judgment in the handling of his case. At the sentencing phase of trial, trial counsel interviewed several potential witnesses in mitigation, many of whose names had been furnished by the defendant. Moreover, few people could testify favorably on behalf of the defendant and, those who could, did testify at trial. Consequently, the court held that the defendant did not show he was denied effective assistance of counsel.

5. Emmanuel Hammond[60] (3/8/90):

Hammond was convicted of malice murder, kidnapping, and armed robbery, and sentenced to death. On appeal, the Georgia Supreme Court remanded the issue of ineffective assistance of counsel. On remand, the superior court found that counsel was not ineffective.

Hammond's arguments for ineffective assistance included: (1) his trial counsel should have moved for a mistrial after the prosecutor argued to the jury that he should not be given a life sentence because "[t]here is no life without parole in Georgia. So one day he will be a free man;"[61] (2) counsel had an actual conflict of interest created by the "media rights" contract Hammond allegedly entered into with counsel;[62] (3) counsel was ineffective in eliciting "bad act" and "bad character" testimony about Hammond from various witnesses at trial;[63] (4) counsel failed to object to the admission of Hammond's juvenile court record; (5) counsel failed to adequately investigate and present evidence at both phases of trial on the issue of Hammond's mental health; (6) counsel failed to consult mental health experts regarding Hammond's ability to understand the nature of his plea offer; (7) counsel failed to move for a change of venue to another county where potential jurors would not have been exposed to extensive pre-trial publicity; (8) counsel failed to object to the district attorney's question to prospective jurors during voir dire regarding potential racial bias, because Hammond was black and the victim was white; (9) counsel should not have called unprepared defense witnesses, "who added nothing positive to the defense;"[64] and (10) counsel failed to present sufficient mitigating evidence during the sentencing phase of trial.

On return of the case, the Georgia Supreme Court first held that counsel's failure to move for mistrial in response to the prosecutor's argument was not ineffec-

60. Hammond v. State, 452 S.E.2d 745 (Ga. 1995).
61. *Id.* at 748.
62. *Id.* at 750.
63. *Id.*
64. *Id.* at 753.

tive assistance of counsel. Counsel's failure to move for mistrial did not undermine the reliability of the result of the sentencing trial because counsel objected to the prosecutor's improper argument. In addition, the evidence against Hammond was overwhelming and Hammond failed to satisfy his burden of showing that, had a motion for mistrial been made, "the decision reached would reasonably likely have been different."[65] Second, Hammond failed to show the existence of an actual conflict of interest or that such a conflict adversely affected trial counsel's performance. Third, any bad-character evidence elicited by counsel was a defense tactic which did not amount to the denial of effective assistance of counsel. Fourth, evidence of Hammond's juvenile court record was admissible and, thus, counsel's failure to object could not be considered deficient. Fifth, trial counsel was not ineffective merely because he initially requested a mental health examination by a state doctor, and Hammond did not sufficiently show prejudice by counsel's failure to secure a mental evaluation before the trial date. Sixth, Hammond's allegation that counsel's failure to consult mental health experts was without merit in that it was based entirely on conjecture. Seventh, counsel's decision not to move for change of venue was based on trial strategy. Additionally, Hammond set forth no evidence to support his assertion that a change of venue would have been more advantageous to his defense. Eighth, Hammond failed to satisfy his burden of demonstrating that counsel's actions and inactions during voir dire "fell outside the 'wide range of reasonable professional assistance.'"[66] Ninth, Hammond failed to show that his last allegation of ineffectiveness so undermined the adversarial process that he was deprived of a fair trial. Finally, Hammond did not suggest any additional mitigating evidence that could have and should have been presented so as to prove ineffectiveness. Consequently, the court concluded that trial counsel did not render ineffective assistance in the direct appeal of Hammond's case.

6. Carlton Gary[67] (8/27/86):

Gary was convicted of three counts of murder and sentenced to death. On appeal, the defendant argued ineffective assistance of counsel. Trial counsel represented the defendant pro bono. He first secured the dismissal of the defendant's court-appointed counsel. The defendant was represented by two additional attorneys, acting pro bono, during much of the pre-trial proceedings. Gary requested funds for forensic and investigative assistance, but was denied. However, trial counsel stated during pre-trial proceedings that because of the lack of funds and time, he was unprepared to try the case. The case proceeded to trial despite counsel's objection. The court then exercised its discretion to remand the case for a hearing to determine whether, for any reason, including lack of funds, the defendant was denied effective assistance of counsel.

65. *Id.* at 750.
66. *Id.* at 752 (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984)).
67. Gary v. State, 389 S.E.2d 218 (Ga. 1990).

The trial court explained that the defendant, through a hearing before the court with counsel of his own choosing, had the opportunity to argue any and all possible errors affecting the trial or prejudicing the defendant. The defendant refused to accept the opportunities provided to him. Moreover, the defendant asserted his privilege not to have his counsel testify. This was true even though the defendant was made aware by the court that this hearing was his opportunity to have the ineffective assistance of counsel issues litigated. Thus, the trial court held, and the Georgia Supreme Court affirmed, that the defendant knowingly, intelligently, and voluntarily waived his ineffective assistance of counsel claims.

7. David Brantley[68] (2/17/89):

Brantley was convicted of two counts of murder for which a death sentence was imposed. The Georgia Supreme Court affirmed the convictions, but reversed the death sentence imposed on one count of murder and remanded for resentencing. On remand and with the state's consent, Brantley elected to be sentenced to life without parole. Brantley then appealed the denial of his challenges to his resentence. Brantley argued that his sentence of life without parole should have been set aside by the trial court because ineffective assistance of counsel "rendered his acceptance of the sentencing agreement involuntary as a matter of law."[69] He further argued ineffective assistance because he was not given the opportunity to review and rebut victim impact statements pursuant to the Georgia Code.[70]

The Georgia Supreme Court held that Brantley was not denied effective assistance of counsel. First, the court explained that Brantley's two attorneys' comments in correspondence regarding the life-without-parole statute[71] and defendant's slim possibility of parole did not constitute ineffective assistance of counsel. Moreover, Brantley's attorney testified that he spoke with Brantley on several occasions about electing life without parole; that, after speaking with citizens of the county in which he was convicted, the attorney believed Brantley would again be sentenced to death if he did not so elect; that no promises or threats were made to Brantley or his attorney; and that counsel was confident that Brantley understood the implications of the sentence and elected it knowingly and voluntarily. In fact, the court emphasized:

> Prior to sentencing, Brantley executed an 'Election of Defendant to be Sentenced to Life Without Parole' in which he affirmed that he understood the status of his case on remand, that the State had previously indicated its intention to seek the death penalty, and that, with the State's consent, he was electing imprisonment for life without parole. Brantley also executed a written 'Acknowledgment of Defendant' in which he admitted, *inter alia,* that he com-

68. Brantley v. State, 486 S.E.2d 169 (Ga. 1997), *cert. denied,* Brantley v. Georgia, 118 S. Ct. 449 (1997).
69. *Id.* at 170.
70. GA. CODE ANN. § 17-10-1.2 (1997).
71. The court stated that "[t]he letters did not make any promises or guarantees of parole, and the evidence plainly shows that Brantley's decision did not turn on the attorneys' conjecture, rather Brantley knowingly opted for life in prison without the possibility of parole in order to spare himself." *Brantley,* 486 S.E.2d at 171-72.

> mitted the murder of his former sister-in-law while he was engaged in the murder of his ex-wife; that he understood that the State had indicated its intention to again seek the death penalty; that he understood that if he was sentenced to life without parole he would serve the remainder of his natural life in prison without the possibility of parole; that he was not under the influence of any drug, medicine, or alcohol; that he understood he had the right to trial by a jury but waived that right as to all issues; that he had the rights to have favorable witnesses testify and to question and cross-examine prosecution witnesses but waived such rights; that he understood had he elected to go to trial, he could have been sentenced to death or to life in prison with the possibility of parole; that no one had made him any promise or threat to cause his election; and that he was satisfied with his provided attorneys and had been informed of all of his rights and options.[72]

As a result, the court concluded that Brantley's plea was voluntarily entered. Second, the court noted that counsel's failure to comply with the Georgia Code[73] did not provide a basis for invalidating his sentence and that Brantley failed to show detriment caused by the admission of victim impact statements without the opportunity to rebut or review them.

8. Jimmy Fletcher Meders[74] (4/7/89):

Meders was convicted of malice murder and armed robbery and was sentenced to death. On remand, the trial court concluded that the defendant had not been denied effective assistance of counsel. The issue was appealed to the Georgia Supreme Court. Meders argued the trial court should have appointed a mental health expert to assist him at the remand hearing, a jury composition expert, and a criminal defense attorney to testify as an expert witness on the issue of ineffectiveness.

Meders was represented by two attorneys at the remand hearing. The court held that Meders was not entitled to the appointment of a third attorney to testify as an expert witness about how to properly try a death penalty case. The court also held that expert assistance was not necessary to determine whether the jury lists fairly represented the population of Glynn County. Finally, the court held that it was not an abuse of discretion to deny Meders' motion for independent psychological assistance at a hearing held to determine whether he had received effective assistance of counsel at the penalty phase. Thus, the Georgia Supreme Court concluded that the trial court persuasively demonstrated that Meders had failed to overcome the "strong presumption" that the defendant's trial counsel performed effectively.[75]

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72. *Id.* at 171 n.2.
73. GA. CODE ANN. § 17-10-1.2.
74. Meders v. State, 411 S.E.2d 491 (Ga. 1992).
75. *Id.* at 492.

9. John Hightower[76] (5/4/88):

Hightower was convicted of three counts of murder and was sentenced to death. On appeal, Hightower argued he was denied effective assistance of counsel because his court-appointed attorneys were underpaid. Hightower was represented by two attorneys.

The Georgia Supreme Court held that the trial court did not abuse its discretion by refusing to appoint a third attorney. In addition, the court held that the amount awarded to the defendant's attorneys for their services was not so low as to deny the defendant effective assistance of counsel. Moreover, the court explained that absent evidence that the amount awarded for attorney fees was so low as to deny effectiveness of counsel, attorney fees was not an issue addressable on this appeal.

10. Ricky Dane Hatcher[77] (7/2/88):

Hatcher pled guilty to murder and was sentenced to death following a jury sentencing hearing. Hatcher then appealed the sentence. The defendant had an appointed attorney represent him at the post-trial proceedings and on appeal. At the hearing on the motion for a new trial, and also on this appeal, the defendant argued that his trial attorneys were ineffective because their remarks during voir dire effectively conceded the issue of guilt, leaving him "no alternative but to plead guilty."[78]

At the hearing on the motion for a new trial, neither Hatcher nor his trial attorneys testified. Looking at the transcript of the guilty-plea hearing, the court determined that the defendant's guilty plea was voluntarily entered. The court held that Hatcher failed to show that he felt compelled to plead guilty because of any action or inaction on the part of his trial attorneys. Hence, the court continued, assuming deficient attorney performance in the conduct of the voir dire, Hatcher failed to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," and Hatcher would not have pled guilty.[79] Thus, the defendant failed to show ineffectiveness of trial counsel.

11. Ronald Leroy Kinsman[80] (4/18/87):

Kinsman was convicted of malice murder, armed robbery, and theft by taking, and was sentenced to death. On appeal, the defendant argued that the trial court's ruling to allow a state's witness to testify, even though the witness was not on the list furnished to the defendant, denied the defendant the effective assistance of counsel.

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76. Hightower v. State, 386 S.E.2d 509 (Ga. 1989).
77. Hatcher v. State, 379 S.E.2d 775 (Ga. 1989).
78. *Id.* at 776.
79. *Id.* at 776-77 (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).
80. Kinsman v. State, 376 S.E.2d 845 (Ga. 1989).

The court explained that Kinsman did not move to exclude the witness and that the trial court granted Kinsman's request to interview the witness prior to testifying. The witness's testimony was very brief. As a result, the court held that there was no merit to the defendant's contention that he was denied the effective assistance of counsel by the trial court's ruling.

12. Walter William Curry[81] (12/6/84):

Curry was convicted of murder in the course of rape and burglary and was sentenced to death. On appeal, the defendant argued that his trial counsel was ineffective in that his attorney failed to request help that the court freely offered.

The court found that counsel was ineffective where counsel failed to obtain an independent psychiatric evaluation of the defendant. This was a question arising from counsel's failure to request aid that the court freely offered.[82] Despite the trial court's positive response to a request from Curry's first appointed counsel for funds for an independent evaluation, Curry's trial counsel never followed up on this request. In fact, the court found it critical that, upon the court's own motion that Curry be tested for competency to stand trial, the treating physician's report was highly unfavorable to the defense. Curry's first appointed attorney testified by affidavit that he felt it imperative to obtain an independent evaluation because he believed from his own observations that Curry was severely mentally handicapped and that his court-appointed examination occurred at an underequipped facility. At the habeas hearing, trial counsel responded to these allegations by testifying that, based on his own observations and on the treating physician's report, he felt an independent examination would be futile. Consequently, the court concluded that trial counsel's:

> failure to take a crucial step of obtaining an independent psychiatric evaluation of Curry deprived his client of the protection of counsel . . . . The failure to obtain a second opinion, which might have been the basis for a successful defense of not guilty by reason of insanity and would certainly have provided crucial evidence in mitigation, so prejudiced the defense that the guilty plea and the sentence of death must be set aside.[83]

13. Alexander Edmund Williams[84] (8/29/86):

Williams was convicted of murder, rape, armed robbery, kidnapping with bodily injury, motor vehicle theft, and financial transaction card fraud, and he was sentenced to death. Williams was declared an indigent and was represented at trial by an appointed counsel. The issue of effective assistance of counsel was

81. Curry v. Zant, 371 S.E.2d 647 (Ga. 1988).

82. The court went on to note that "not every offer extended by the court must be accepted by defense counsel." *Id.* at 648.

83. *Id.* at 649.

84. Williams v. State, 368 S.E.2d 742 (Ga. 1988)

raised on motion for a new trial. The trial court determined that the defendant received effective assistance of counsel at trial.

On appeal, Williams complained that his trial attorney was ineffective because he:

> (1) failed to object to inadmissible evidence and improper argument by the prosecutor, (2) failed to discover and present mitigating evidence, (3) failed to conduct substantive death-qualification voir dire to object to the excusal of qualified venire persons with scruples against the death penalty, and to challenge venire persons biased in favor of a death sentence, (4) failed to request the court to investigate a report that the jury had begun deliberations prematurely (5) failed to request a psychiatric evaluation, and (6) attempted to exclude the testimony of certain state's witnesses when there was no legal basis for doing so.[85]

After examining each of the defendant's ineffective assistance of counsel contentions, the court concluded that Williams was not denied effective assistance of counsel. First, the court explained that evidence in aggravation is not limited to convictions and that reliable information tending to show a defendant's general bad character is admissible in aggravation. Thus, the court held that the failure to object was not ineffective assistance. Similarly, the court found the prosecutor's closing argument was not such a misstatement of law[86] as would compel an objection. Second, the court noted that the record did not show that any of the prospective witnesses[87] who Williams claimed should have been called at the hearing on the motion for a new trial would have testified. Third, counsel's decisions concerning the extent of his voir dire examination and whether or not to interpose challenges[88] were tactical decisions. Fourth, the court asked that the jury not begin its deliberations prior to the end of closing arguments, and Williams contends the court's response was "totally inadequate" and that trial counsel should have requested the court to question the jurors regarding their premature deliberations.[89] The court held that this clearly did "not fall outside 'the wide range of professional assistance.'"[90] Finally, the court noted "the burden is on the defendant to show that his attorney's omissions have prejudiced his case—here, that he has a mental condition that should have been investigated and offered in mitigation"—Williams failed to sustain this burden.[91]

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85. *Id.* at 748.

86. The prosecutor told the jury to consider "everything that you have heard during the course of this trial . . . all of these many things [he gave some examples], and you will then weigh the one against the other and you will decide what is the appropriate punishment." *Id.*

87. Williams asserts ineffectiveness of counsel in counsel's failure to call his mother, his minister, and several other friends as witnesses. *Id.* at 749.

88. Counsel testified at the hearing that he did not utilize peremptory challenges against two jurors because he wanted to save those strikes, and the witnesses did not look like they would be adamant toward him. *Id.*

89. *Id.* at 750.

90. *Id.* (quoting Strickland v. Washington, 466 U.S. 668, 690 (1984)).

91. *Id.*

14. James Cook[92] (2/23/85):

Cook was convicted of murder and was sentenced to death. On appeal, the defendant argued that his retained trial attorneys rendered ineffective assistance of counsel because they: challenged the array of the traverse jury too early and generally failed to understand the nature of such challenges; they only reviewed the state's file one time prior to trial; their cross-examination was inadequate; they failed to properly impeach two state's witnesses, who admitted on cross-examination that they were on probation; gave too short an opening statement; underestimated the defendant's chances that he would be convicted of murder and, as a result, the defendant rejected the state's offer of a life sentence; and most importantly, trial counsel failed to submit any mitigating evidence to the jury.

For several reasons, the court held that defense counsel did not render ineffective assistance of counsel. First, reviewing the state's file only once before trial did not establish that defense counsel rendered ineffective assistance of counsel. Second, even though defense counsel failed to introduce certified copies of convictions of two state witnesses, Cook failed to show that he had received ineffective assistance of counsel and failed to show that either witness had been convicted of a felony or misdemeanor involving moral turpitude as would bear on the witness's credibility. Third, the brevity of defense counsel's opening statement does not amount to ineffective assistance of counsel. Fourth, trial counsel's failure to advise Cook to accept a plea bargain offered by the state did not constitute ineffective assistance of counsel, though by agreeing to go to trial on the murder charge, Cook risked the death penalty. Fifth, trial counsel's failure to present witnesses to testify to Cook's good character did not amount to ineffectiveness because such presentation would have opened the door to considerable aggravating evidence by the state. Finally, trial counsel made a reasonable strategic judgment to present less than all of the available mitigating evidence. The court concluded that Cook failed to overcome the "'strong presumption' that the performance of his trial attorneys at the sentencing phase of the trial fell within 'the wide range of reasonable professional assistance.'"[93]

B. Conclusions

Fourteen out of sixty-five, or 22%, of the capital defendants sentenced between 1985 and 1990 in Georgia raised ineffective assistance of counsel claims.[94] Contrary to those capital defendants sentenced in the 1973 to 1983 time period, capital defendants could now rely on the two-prong *Strickland* standard. As a result, Georgia courts found that only one death row inmate in Georgia, William Walter Curry, successfully argued ineffective assistance of counsel, thereby hav-

92. Cook v. State, 340 S.E.2d 843 (Ga. 1986).
93. *Id.* at 861 (quoting *Strickland*, 466 U.S. at 669).
94. *See infra,* Part IV.A.

ing his death sentence set aside. Therefore, the only basis on which Georgia courts have found ineffective assistance was trial counsel's blatant failure to obtain an independent psychiatric evaluation for his client, where the results of such an evaluation would have provided a formidable defense.

Curry argued an egregious lapse by his trial counsel, who failed to request financial assistance that the court freely offered. The court noted that counsel's failure to take the "crucial step of obtaining an independent psychiatric evaluation of [the defendant] deprived his client of the protection of counsel."[95] Among the other ineffective assistance cases during this period, Curry clearly presented the most egregious lapse allegedly committed by trial counsel. However, failing to present mitigating evidence in support of a capital defendant's plea for life is certainly a close second.

From 1985 to 1990, capital defendants made fewer ineffective assistance of counsel claims based upon egregious lapses than between 1973 and 1983. First, Johnson asserted that counsel failed to interview witnesses essential to establish the facts of his case. Similarly, Ferrell argued that his trial counsel failed to interview some of the state's witnesses.

A second egregious lapse alleged to have been committed was counsel's failure to conduct an adequate investigation prior to trial. Such a claim was asserted by Hammond. He argued that counsel failed to adequately investigate and present evidence of his mental health at either the trial or sentencing phases of his case.

Additionally, Johnson asserted an egregious lapse of counsel when he argued that counsel distanced himself from him before and during trial. Johnson claimed that counsel failed to discuss with him possible defenses and did not confer with him at all before trial and would not sit with him during trial. In general, Johnson asserted that his trial counsel was disloyal to him.

Another ineffective assistance of counsel claim premised upon an egregious lapse was counsel's failure to present mitigating evidence during the sentencing phase. This serious allegation was asserted by Black, Hammond, Williams, and Cook. Such claims were based upon counsel's unprepared appearance. Gary made a claim that his court-appointed counsel was ineffective because he was unprepared for trial due to a lack of funds. In addition, Brantley argued ineffectiveness based upon counsel's not being given the opportunity to review and rebut victim impact statements.

Finally, Hatcher argued ineffectiveness because counsel made statements during voir dire which effectively conceded the issue of guilt. This error was egregious because counsel should have communicated to the judge and jury with complete commitment to the client's cause. If proven, this claim could constitute an ethical violation, as counsel failed to act as a zealous advocate for his client.

The trend of the obviousness of ineffective assistance of counsel claims, comparing the 1973-to-1983 and 1985-to-1990 periods, is not remarkable, but is

95. Curry v. Zant, 371 S.E.2d 647, 649 (Ga. 1988).

readily apparent. Although the proportion of capital defendants who raised ineffective assistance claims increased between these two periods, the lapses were less egregious. Capital defendants between 1985 and 1990 raised fewer ineffectiveness claims premised upon egregious lapses compared to such claims made by capital defendants sentenced before *Strickland*. From 1973 to 1983, capital defendants asserted several obvious blunders committed by counsel, ranging from an extreme lack of investigation and preparation, to failing to conduct effective questioning during voir dire. However, between 1985 and 1990, fewer and less obvious blunders were asserted against capital counsel. Such claims included counsel's blatant failure to obtain an independent medical evaluation, failure to present mitigating evidence, failure to conduct an adequate investigation, and failure to act as a zealous advocate.

V. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS: 1992 THROUGH 1998[96]

A. Summary of Cases

1. Andrew Grant DeYoung[97] (10/13/95):

DeYoung was convicted of the malice murders of his parents and his fourteen-year-old sister. The jury recommended the death penalty and the trial court sentenced him to death on October 13, 1995. On appeal, DeYoung argued that he was denied effective assistance of trial counsel, claiming his counsel: (1) failed to move to disqualify venireperson Horner for cause because she had at one time worked for the district attorney and was a good friend of a secretary who currently worked at that office; (2) should have moved to excuse Horner based upon her exposure to prejudicial pre-trial publicity; (3) did not conduct effective cross-examinations during the guilt-innocence phase; (4) should not have elicited testimony from the medical examiner that the absence of any wounds on the victims' faces could mean that the perpetrator knew or had strong emotional ties to the victims; and (5) failed to present character evidence in mitigation from witnesses Butler, Albright, and Fisher.

First, the court found that Horner worked for the district attorney's office for only one week and had had no contact with the district attorney or any member of that office since that time. In addition, she stated that her experience would not affect her judgment in the case. Second, even though Horner read and heard about the case from newspapers and television coverage, she stated that she could not remember enough about it to form an opinion. Thus, the court found that her opinion was not fixed and definite, and failure to move to disqualify her was not deficient. Third, the court noted that counsel's cross-examination strate-

96. According to the records provided by the NAACP, 46 defendants were sentenced to death between 1992 and 1998. As one would naturally expect, all defendants during this time period appealed their death sentence.

97. DeYoung v. State, 493 S.E.2d 157 (Ga. 1997), *cert. denied,* DeYoung v. Georgia, 118 S. Ct. 1848 (1998).

gies[98] were informed tactical decisions which did not amount to inadequacy under *Strickland*. Fourth, the court explained that no prejudice resulted from the exchange between counsel and the medical examiner because there was no reasonable probability that the outcome would have been affected had counsel not asked the question which led to the medical examiner's response. Finally, the court held that decisions regarding which witnesses to present were matters of trial strategy; counsel conducted an extensive investigation into DeYoung's background, interviewing his teachers, other students at school, co-workers, friends, and family members. Moreover, the court found that the defendant was examined by a psychologist and a psychiatrist, and the defense presented extensive evidence in mitigation. As a result, the court held that DeYoung received effective assistance of counsel.

2. Troy Anthony Davis[99] (8/30/91):

Davis was convicted by a jury of murder, obstruction of a law enforcement officer, aggravated assault, and possession of a firearm during the commission of a felony. He was sentenced to death for the murder on August 30, 1991. On appeal, he argued his trial counsel was ineffective for failing to object to certain evidence and charges, for not requesting certain jury charges, and for not recalling a witness for additional cross-examination. However, the court held, without comment, that Davis failed to show deficient attorney performance or actual prejudice and that he failed to show that he was denied effective assistance of counsel.

3. Marcus A. Wellons[100] (6/8/93):

Wellons was convicted of malice murder and rape of a fifteen-year-old girl. The jury sentenced him to death for the murder on June 8, 1993. Wellons appealed from the judgment entered by the trial court. On appeal, he argued, among thirty-five enumerations of error, that the presence of the media denied him effective assistance of counsel. However, the court held, without explanation, that this claim was wholly unsupported by the record.

4. Warren Lee Hill[101] (8/2/91):

Hill was convicted of murder by a jury and sentenced to death on August 2, 1991. On appeal, he argued, among twenty-two other enumerated errors, that he was denied effective assistance of trial counsel when the trial judge failed to adjourn at a reasonable time.[102]

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98. One such tactic concerned counsel cross-examining a codefendant about burglaries committed by the defendant. The court explained that counsel "knew [that the defendant] would be convicted and preferred to bring out this evidence themselves, rather than allow prosecutor to elicit the evidence during the sentencing phase where the information could, in their judgment, be more damaging . . . . [T]he idea behind the strategy was to portray codefendant as the architect of the other crimes as well as the murders." *Id.* at 785.

99. Davis v. State, 426 S.E.2d 844 (Ga. 1993).

100. Wellons v. State, 463 S.E.2d 868 (Ga. 1995).

101. Hill v. State, 427 S.E.2d 770 (Ga. 1993).

102. The court noted that although the first day of voir dire lasted until 11:00 p.m., the court adjourned between 6:00 p.m. and 8:00 p.m. on the remaining days of the trial. *Id.* at 773.

The court held, however, that the "'trial court retains the discretion to determine how late to hold court before recessing for the evening.'"[103] Moreover, no evidence was set forth showing the trial was unfairly expedited either through long sessions or truncated arguments and examinations. Therefore, the court held that Hill was not denied effective assistance of counsel.

B. Conclusions

Out of the forty-six capital defendants who were sentenced to death in Georgia between 1992 and 1998, only four defendants have thus far raised an ineffective assistance of counsel claim.[104] However, a precise proportion of capital defendants raising an ineffectiveness claim cannot be drawn.[105] The Georgia Supreme Court will not consider an ineffectiveness claim on direct appeal because some of the critical evidence, such as defense counsel's own testimony regarding strategy, can only be developed outside the appellate record. Thus, ineffectiveness claims are relegated to a post-conviction collateral attack proceeding. Inasmuch as the direct appeal takes a few months, the post-conviction trial proceeding can linger for awhile, and then *it* has to be appealed. Thus, it can take several years for a death sentence inmate to have an ineffectiveness claim ripe for appellate review—some capital defendants for the time period 1992 to 1998 may not yet have such a "ripe" ineffectiveness claim.

Because it is unclear how many capital defendants sentenced to death between 1992 and 1998 will assert an ineffectiveness claim, a clear trend of the number or proportion of such claims cannot be positively identified for this time period. However, other conclusions may be drawn. First, the number of ineffective assistance of counsel claims decreased from 1973 to 1990. Similarly, the proportion of capital defendants raising an ineffective assistance of counsel claim decreased over this time period. Most importantly, however, capital defendants made fewer claims of ineffective assistance of counsel based on egregious conduct over this period of time.

Based on the ineffectiveness claims raised thus far, there are less obvious blunders being committed by capital counsel today than between 1973 and 1983. Only one capital defendant from 1973 to 1983 has successfully argued ineffective assistance of counsel. In addition, before *Strickland*, several ineffectiveness claims were premised upon egregious conduct committed by capital counsel, including the failure to adequately conduct voir dire; to interview witnesses and, generally, to conduct a thorough investigation; and to adequately prepare for trial. However, similar egregious claims have not been alleged by capital defendants between 1992 and 1998 thus far.

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103. *Id.* (quoting Spencer v. State, 398 S.E.2d 179, 186 (Ga. 1990)).

104. *See infra* Part V.A.

105. After a thorough WestLaw search, four capital defendants, analyzed above (*see infra* Part V.A.), have raised ineffectiveness claims, 23 have made direct appeals without raising ineffectiveness claims, and 19 have yet to make any type of appeal on record.

VI. CONCLUSION

It is extraordinarily difficult for death row inmates to have their death sentences overturned on the basis of ineffective assistance of counsel. Only two death row inmates in Georgia, one prior to and one subsequent to *Strickland,* have had their death sentences reversed based on ineffective assistance of counsel. In most instances, death row inmates have not even asserted such a claim. However, when an ineffectiveness claim is made, Georgia courts have gone to great lengths to find effective assistance by trial counsel.

Death row inmates have made several allegations to support their ineffectiveness arguments, but it appears from the above analysis that attorneys are doing a reasonably effective job during representation of such clients. During the pre-*Strickland* era of ineffective assistance of counsel claims, several claims were premised upon egregious lapses. Between 1985 and 1990, those egregiousness claims decreased, but not significantly. Recently, however, only four capital defendants have asserted ineffective assistance of counsel claims and, more importantly, they have made fewer ineffective assistance claims premised upon egregious lapses. Georgia courts support this conclusion: Trial counsel are "smartening up" and not making the same obvious blunders during representation of a capital defendant as were made in the previous twenty-five years.