

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%)

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.

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.