

CHECKLIST

Categories of Some Possible Errors

I. PRE-TRIAL

Some possible errors arising or complained of prior to trial:

A. Arrest: OCGA Title 17, Chapter 4

1. With warrant:

OCGA § 17-4-40; Devier v. State, 253 Ga. 604 (5) (323 SE2d 150)(1984)

2. Without warrant:

OCGA § 17-4-20; Durden v. State, 250 Ga. 325 (1) (297 SE2d 237)(1982)

a. In public place:

United States v. Watson, 423 US 411 (96 SC 820, 46 LE2d 598) (1976);
Ellis v. State, 248 Ga. 414 (283 SE2d 870) (1981)

b. In home:

Payton v. New York, 445 US 573 (100 SC 1371, 63 LE2d 639) (1980);
Carranza v. State, 266 Ga. 263 (467 SE2d 315)(1996)

3. Investigative detentions

a. Must be supported by reasonable and articulable suspicion:

Vansant v. State, 264 Ga. 319 (2) (443 SE2d 474) (1994);
Lee v. State, 270 Ga. 798 (7) (514 SE2d 1) (1999)

b. Limited in Scope:

Terry v. Ohio, 392 US 1 (88 SC 1868, 20 LE2d 889) (1968);
Smith v. State, 216 Ga. App. 453 (2) (454 SE2d 635) (1995)

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

1. With warrant

a. Sufficiency of description:

Anderson v. State, 249 Ga. 132 (5) (287 SE2d 195) (1982)

b. Sufficiency of probable cause:

Illinois v. Gates, 462 US 213 (103 SC 2317, 76 LE2d 527) (1983);
DeYoung v. State, 268 Ga. 780 (7) (493 SE2d 157) (1997)

- c. Scope of permissible search:
 - Landers v. State, 250 Ga. 808 (301 SE2d 633) (1983)

2. Without warrant

- a. Expectation of privacy -- standing:

- Rakas v. Illinois, 439 US 128 (99 SC 421, 58 LE2d 387) (1978);
 - Barnes v. State, 269 Ga. 345 (4) (496 SE2d 674) (1998);
 - Sears v. State, 268 Ga. 759 (4) (493 SE2d 180) (1997)

- b. Search of person

- (1) Incident to arrest:

- United States v. Robertson, 414 US 21 (94 SC 467, 38 LE2d 427) (1973);
 - Chimel v. California, 395 US 752 (89 SC 2034, 23 LE2d 685) (1969);
 - Paxton v. State, 160 Ga. App. 19 (1) (285 SE2d 741) (1981);
 - Banks v. State, 246 Ga. 178 (2) (269 SE2d 450) (1980);
 - Batton v. State, 260 Ga. 127 (3) (391 SE2d 914) (1990)

- (2) Inventory search of personal effects prior to incarceration:

- Illinois v. Lafayette, 462 US 640 (103 SC 2605, 77 LE2d 65) (1983)

- (3) Limited search during investigative detention:

- Florida v. Royer, 460 US 491 (103 SC 1319, 75 LE2d 229) (1983)

- (4) Consent search:

- Schneekloth v. Bustamante, 412 US 218 (93 SC 2041, 36 LE2d 854) (1973)

- c. Search of vehicle

- (1) Protective search during lawful investigative stop:

- Michigan v. Long, 463 US 1032 (103 SC 3469, 77 LE2d 1201) (1983)

- (2) The “plain view” doctrine:

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

- (3) Incident to arrest:

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

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

d. Search of premises

- (1) Incident to arrest:
Chimel v. California, 395 US 752 (89 SC 2034, 23 LE2d 685) (1969);
Maryland v. Buie, 494 US 325 (110 SC 1093, 108 LE2d 276) (1990)
- (2) Probable cause and exigent circumstances:
Warden v. Hayden, 387 US 294 (87 SC 1642, 18 LE2d 782) (1967);
Cates v. State, 232 Ga. App. 262 (501 SE2d 262) (1998);
Clare v. State, 135 Ga. App. 281 (217 SE2d 638) (1975)
- (3) Arrest warrant for third party:
Steagald v. United States, 451 US 204 (101 SC 1642, 68 LE2d 38) (1981);
King v. State, 217 Ga. App. 889 (459 SE2d 605) (1995)

3. Electronic surveillance

- a. Federal Statutes:
18 USCA 2516 et seq.
- b. Georgia statutes:
OCGA Title 16, Ch. 11, Art. 3, Part 1
- (1) By law enforcement:
OCGA § 16-11-64; State v. Toomey, 134 Ga. App. 343 (214 SE2d 421) (1975);
Dobbins v. State, 262 Ga. 161 (2) (a) (415 SE2d 168) (1992)
- (2) By private party:
OCGA § 16-11-62; Mitchell v. State, 239 Ga. 3 (235 SE2d 509) (1977)

4. Motion to suppress:

OCGA § 17-5-30

- a. Scope:
State v. Johnston, 249 Ga. 413 (291 SE2d 543) (1982)
- b. File before trial if grounds known:
Thomas v. State, 118 Ga. App. 359 (163 SE2d 850) (1968)

- c. Should be in writing:
Hiatt v. State, 132 Ga. App. 289 (208 SE2d 163) (1974)
- d. Sufficiency of form of motion:
Lavelle v. State, 250 Ga. 224 (3) (297 SE2d 234) (1982)

C. Identification of defendant

- 1. Reliability/admissibility:
Manson v. Brathwaite, 432 US 98 (97 SC 2243, 53 LE2d 140) (1977);
Neil v. Biggers, 409 US 188 (93 SC 375, 34 LE2d 401) (1972);
Thomason v. State, 268 Ga. 298 (3) (486 SE2d 861) (1997)
- a. Of defendant's voice:
Jefferson v. State, 206 Ga. App. 544 (2) (425 SE2d 915) (1992)

D. Confessions and Admissions

- 1. Applicability of Miranda v. Arizona, 384 US 436 (86 SC 1602, 16 LE2d 694) (1966):
Cook v. State, 270 Ga. 820 (2) (514 SE2d 657) (1999);
Findley v. State, 251 Ga. 222 (1) (304 SE2d 898) (1983)
- 2. Assertion of right to counsel:
Davis v. United States, 512 US 450 (114 SC 2350, 129 LE2d 362) (1994);
Edwards v. Arizona, 451 US 477 (101 SC 1880, 68 LE2d 378) (1981);
Jordan v. State, 267 Ga. 442 (1) (480 SE2d 18) (1997);
Allen v. State, 259 Ga. 63 (377 SE2d 150) (1989);
Gissendaner v. State, 269 Ga. 495 (500 SE2d 577) (1998)
- 3. Invocation of right to remain silent:
Michigan v. Mosley, 423 US 96 (96 SC 321, 46 LE2d 313) (1975);
Fields v. State, 266 Ga. 241 (1) (466 SE2d 202) (1996);
Hatcher v. State, 259 Ga. 274 (2) (379 SE2d 775) (1989)
- 4. Confessions and admissions of co-conspirators:
OCGA § 24-3-52; Bruton v. United States, 391 US 123 (88 SC 1620, 20 LE2d 476) (1968);
Hanifa v. State, 269 Ga. 797 (2) (505 SE2d 731) (1998);
Gray v. Maryland, 523 US 185 (118 SC 1151, 140 LE2d 294) (1998)
- 5. Confessions and admissions during psychiatric examination:
Estelle v. Smith, 451 US 454 (101 SC 1866, 68 LE2d 359) (1981);
Hicks v. State, 256 Ga. 715 (14) (352 SE2d 762) (1987);
Stephens v. State, 270 Ga. 354 (4) (309 SE2d 605) (1998)

6. Confessions obtained after illegal arrest:
Dunaway v. New York, 442 US 200 (99 SC 2248, 60 LE2d 824) (1979);
Devier v. State, 253 Ga. 604 (7) (323 SE2d 150) (1984)
7. Voluntariness of confession:
OCGA § 24-3-50; Lee v. State, 270 Ga. 798 (2) (514 SE2d 1) (1999);
State v. Ritter, 268 Ga. 108 (485 SE2d 492) (1997)

E. Bail: OCGA Title 17, Chapter 6

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

F. Representation by Counsel

1. Right to counsel:
OCGA Title 17, Chapter 12;
Gideon v. Wainwright, 372 US 335 (83 SC 792, 9 LE2d 799) (1963)
2. Right of self-representation:
Faretta v. California, 422 US 806 (95 SC 2525, 45 LE2d 562) (1975);
Thaxton v. State, 260 Ga. 141 (2) (390 SE2d 841) (1990);
Seagraves v. State, 259 Ga. 36 (376 SE2d 670) (1989)
3. No absolute right of indigent to appointment of attorney of own choosing:
Lipham v. State, 257 Ga. 808 (2) (364 SE2d 840) (1988);
Kesler v. State, 249 Ga. 462 (12) (291 SE2d 497) (1982)
4. Appointment of counsel:
Amadeo v. State, 259 Ga. 469 (384 SE2d 181) (1989);
Clarke v. Zant, 247 Ga. 194 (275 SE2d 49) (1981)
5. Effective assistance of counsel
 - a. General standard:
Strickland v. Washington, 466 US 668 (104 SC 2052, 80 LE2d 674) (1984);
Smith v. Francis, 253 Ga. 782 (1) (325 SE2d 362) (1985)
 - b. Includes meaningful access to attorney:
Wright v. State, 250 Ga. 570 (1) (300 SE2d 147) (1983)
 - c. Conflicts of interest:
Chapel v. State, 264 Ga. 267 (443 SE2d 271) (1994);

Sallie v. State, 269 Ga. 446 (499 SE2d 897) (1998)

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

1. Special versus general demurrers:

Bramblett v. State, 239 Ga. 336 (1) (236 SE2d 580) (1977)

H. Arraignment: OCGA § 17-7-5

1. Notice:

OCGA § 17-7-91;

Smith v. State, 235 Ga. 620 (221 SE2d 41) (1975)

2. Guilty plea

a. Competency:

Boykin v. Alabama, 395 US 238 (89 SC 1709, 23 LE2d 274) (1969);

Godinez v. Moran, 509 US 389 (113 SC 2680, 125 LE2d 321) (1993);

Goodman v. Davis, 249 Ga. 11 (287 SE2d 26) (1982);

State v. Germany, 245 Ga. 326 (265 SE2d 13) (1980)

b. Plea to lesser offense:

Wharton v. Anderson, 270 Ga. 22 (504 SE2d 670) (1998);

Breland v. Smith, 247 Ga. 690 (279 SE2d 204) (1981)

c. Jury trial as to sentence after guilty plea:

Browner v. State, 257 Ga. 321 (357 SE2d 559) (1987)

d. Withdrawal of plea:

Henry v. State, 269 Ga. 851 (2) (507 SE2d 419) (1998);

Browner v. State, 257 Ga. 321 (357 SE2d 559) (1987);

Fair v. State, 245 Ga. 868 (8) (268 SE2d 316) (1980)

I. Pleas in Bar

1. Double jeopardy:

1983 Const., Art 1, Sec. 1, Par. XVII; OCGA § 16-1-8 (c);

Blockburger v. United States, 284 US 299 (52 SC 180, 76 LE 306) (1932);

Torres State, 270 Ga. 79 (1) (508 SE2d 171) (1998)

a. Denial of timely-filed plea of double jeopardy appealable prior to trial:

Patterson v. State, 248 Ga. 875 (1982)

- b. Aggravating circumstances:
 OCGA § 17-10-30;
 Spraggins v. State, 255 Ga. 195 (336 SE2d 227) (1985)
- 2. Statute of limitations:
 OCGA § 17-3-1, 2;
 Hall v. Hopper, 234 Ga. 625 (1) (216 SE2d 839) (1975)
- 3. Speedy trial
 - a. OCGA § 17-7-171
 - b. US Constitution, Amendments 6 and 14:
 Barker v. Wingo, 407 US 574 (92 SC 2182, 33 LE2d 101) (1972);
 Pruitt v. State, 270 Ga. 745 (3) (514 SE2d 639)(1999);
 Brown v. State, 264 Ga. 803 (2) (450 SE2d 821) (1994)
- 4. Prevent seeking of death penalty due to alleged racial or gender bias:
 Rower v. State, 264 Ga. 323 (1) (443 SE2d 839) (1994);
 Perkins v. State, 269 Ga. 791 (2) (505 SE2d 16) (1998)

J. Defendant’s Mental Condition

- 1. Motion for independent mental examination:
 Ake v. Oklahoma, 470 US 68 (105 SC1087, 84 LE2d 53) (1985);
 Bright v. State, 265 Ga. 265 (2) (455 SE2d 37) (1995) (to develop mitigation evidence);
 Holloway v. State, 257 Ga. 620 (361 SE2d 794) (1987);
 Lindsey v. State, 254 Ga. 444 (330 SE2d 563) (1985)
- 2. Defendant’s competence to stand trial:
 OCGA § 17-7-130;
 Pate v. Robinson, 383 US 375 (86 SC 836, 15 LE2d 815) (1966);
 Meders v. State, 260 Ga. 49 (1) (238 SE2d 334) (1990);
 Holloway v. State, 257 Ga. 620 (361 SE2d 794) (1987)
- 3. Defendant’s mental condition at time of offense
 - a. Presumption of sanity:
 Durham v. State, 239 Ga. 697 (1) (238 SE2d 334) (1977)
 - b. Insane at time of crime defined:
 OCGA § 17-7-131 (a) (1);
 OCGA §16-3-2 and 3;

Clark v. State, 245 Ga. 629 (1) (266 SE2d 466) (1980)

- c. "Mentally ill" defined: OCGA § 17-7-131 (a) (2)
- d. "Mentally retarded" defined:
 - OCGA § 17-7-131 (a) (3);
 - Fleming v. Zant, 259 Ga. 687 (386 SE2d 339) (1989);
 - Burgess v. State, 264 Ga. 777 (36) (450 SE2d 680) (1994)
- e. Charge/form of verdict:
 - OCGA § 17-7-131 (b) and (c); Spraggins v State, 258 Ga. 32 (364 SE2d 861) (1988)
- f. Burden of proof as to sanity:
 - Brown v. State, 250 Ga. 66 (2) (295 SE2d 727) (1982)
- g. Burden of proof as to mental retardation:
 - Burgess v. State, 264 Ga. 777 (36) (450 SE2d 680) (1994);
 - Stephens v. State, 270 Ga. 354 (2) (509 SE2d 605) (1998)

K. Discovery

- 1. Generally:
 - OCGA § 17-16-1 et seq.;
 - State v. Lucious, 271 Ga.361 (518 SE2d 677)(1999)
- 2. State's disclosure of evidence favorable to defendant:
 - Brady v. Maryland, 373 US 83 (83 SC 1194, 10 LE2d 215) (1963);
 - United States v. Agurs, 427 US 97 (96 SC 2392, 49 LE2d 342) (1976);
 - Williams v. State, 250 Ga. 463 (298 SE2d 492) (1983);
 - Mize v. State, 269 Ga. 646 (2) (501 SE2d 219) (1998);
 - Gulley v. State, 271 Ga. 337 (5) (519 SE2d 655) (1999)
- 3. Witness list:
 - OCGA § 17-16-8
- 4. Witness statements:
 - OCGA §§ 17-16-4 (a) (1), 17-16-7
 - a. Plea arrangements with witness:
 - Giglio v. United States, 405 US 150 (92 S. Ct. 763, 31 LE2d 104) (1972);
 - Owen v. State, 265 Ga. 67 (2) (453 SE2d 728) (1995);
 - Patillo v. State, 258 Ga. 255 (4) (368 SE2d 493) (1988)

5. Failure to preserve evidence - bad faith:
Arizona v. Youngblood, 488 US 51 (109 SC 333, 102 LE2d 281) (1988)
6. In-camera inspection by trial court:
Reed v. State, 249 Ga. 52 (3) (287 SE2d 205 (1982);
Tribble v. State, 248 Ga. 274 (280 SE2d 352) (1981)
7. Discovery of the defendant's statements:
OCGA §§ 17-16-4 (a) (1), 17-16-7;
Walraven v. State, 250 Ga. 401 (2) (297 SE2d 278) (1982)
 - a. Statements made by co-defendant:
OCGA § 17-16-4 (a) (1);
OCGA § 17-16-7
8. Scientific reports:
OCGA § 17-16-4 (a) (4) and (b) (2);
Brady v. State, 233 Ga. App. 287 (2) (503 SE2d 906) (1998)
9. Notice to produce:
OCGA §§ 24-10-26, 24-10-29;
Wilson v. State, 246 Ga. 62 (1) (268 SE2d 895) (1980)
10. Independent examination of evidence by a defense expert:
OCGA § 17-16-4 (a) (3)

L. Motion for Severance

1. Severance of co-defendant's case a matter of right when death penalty sought:
OCGA § 17-8-4
2. Severance of offenses:
OCGA § 16-1-7 (c); Cooper v. State, 253 Ga. 736 (3) (325 SE2d 137) (1985);
Jarrell v. State, 234 Ga. 410 (1) (216 SE2d 258) (1975)

M. Other Pre-Trial Motions

1. Bruton motion:
Bruton v. United States, 391 US 123 (88 SC 1620, 20 LE2d 476) (1968);
Hanifa v. State, 269 Ga. 797 (2) (505 SE2d 731) (1998)
2. Motion to disclose plea bargain agreements between state and its witnesses:
Giglio v. United States, 405 US 150 (92 SC 763, 31 LE2d 104) (1972);

Owens v. State, 251 Ga. 313 (1) (305 SE2d 102) (1983);

3. Motions in limine – discretion of court to rule on admissibility of evidence prior to trial:
State v. Johnston, 249 Ga. 413 (3) (291 SE2d 543) (1982)

N. Motion to Recuse

1. Judge:

Pope v. State, 257 Ga. 32 (354 SE2d 429) (1987);
Romine v. State, 251 Ga. 208 (2) (305 SE2d 93) (1983);
Smith v. State, 250 Ga. 438 (1) (298 SE2d 492) (1983);
Speed v. State, 270 Ga. 688 (55) (512 SE2d 896) (1999)

2. Prosecutor:

Frazier v. State, 257 Ga. 690 (9) (362 SE2d 357) (1987);
Rutledge v. State, 245 Ga. 768 (1) (267 Ga. 199) (1980);
Pruitt v. State, 270 Ga. 745 (19) (514 SE2d 639) (1999)

O. Continuances: OCGA § 17-8-2

1. Absence of witness:

OCGA § 17-8-25;
Wilson v. State, 250 Ga. 630 (8) (300 SE2d 640) (1983);
Romine v. State, 251 Ga. 208 (11) (298 SE2d 492) (1983)

2. Absence of attorney:

OCGA § 17-8-24; Putman v. State, 251 Ga. 605 (5) (308 SE2d 145) (1983);
Shaw v. State, 251 Ga. 109 (303 SE2d 448) (1983)

3. Other reasons:

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

P. Motions Regarding Publicity

1. Change of venue:

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

2. "Gag orders" :

Nebraska Press Assn. v. Stuart, 427 US 539 (96 SC 2791, 49 LE2d 683) (1976)

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

Q. Jury Challenges (to the Array)

1. Distinguish challenges to the "poll":
Jordan v. State, 247 Ga. 328 (6) (276 SE2d 224) (1981)
2. Statutory fair cross-section requirement:
OCGA § 15-12-40
 - a. Applicable to grand and traverse jury pools:
Devier v. State, 250 Ga. 652 (300 SE2d 480) (1983)
 - b. Violation of OCGA § 15-12-40 regarding grand jury pool is not cured by subsequent conviction by properly constituted traverse jury:
West v. State, 252 Ga. 156 (1) (313 SE2d 67) (1984)
3. Sixth Amendment
 - a. Requires that traverse jury array constitute a fair cross-section of the community:
Duren v. Missouri, 439 US 357 (99 SC 664, 58 LE2d 579) (1979)
 - b. Purposeful discrimination irrelevant:
Walraven v. State, 250 Ga. 401 (3) (297 SE2d 278) (1982)
4. Equal Protection Clause of Fourteenth Amendment
 - a. Applicable to grand and traverse jury venires:
Castaneda v. Partida, 430 US 482 (97 SC 1272, 51 LE2d 498) (1977)
 - b. Substantial under representation of race or identifiable group, resulting from purposeful discrimination, is a denial of equal protection:
Swain v. Alabama, 380 US 202 (85 SC 824, 13 LE2d 759) (1965)
 - c. Violation of equal protection regarding the grand jury is not cured by subsequent conviction by properly constituted traverse jury:
Vasquez v. Hillery, 474 US 254 (106 SC 617, 88 LE2d 598) (1986)
5. Measuring under representation:
Cook v. State, 255 Ga. 565 (11) (340 SE2d 843) (1986);
Mobley v. State, 262 Ga 808 (1) (426 SE2d 150) (1993)

6. Cognizability of under represented group:
 - Parks v. State, 254 Ga. 403 (6)(b) (330 SE2d 686) (1985);
 - Bryant v. State, 268 Ga 664 (2) (492 SE2d 868) (1997)
7. Time for interposing challenge
 - a. Announcement of intention to challenge should be made at first hearing:
 - Unified Appeal Procedure, Rule II (B) (5);
 - Walraven v. State, 250 Ga. 401 (1) (297 SE2d278) (1982)
 - b. After trial is too late:
 - Young v. State, 232 Ga. 285 (206 SE2d 439) (1974)
8. Prospective jurors may be excused from jury duty by trial court:
 - OCGA § 15-12-1 (a)
 - a. Disregard of this code section may vitiate the array:
 - Joyner v. State, 251 Ga. 84 (303 SE2d 106) (1983)

Part II. Trial Proceedings: Guilt- Innocence Phase

A. Voir Dire

1. Individual Voir Dire:
 - OCGA §15-12-133; State v. Hutter, 251 Ga. 615 (307 SE2d 910) (1983)
2. Sequestered Voir Dire Discretionary:
 - Sanborn v. State, 251 Ga. 169 (3) (304 SE2d 377) (1983)
3. Scope of Examination:
 - Curry v. State, 255 Ga. 215 (2) (b) (336 SE2d 762) (1985);
 - Henderson v. State, 251 Ga. 398 (306 SE2d 645) (1983)
4. Challenges for Cause
 - a. Generally:
 - Jordan v. State, 247 Ga. 328 (6) (276 SE2d 224) (1981);
 - OCGA § 15-12-163
 - b. Death penalty bias - for or against:
 - Greene v. State, 268 Ga. 47 (485 SE2d 741)(1997);
 - Wainwright v. Witt, 469 US 412 (105 SC 844, 83 LE2d 841) (1985);
 - Alderman v. State, 254 Ga. 206 (4) (327 SE2d 168) (1985)

- c. Required disqualification of police officers upon defense motion:
 - Hutcheson v. State, 246 Ga. 13 (268 Ga. 643) (1980);
 - Mosher v. State, 268 Ga. 555 (2) (491 SE2d 348) (1997)
 - d. Pretrial publicity:
 - Speed v. State, 270 Ga. 688 (4) (512 SE2d 896) (1999);
 - Norton v. State, 263 Ga. 448 (2) (435 SE2d 30) (1993)
5. Peremptory challenges:
- a. Parties entitled to panel of 42 qualified jurors:
 - Harris v. State, 255 Ga. 464 (339 SE2d 712) (1986)
 - b. Racial discrimination:
 - Georgia v. McCollum, 505 US 42 (112 SC 2348, 120 LE2d 33) (1992);
 - Powers v. Ohio, 499 US 400 (111 SC 1364, 113 LE2d 411) (1991);
 - Barnes v. State, 269 Ga. 345 (6) (496 SE2d 674) (1998);
 - Batson v. Kentucky, 476 US 79 (106 SC 1712, 90 LE2d 69) (1986);
 - Gamble v. State, 257 Ga. 325 (2) (357 SE2d 792) (1987)
 - c. Gender discrimination:
 - JEB v. Alabama, 511 US 127 (114 SC 1419, 128 LE2d 89) (1994);
 - Tedder v. State, 265 Ga. 900 (2) (463 SE2d 697) (1995)

B. Opening Statements

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

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

- 1. On request, invocation of Rule mandatory:
 - Poultryland v. Anderson, 200 Ga. 549 (2) (37 SE2d 745) (1946)
- a. Rule need not be invoked until presentation of evidence:
 - Putman v. State, 251 Ga. 605 (6) (308 SE2d 145) (1983)
- b. Court may allow exceptions to the Rule:
 - Hill v. State, 250 Ga. 277 (8) (295 SE2d 518) (1982);

Barnes v. State, 269 Ga. 345 (17) (496 SE2d 674) (1998)

2. Violation of the Rule by a witness does not render witness incompetent:
Jordan v. State, 247 Ga. 328 (10) (276 SE2d 224) (1981)
3. Violation of the Rule outside the courtroom is relevant to the credibility of the violator:
Childress v. State, 266 Ga. 425 (2) (467 SE2d 865) (1996)

D. Hearings Outside the Presence of the Jury

1. Admissibility of Defendants's Statement

a. Upon objection by defendant to admissibility of custodial statement, trial court must conduct hearing outside the presence of the jury:

Peinado v. State, 223 Ga. App. 271 (1) (477 SE2d 408) (1996);
Jackson v. Denno, 378 US 368 (84 SC 1774, 12 LE2d 908) (1964)

(1) Trial court's ruling on voluntariness of statement must be clear:
Walraven v. State, 250 Ga. 401 (4) (a) (297 SE2d 278) (1982)

2. Motion to quash in-court identification:

Holcomb v. State, 128 Ga. App. 238 (196 SE2d 330) (1973)

3. Hearing outside presence of jury contemplated by motion in limine made prior to trial: State v. Johnston, 249 Ga. 413 (3) (291 SE2d 543) (1982)

E. Issues Which May Arise Regarding Admissibility of Evidence.

1. Relevancy defined:

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

2. Videotapes

a. Motion pictures:

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

b. Reenactment videos:

Pickren v. State, 269 Ga. 453 (2) (500 SE2d 566) (1998)

3. Audiotapes:

Robertson v. State, 268 Ga. 772 (3) (493 SE2d 697) (1997)

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

4. Photographs

a. Authentication:

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

b. Autopsy photographs:

Jenkins v. State, 269 Ga. 282 (20) (498 SE2d 502) (1998);

Sears v. State, 268 Ga. 759 (14) (493 SE2d 180) (1997);

Drane v. State, 265 Ga. 255 (10) (455 SE2d 27) (1995)

(post-incision photo graphs sometimes admissible);

Brown v. State, 250 Ga. 862 (5) (302 SE2d 347) (1983)

c. Trial court has discretion to exclude photos with marginal probative value:

Hicks v. State, 256 Ga. 715 (13) (352 SE2d 762) (1987)

5. Documents

a. Public:

OCGA Title 24, Chapter 7, Article 2

b. Private:

OCGA Title 24, Chapter 7, Article 1

c. Handwriting:

OCGA § 24-7-6

6. Tangible objects

a. Chain of custody:

Mize v. State, 269 Ga. 646 (5) (501 SE2d 219) (1998);

Stephens v. State, 259 Ga. 820 (3) (388 SE2d 519) (1990);

Harper v. State, 251 Ga. 183 (1) (304 SE2d 693) (1983)

7. Best evidence rule:

OCGA § 24-5-1;

Howard v. State, 204 Ga. App. 743 (1) (420 SE2d 594) (1992)

(certified copy of conviction);

In the Interest of F.L.P, 184 Ga. App.164 (2) (361 SE2d 43) (1987)
(BER does not apply to a tape recorded statement);
Merrill Lynch v. Zimmerman, 248 Ga. 580 (285 SE2d 181) (1981)

8. Character evidence:

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

a. Relevant evidence not inadmissible simply because it reflects defendant's bad character:

Mize v. State, 269 Ga. 646 (3) (501 SE2d 219) (1998);
Earnest v. State, 262 Ga. 494 (1) (422 SE2d 188) (1992)

b. Victim's character:

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

c. Placing character "in issue":

Head v. State, 195 Ga. App. 445 (2) (393 SE2d 730) (1990);
Jones v. State, 257 Ga. 753 (323 SE2d 529) (1988)

9. Scientific evidence

a. Admissibility:

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

b. Polygraph evidence:

State v. Chambers, 240 Ga. 76 (239 SE2d 324) (1977)

10. Opinion evidence

a. Lay witnesses:

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

(1) Emotional states:

Travelers Ins. Co. v. Sheppard, 85 Ga. 751 (8) (12 SE2d 18) (1890)

(2) Lay testimony of defendant's mental condition:

Dix v. State, 238 Ga. 209 (2) (232 SE2d 47) (1977);
Speed v. State, 270 Ga. 688 (37) (512 SE2d 896)(1999)

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

11. Hearsay

- a. Definition:
OCGA § 24-3-1;
Hurston v. State, 194 Ga. App. 226 (390 SE2d 119) (1990);
Reed v. State, 249 Ga. 52 (4) n.3 (287 S.E.2d 205) (1982)
- b. Explanation of conduct:
OCGA § 24-3-2;
Mincey v. State, 251 Ga. 255 (12) (304 SE2d 882) (1983)
- c. Declarations of co-conspirators:
OCGA § 24-3-5; Copeland v. State, 266 Ga. 664 (2) (469 SE2d 672) (1996);
Castell v. State, 250 Ga. 776 (1) (301 SE2d 234) (1983)
- d. Business records:
OCGA § 24-3-14

12. Privileged communications:

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

F. Examination of Witnesses

1. Competency of witnesses

- a. Generally:
OCGA § 24-9-1
- b. Children:
OCGA § 24-9-5;
Smith v. State, 247 Ga. 511 (277 SE2d 53) (1981);
Sizemore v. State, 262 Ga. 214 (416 SE2d 500) (1992);
Norton v. State, 263 Ga. 448 (3) (435 SE2d 30) (1993)
- c. Interpreters:
OCGA § 24-9-4;

Reed v. State, 249 Ga. 52 (1) (287 SE2d 205) (1982)

2. Direct examination

a. Leading questions

(1) Definition:

Ealey v. State, 139 Ga. App. 110 (227 SE2d 902) (1976)

(2) Discretion to allow:

Hayes v. State, 268 Ga. 809 (6) (493 SE2d 169) (1997);

OCGA § 24-9-63;

Hamby v. State, 158 Ga. App. 265 (1) (279 SE2d 715) (1981)

3. Cross examination:

OCGA § 24-9-64

a. Cross examination of state witnesses regarding pending criminal charges:

Byrd v. State, 262 Ga. 426 (2) (420 SE2d 748) (1992);

Beam v. State, 265 Ga. 853 (4) (463 SE2d 347) (1995);

Davis v. Alaska, 415 US 308 (94 SC 1105, 39 LE2d 347) (1974);

Kinsman v. State, 259 Ga. 89 (7)(b) (376 SE2d 845) (1989)

b. Right to thorough and sifting cross examination not an exception to the hearsay rule:

Willett v. State, 223 Ga. App. 866 (4) (479 SE2d 132) (1996);

Bell v. State, 71 Ga. App. 430 (2) (31 SE2d 109) (1944)

4. Redirect/recross examination:

Mincey v. State, 251 Ga. 255 (15) (304 SE2d 882) (1983)

5. Impeachment by prior inconsistent statement

a. Not hearsay:

Gibbons v. State, 248 Ga. 858 (286 SE2d 717) (1982)

b. Showing of surprise unnecessary to impeach own witness:

Williams v. State, 251 Ga. 749 (13) (312 SE2d 408) (1983);

Ranger v. State, 249 Ga. 315 (2) (290 SE2d 63) (1982);

Davis v. State, 249 Ga. 309 (3) (290 S.E.2d 273) (1982)

c. Impeachment of defendant's testimony with statements taken in violation of Miranda

(1) Permissible if statement voluntary:

Harris v. New York, 401 US 222 (91 SC 643, 28 LE2d 1) (1971);
Jones v. State, 265 Ga. 84 (3) (453 SE2d 716) (1995)

(2) Not permissible if statement involuntary:
Mincey v. Arizona, 437 US 385 (98 SC 2408, 57 LE2d 290) (1978)

G. Motions for Mistrial and for Curative Instructions

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

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

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

I. Reopening the Evidence

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

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

1. In General:
Conner v. State, 251 Ga. 113 (6) (303 SE2d 266) (1983)
2. Injection by state of matters not in evidence:
Bell v. State, 263 Ga. 776 (439 SE2d 480) (1994)
3. Restriction of argument of defense counsel:
Hayes v. State, 268 Ga. 809 (7) (493 SE2d 169) (1997)
4. Prosecutorial comment on pre-trial silence of accused:
Mallory v. State, 261 Ga. 625 (5) (409 SE2d 839) (1991);
Barnes v. State, 269 Ga. 345 (12) (496 SE2d 674) (1998)

5. Prosecutorial comment on defendant's failure to testify:
 Ranger v. State, 249 Ga. 315 (3) (290 SE2d 63) (1982);
 Shirley v. State, 245 Ga. 616 (1) (266 SE2d 218) (1980)
6. Prosecutorial comment on the failure of the defendant's wife to testify:
 OCGA § 24-9-23;
 Ferry v. State, 161 Ga. App. 795 (1) (287 SE2d 732) (1982)
7. Expression of personal opinion as to defendant's guilt:
 McClain v. State, 267 Ga. 378 ((3) (b) (477 SE2d 814) (1996);
 Hoerner v. State, 246 Ga. 374 (4) (271 SE2d 458) (1980)
8. Reference to the possibility of parole or other clemency:
 OCGA § 17-8-76
9. Reading law:
 Kirkland v. State, 271 Ga. ___ (3) (___ SE2d ___) (1999);
 Conklin v. State, 254 Ga. 558 (10) (b) (331 SE2d 532) (1985)
10. Defendant's failure to object to improper argument by the State in death penalty cases:
 Mullins v. State, 270 Ga. 450 (2) (511 SE2d 165) (1999)
11. Improper to argue future dangerousness:
 McClain v. State, 267 Ga. 378 (3) (a) (477 SE2d 814) (1996);
 Sterling v. State, 267 Ga. 209 (2) (477 SE2d 807) (1996)
12. Time Allowed:
 OCGA § 17-8-73; Hayes v. State, 268 Ga. 809 (7) (493 SE2d 169)(1997)
13. Order of Argument:
 Kennebrew v. State, 267 Ga. 400 (4) (480 SE2d 1) (1996)
14. "Golden Rule" violation (asking jury to assume victim's position):
 Horne v. State, 192 Ga. App. 528 (2) (385 SE2d 704) (1989);
 McClain v. State, 267 Ga.378 (3) (477 SE2d 814) (1996)

K. Charge of the Court.

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

- b. Trial court shall file with clerk all written requests to charge:
OCGA § 5-5-24 (b)

2. Lesser Included Offenses

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

3. Presumptions

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

4. Charges on confessions and admissions

- a. Word “confession” best avoided:

- Golden v. State, 250 Ga. 428 (4) (297 SE2d 479) (1982)
- b. Definitions:
Lowe v. State, 267 Ga. 180 (4) (476 SE2d 583) (1996)
5. Exceptions to charges
- a. Generally:
Freeman v. State, 269 Ga. 337 (1) (d) (496 SE2d 558) (1998);
McCoy v. State, 262 Ga. 699 (2) (425 SE2d 646) (1993)
- b. “Substantial error” in charge reviewable, regardless of whether objection entered:
OCGA § 5-5-24 (c);
Medina v. State, 234 Ga. App. 13 (2) (505 SE2d 558) (1998);
Parker v. State, 230 Ga. App. 578 (2) (497 SE2d 62) (1998)
- c. General reservation of objections for appeal and/or new trial:
McCoy v. State, 262 Ga. 699 (2) (425 SE2d 646) (1993)

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

1. Expression of opinion by trial court:
OCGA § 17-8-57;
Sims v. State, 266 Ga. 417 (2) (467 S.E.2d 574) (1996)
(general reservation of right to object to jury charge preserves for review alleged
OCGA § 17-8-57 violation which occurs during the charge);
Cook v. State, 270 Ga. 820 (6) (514 SE2d 657) (1999);
Barnes v. State, 269 Ga. 345 (16) (496 SE2d 674) (1998)
2. Control of Counsel
- a. Correction of misstatement of law by defense counsel:
Davis v. State, 234 Ga. 730 (2) (218 SE2d 20) (1975)
- b. Rebuke of counsel for improper conduct:
Defreese v. State, 232 Ga. 739 (14) (208 SE2d 832) (1974)
3. Physical control of defendant:
OCGA § 15-1-3 (1), (4);
Young v. State, 269 Ga. 478 (2) (499 SE2d 60) (1998) (shock belt);
Pace v. State, 212 Ga. App. 489 (442 SE2d 307) (1994) (shackles);
Illinois v. Allen, 397 US 337 (90 SC 1057, 25 LE2d 353) (1970);
Potts v. State, 259 Ga. 96 (3) (376 SE2d 881) (1989)

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

M. Conduct of Counsel

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

N. Conduct of Jurors

1. Jury's knowledge of co-defendant's guilty plea:
Hayes v. State, 136 Ga. App. 746 (1) (222 SE2d 193) (1975);
Hendrix v. State, 202 Ga. App. 54 (4) (413 SE2d 232) (1991)
2. Communications with non-jurors:
Maltbie v. State, 139 Ga. App. 342 (1) (228 SE2d 368) (1976);

Wellmaker v. State, 124 Ga. App. 37 (1) (183 SE2d 62) (1971);
McIlwain v. State, 264 Ga. 382 (3) (445 SE2d 261) (1994) (with bailiff);
Hanifa v. State, 269 Ga. 797 (6) (505 SE2d 731) (1998)
(communications with judge outside presence of counsel)

3. Unauthorized dispersal of jurors:
Huey v. State, 263 Ga. 840 (6) (439 SE2d 656)(1994);
Legare v. State, 243 Ga. 744 (11) (257 SE2d 247) (1979)
4. Waiver of jury sequestration:
Jones v. State, 243 Ga. 820 (3) (256 SE2d 907) (1979)
5. Jurors not permitted to directly question witness:
Matchett v. State, 257 Ga. 785 (2) (364 SE2d 565) (1988);
State v. Williamson, 247 Ga. 685 (279 SE2d 203) (1981)
6. Jury request to rehear evidence:
Johns v. State, 239 Ga. 681 (2) (238 SE2d 372) (1977);
Stephens v. State, 261 Ga. 467 (4) (405 SE2d 483) (1991)
7. Jury request to be recharged:
Williams v. State, 263 Ga. 135 (4) (429 SE2d 512)(1993);
Williams v. State, 249 Ga. 6 (6) (287 SE2d 31) (1982)
8. Alternate jurors not to deliberate with jury:
OCGA § 15-12-171, 172;
Lonchar v. State, 258 Ga. 447 (5) (369 SE2d 749) (1988);
Jarrells v. State, 258 Ga. 833 (6) (375 SE2d 842) (1989)

O. Conduct of Witness

1. Violation of the rule of sequestration does not render the witness incompetent:
OCGA § 24-9-61;
Jordan v. State, 247 Ga. 328 (10) (276 SE2d 224) (1981);
Johnson v. State, 258 Ga. 856 (4) (376 SE2d 356) (1989);
Childress v. State, 266 Ga. 425 (2) (467 SE2d 865) (1996)

P. Conduct of the Defendant

1. Voluntary absence of the defendant:
Speed v. State, 270 Ga. 688 (2) (512 SE2d 896) (1999);
Lonchar v. State, 258 Ga. 447 (2) (369 SE2d 749) (1988);
State v. Phillips, 247 Ga. 246 (275 SE2d 323) (1981)

2. Disruptive defendant:
Illinois v. Allen, 397 US 337 (90 SC 1057, 25 LE2d 353) (1970)
3. Right to assist in the defense:
Cargill v. State, 255 Ga. 616 (3) (340 SE2d 891) (1986);
Johnson v. State, 266 Ga. 775 (9) (470 SE2d 637) (1996);
Miller v. State, 219 Ga. App. 213 (1) (464 SE2d 621) (1995)

Q. Verdict

1. Form:
Rucker v. State, 270 Ga. 431 (5) (510 SE2d 816) (1999)
2. Poll of Jurors:
Maddox v. State, 233 Ga. 874 (2) (213 SE2d 654) (1975)

PART III. TRIAL PROCEEDINGS: SENTENCING PHASE

A. Issues Which May Arise Regarding the Admissibility of Evidence

1. General considerations applicable to evidence in mitigation and aggravation
 - a. Jury may consider all facts and circumstances of the case:
Spivey v. State, 241 Ga. 477 (2) (246 SE2d 288) (1978);
Eberheart v. State, 232 Ga. 247, 253-54 (206 SE2d 12) (1974)
 - b. Evidence may not be excluded because it could have been presented in guilt- innocence phase:
Brown v. State, 235 Ga. 644 (3) (220 SE2d 922) (1975)
 - c. Evidence may not be excluded as only relevant to guilt or innocence:
Blankenship v. State, 251 Ga. 621 (308 SE2d 369) (1983)
2. Admissibility of proffered mitigation evidence
 - a. Generally:
Barnes v. State, 269 Ga. 345 (27) (496 SE2d 674) (1998);
Woodson v. North Carolina, 428 US 280 (96 SC 2978, 49 LE2d 944) (1976);
Lockett v. Ohio, 438 US 586 (98 SC 2954, 57 LE2d 973) (1978);
Eddings v. Oklahoma, 455 US 104 (102 SC 869, 71 LE2d 1) (1982)
 - b. Testimony of friend or relative asking for mercy:
Barnes v. State, 269 Ga. 345 (27) (496 SE2d 674) (1998);
Childs v. State, 257 Ga. 243 (19) (b) (357 SE2d 48) (1987);

Romine v. State, 251 Ga. 208 (11) (305 SE2d 93) (1983)

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

(1) Death penalty is not a deterrent:

Stevens v. State, 247 Ga. 698 (24) (278 SE2d 398) (1981);
Fleming v. State, 265 Ga. 541 (458 SE2d 638) (1995)

(2) Religious/philosophical approaches to death penalty:

Franklin v. State, 245 Ga. 141 (7) (263 SE2d 666) (1980)

(3) Mechanics of electrocution:

Horton v. State, 249 Ga. 871 (5) (295 SE2d 281) (1982)

(4) Penalties imposed by juries in similar cases:

OCGA § 17-10-35 (c) (3); Wilson v. State, 250 Ga. 630 (12) (300 SE2d 640) (1983);
Blake v. State, 239 Ga. 292 (3) (236 SE2d 637) (1977)

3. Admissibility of aggravating evidence

a. Notice:

OCGA § 17-10-2

b. Non-statutory aggravating circumstances may be shown and considered by the jury:

Zant v. Stephens, 250 Ga. 97 (2) (297 SE2d 1) (1982)

c. Matters relevant in aggravation:

Fair v. State, 245 Ga. 868 (4) (268 SE2d 316) (1980);
Simpkins v. State, 268 Ga. 219 (2) (486 SE2d 833) (1997)

d. Proof of prior crimes:

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

e. Prior convictions based on guilty pleas:

Mize v. State, 269 Ga. 646 (15) (501 SE2d 219) (1998);
Pope v. State, 256 Ga. 195 (17) (345 SE2d 831) (1986)

f. Victim-impact evidence:

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

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

1. Aggravating Circumstance (b)(1)

a. Notice of prior convictions:

Franklin v. State, 245 Ga. 141 (5) (263 SE2d 666) (1980)

b. Invalid prior convictions:

Johnson v. Mississippi, 486 US 578 (108 SC 1981, 100 LE2d 575) (1988)

c. (b) (1) status determined at time of sentencing rather than time of offense:

Stephens v. Hopper, 241 Ga. 596 (4) (247 SE2d 92) (1978)

2. Aggravating Circumstance (b)(2)

a. Phrase “Capital Felony” in (b) (2) Defined:

Waters v. State, 248 Ga. 355 (13) (283 SE2d 238) (1981)

b. Aggravated battery -- must be separate from act causing instantaneous death:

Davis v. State, 255 Ga. 588 (3) (c) (340 SE2d 862) (1986)

c. A finding of the (b) (2) circumstance does not require separate conviction of the capital felony:

Jones v. State, 249 Ga. 605 (6) (293 SE2d 708) (1982);

Fair v. State, 245 Ga. 868 (2) (268 SE2d 316) (1980)

d. The supporting felony should be specified:

Rivers v. State, 250 Ga. 303 (8) (a) (298 SE2d 1) (1982);

Burger v. State, 245 Ga. 458 (4) (265 SE2d 796) (1980)

e. Mutually supporting aggravating circumstances resulting from a double murder renders one aggravating circumstance invalid:

Jenkins v. State, 269 Ga. 282 (23) (a) (498 SE2d 502) (1998);

Putman v. State, 251 Ga. 605 (12) (308 SE2d 145) (1983)

f. Continuous course of conduct may establish “in commission of” element of (b) (2) aggravating circumstance:

Romine v. State, 251 Ga. 208 (8) (305 SE2d 93) (1983)

3. Aggravating Circumstance (b)(3)

a. Application:

Harrison v. State, 257 Ga. 528 (6) (361 SE2d 149) (1987);

Pope v. State, 256 Ga.195 (18) (345 SE2d 831) (1986);

Philpot v. State, 268 Ga. 168 (486 SE2d 158) (1997)

b. Jury Instructions:

Philpot v. State, 268 Ga. 168 (3) (486 SE2d 158) (1997)

4. Aggravating Circumstance (b)(4)

a. Distinction between (b)(4) and (b)(2) aggravating circumstances:

Simpkins v. State, 268 Ga. 219 (2) (486 SE2d 833) (1997);

Jenkins v. State, 269 Ga. 282 (23) (d) (498 SE2d 502) (1998)

5. Aggravating circumstance (b)(5)

6. Aggravating circumstance (b)(6):

Mize v. State, 269 Ga. 646 (14) (501 SE2d 219) (1998);

Whittington v. State, 252 Ga. 168 (313 SE2d 73) (1984)

7. Aggravating Circumstance (b)(7)

a. Scope: McMichen v. State, 265 Ga. 598 (2) (404 SE2d 255) (1995);

Hance v. State, 245 Ga. 856 (3) (268 SE2d 339) (1980);

Whittington v. State, 252 Ga. 168 (313 SE2d 73) (1984)

b. Suggested Charge on (b)(7):

Taylor v. State, 261 Ga. 287 (13) (404 SE2d 255) (1991);

West v. State, 252 Ga. 156 (313 SE2d 67) (1984)

8. Aggravating Circumstance (b)(8)

9. Aggravating Circumstance (b)(9)

a. Evidence to prove lawful custody or confinement:

Franklin v. State, 245 Ga. 141 (6) (263 SE2d 666) (1980)

10. Aggravating Circumstance (b)(10)

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

1. Scope of closing argument generally:

Conner v. State, 251 Ga. 113 (5), (6) (303 SE2d 266) (1983);

Brooks v. Kemp, 762 F2d 1383 (11th Cir. 1985)

2. Prosecutorial reference to appellate review:

Smith v. State, 270 Ga. 240 (11) (510 SE2d 1) (1998);
Caldwell v. Mississippi, 472 US 320 (105 SC 2653, 86 LE2d 231) (1985);
Prevatte v. State, 233 Ga. 929 (6) (214 SE2d 365) (1975)

3. Reading Law:

Kirkland v. State, 271 Ga. 217 (3) (518 SE2d 687) (1999);
Conklin v. State, 254 Ga. 558 (10) (331 SE2d 532) (1985)

4. Arguments regarding lack of remorse, future dangerousness and deterrence:

Jenkins v. State, 269 Ga. 282 (27) (c) (498 SE2d 502) (1998);
Pye v. State, 269 Ga. 779 (19) (505 SE2d 4) (1998);
McClain v. State, 267 Ga. 378 (4) (a) (477 SE2d 814) (1996)

5. Parole argument permissible:

OCGA § 17-10-31.1;
Jenkins v. State, 265 Ga. 539 (1) (458 SE2d 477) (1995)

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

1. Charge on mitigating circumstances

a. Generally:

Romine v. State, 251 Ga. 208 (10) (305 SE2d 93) (1983)

b. Jury can consider all the evidence presented in both phases of the trial:

Spivey v. State, 241 Ga. 477, 481 (246 SE2d 288) (1978)

c. Jury should be instructed that it is authorized to consider mitigating evidence but the trial court is not required to identify specific mitigating circumstances:

Jenkins v. State, 269 Ga. 282 (24), (25) (498 SE2d 502) (1998);
Hawes v. State, 240 Ga. 327 (9) (240 SE2d 833) (1977)

d. Jury should be informed that it may recommend a life sentence even if it finds one or more statutory aggravating circumstances:

Fleming v. State, 240 Ga. 142 (7) (240 SE2d 37) (1977);
Jenkins v. State, 269 Ga. 282 (24) (498 SE2d 502) (1998)

e. Charge that jury should not base its verdict on sympathy disapproved:

Legare v. State, 250 Ga. 875 (2) (302 SE2d 351) (1983)

2. Necessity to define legal words of art:

Rivers v. State, 250 Ga. 303 (8(a), (b) (298 SE2d 1) (1982);
Gilreath v. State, 247 Ga. 814 (16) (279 SE2d 650) (1981)

3. "Allen" Charge: Romine v. State, 256 Ga. 521 (1) (350 SE2d 446) (1986);
Sears v. State, 270 Ga. 834 (1) (___SE2d___) (1999)
4. Statutory instructions to be provided to jury in writing:
OCGA § 17-10-30 (c);
Spraggins v. State, 243 Ga. 73 (2) (252 SE2d 620) (1979)

E. Issues Which May Arise in Connection With the Verdict

1. Form:
Potts v. State, 259 Ga. 96 (22) (376 SE2d 851) (1989);
Romine v. State, 251 Ga. 208 (7) (305 SE2d 93) (1983);
Ledford v. State, 264 Ga. 60 (22) (439 SE2d 917) (1994) ((b) (7) aggravating circumstance)
2. Substance:
Gibson v. State, 236 Ga. 874 (2) (226 SE2d 63) (1976)
3. Poll of Jurors

PART IV. MOTION FOR NEW TRIAL

A. Necessity for presence of defendant at hearing.

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

B. Supplementation of the record.

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

C. Newly Discovered Evidence Regarding Sentence.

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

PART V. REVIEW IN THE SUPREME COURT

A. Superior Court Can Be Directed to Conduct Further Hearings

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

B. “Plain Error” Review in Death Penalty Cases

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

C. Mandatory Review of Sentence Whenever Death Penalty Imposed

1. OCGA § 17-10-35

PART VI. RETRIAL AS TO SENTENCE

A. When Permitted

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

B. Evidence

1. State not limited to statutory aggravating circumstances found at first trial:
Spraggins v. State, 255 Ga. 195 (336 SE2d 227) (1985);
Poland v. Arizona, 476 US 147 (106 SC 1749, 90 LE2d 123) (1986)
2. Defendant may introduce exculpatory evidence even though he stands convicted:
Blankenship v. State, 251 Ga. 621 (308 SE2d 369) (1983)