

APPELLATE COURT OPINION SUMMARIES
JUNE 1- JUNE 24, 2005

United States Supreme Court

Gonzalez v. Crosby, No. 04-6432, 2005 U.S. LEXIS 5014 (June 23, 2005)

Petitioner's federal habeas corpus petition was dismissed as time barred. Later, the Supreme Court decided that a state post-conviction relief petition can toll the federal statute of limitations in Artuz v. Bennett, 531 U.S. 4. Petitioner filed a Federal Rule of Civil Procedure 60(b)(6) motion for relief from the judgment, which the District Court denied. The Eleventh Circuit affirmed the denial, holding that the Rule 60(b) motion was in substance a second habeas petition, which under AEDPA, cannot be filed without pre-certification by the court of appeals.

The Supreme Court held that the Rule 60(b) motion did not seek to add a new ground for relief from the state conviction or challenge the federal court's previous resolution of a claim on the merits. Rather, because the motion challenged only the District Court's previous ruling on AEDPA's statute of limitations, it is not the equivalent of a successive habeas petition. Allowing the motion to proceed on its own terms creates no inconsistency with the habeas statute or rules and can be ruled upon by the District Court without pre-certification. The Supreme Court held on the merits of the Rule 60(b) motion that the District Court was correct to deny relief. The change in the law worked by Artuz is not an "extraordinary circumstance" justifying relief, and it is made all the less extraordinary by the lack of diligence that petitioner showed in seeking direct appellate review of the statute-of-limitations issue.

Mayle v. Felix, No. 04-563, 2005 U.S. LEXIS 5016 (June 23, 2005)

Respondent Felix was convicted of murder and robbery in California state court. He applied for federal habeas relief based on the trial court's error in admitting his coerced inculpatory statement in violation of Fifth Amendment right against self-incrimination. He also alleged that the admission of a videotape recording of testimony of a prosecution witness violated the Sixth Amendment's confrontation clause. In a timely filed habeas petition (within one year of the sentence becoming final per AEDPA), Felix asserted his Sixth Amendment challenge, but did not challenge the admission of his own pretrial statements until the expiration of AEDPA's time limit in an amended petition. Felix asserted that the amendment was not time barred because Rule 15(c)(2) stated that pleading amendments relate back to the filing date of the original pleading when both the original plea and the amendment arise out of the same "conduct, transaction, or occurrence set forth . . . in the original pleading." The District Court dismissed the Fifth Amendment claim as time barred, and rejected the Sixth Amendment claim on its merits. The Ninth Circuit affirmed as to the latter claim, but reversed the dismissal of the coerced statements claim holding that the relevant "transaction" was Felix's state-court trial and conviction. The Supreme Court reversed holding that an amended habeas petition does not relate back (and thereby avoid AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those set forth in the original pleading.

Halbert v. Michigan, No. 03-10198, 2005 U.S. LEXIS 5012 (June 23, 2005)

Petitioner Halbert pleaded *nolo contendere* to two counts of criminal sexual conduct. Halbert asked the trial court to appoint counsel to help him prepare an application for leave to appeal to the intermediate court. The court denied Halbert's motion and his *pro se* application was denied by the Court of Appeals. Michigan has a two-tier appellate system. The State Supreme Court hears appeals by leave only. The intermediate Court of Appeals adjudicates appeals as of right from criminal convictions, except that a defendant convicted on a guilty or *nolo* [*3] *contendere* plea who seeks intermediate appellate court review must apply for leave to appeal. Under Michigan law, because a defendant who pleads relinquishes access to an appeal as of right, there is no right to appointed counsel when seeking review in the intermediate appellate court.

In deciding this case, the Supreme Court relies on Douglas v. California, 372 U.S. 353, in which it held that, in criminal proceedings, a State must provide counsel for an indigent defendant in a first appeal as of right. Two considerations were key: (1) An appeal of right is an adjudication on the merits, and (2) first-tier review differs from subsequent appellate stages "at which the claims have once been presented by a lawyer and passed upon by an appellate court." The Court recognized two things in Michigan's two-tier system: first, in ruling on an application for leave to appeal, that court sits as an error-correction institute and must evaluate the merits of the appellant's claims to some degree even if the court denies leave. The intermediate appellate court's ruling on the application for leave "provides the first, and likely the only, direct review the defendant's conviction and sentence will receive." Second, indigent defendants pursuing first-tier review in the Court of Appeals are generally ill equipped to represent themselves and do not have any resources to rely on from a first appeal conducted by an attorney. The Supreme Court holds that the Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review in the Michigan Court of Appeals.

Dodd v. United States, No. 04-5286, 2005 U.S. LEXIS 4847 (June 20, 2005)

In 1997, Dodd was convicted for knowingly and intentionally engaging in a continuing criminal enterprise. In 2001, He filed a *pro se* motion under 28 U.S.C. § 2255 claiming that his conviction should be set aside because it was contrary to Richardson v. United States, 526 U.S. 813, which was decided in 1999 after his conviction had become final. The District Court denied his motion as untimely and the Supreme Court affirmed. The issue was whether the one year limitation period in § 2255 begins to run on the date the right was initially recognized or the date its retroactive application is recognized. The text of the statute stated the limitation began to run on "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." The Supreme Court held that the text "unequivocally identifies one, and only one, date from which the limitation period is measured," and that is the date when the rights was first asserted, not when it was made retroactively applicable. Judgment affirmed because Dodd's motion was filed 2 years after the right was initially recognized in Richardson.

Rompilla v. Beard, No. 04-5462, 2005 U.S. LEXIS 4846 (June 20, 2005)

Rompilla was convicted of murder and sentenced to death by the jury. Rompilla appeals, claiming ineffective assistance of counsel during the sentencing phase for failure to discover evidence about his childhood, mental capacity, and alcoholism. The Third Circuit found nothing unreasonable in the state court's application of Strickland, given defense counsel's efforts to uncover mitigation evidence from Rompilla, certain family members, and three mental health experts. The court notes that, "although trial counsel did not unearth useful information in Rompilla's school, medical, police, and prison records, their investigation had gone far enough to give them reason to think that further efforts would not be a wise use of their limited resources."

The Supreme Court reversed holding that a "lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the trial's sentencing phase." While counsel was deficient in reviewing several resources including school and medical records, the Court focuses on counsel's failure to examine the court file on Rompilla's prior rape and assault conviction. The Court noted this defect was particularly disturbing because counsel knew the State intended to use the prior conviction history as an aggravating factor, the prior conviction file was a readily available public record, and "no reasonable lawyer would forgo examination of the file thinking he could do as well by asking the defendant or family relations what they recalled." In a *de novo* examination of the prejudicial element of *Strickland*, the Court found that had counsel examined the prior conviction file, they would have found a range of mitigation leads "would have destroyed the benign conception of Rompilla's upbringing and mental capacity counsel had formed from talking to five family members and from the mental health experts' reports." Taken as a whole, the undiscovered mitigation evidence is "sufficient to undermine confidence in the outcome."

Johnson v. California, No. 04-6964, 2005 U.S. LEXIS 4842 (June 13, 2005)

Johnson, a black man, was convicted of assaulting and murdering a white child. During jury selection, The prosecutor used 3 of his 12 peremptory challenges to remove all of the prospective black jurors, resulting in an all-white jury. Defense counsel properly objected to those strikes on the ground that they were unconstitutionally based on race, but the trial judge immediately found there was no showing of a prima facie case of purposeful discrimination. The judge relied on state precedent which required a showing of a strong likelihood that the exercise of peremptory challenges was based on group bias. The California Court of Appeal set aside the conviction, but the State Supreme Court reinstated it, stressing that the state courts can establish the standards used to evaluate the sufficiency of prima facie cases of purposeful discrimination in jury selection.

The US Supreme Court reversed. Because the first step of *Batson* only requires the defendant to make out a prima facie case, California's "more likely than not" standard is too restrictive a measure to judge the sufficiency of a prima facie case of purposeful discrimination in jury selection. The *Batson* Court intended that the trial judge would be aware of all relevant circumstances, including the prosecutor's explanation, before deciding whether it was more likely than not that the peremptory challenge was improperly motivated. The onerous "more likely than not" standard was not meant to apply to the first step of *Batson*. "*Batson* does not permit California to require at step one that the objector show that it is more likely than not the other party's peremptory challenges, if

unexplained, were based on impermissible group bias.” Rather, the prima facie case of step one can be made so long as the sum of the proffered facts gives "rise to an inference of discriminatory purpose." Judgment reversed because the inferences of discrimination noted by the trial judge and the California Supreme Court were sufficient to establish a prima facie case.

Bradshaw v. Stumpf, No. 04-637, 2005 U.S. LEXIS 4841 (June 13, 2005)

Stumpf and his accomplice Wesley committed an armed robbery that left Mr. Stout wounded and Mrs. Stout dead. Stumpf pleaded guilty to, among other things, aggravated murder. At sentencing, Stumpf's principal mitigation arguments were that Wesley had killed Mrs. Stout, and that Stumpf's minor role in the murder counseled against the death sentence. The panel concluded that Stumpf was the principal offender and sentenced him to death. Stumpf moved to withdraw his own plea or vacate his death sentence, arguing that the State presented evidence that Wesley was the shooter at his trial which should cast doubt on Stumpf's conviction and sentence. The court denied Stumpf's motion because he would possess the requisite intent as the principal offender or as an accomplice under Ohio's aider and abettor theory. Ohio's appellate courts affirmed. Subsequently, the Federal District Court denied Stumpf habeas relief, but the Sixth Circuit reversed.

The Supreme Court held that Stumpf was informed of the aggravated murder charge's specific intent element. Stumpf's attorneys represented at his plea hearing that they had explained the elements to their client. To satisfy constitutional requirements, the judge need not explain a crime's elements to the defendant so long as the record accurately reflects that the charge's nature and the elements were explained to the defendant by his counsel. Additionally, the Court found that the prosecutorial inconsistencies between the Stumpf and Wesley cases did not require voiding Stumpf's guilty plea. The precise identity of the triggerman was immaterial to Stumpf's aggravated murder conviction, and the inconsistencies did not affect the knowing, voluntary, and intelligent nature of his plea. The Supreme Court did acknowledge that the inconsistencies could have had a direct effect on Stumpf's sentence, "for it is arguable that the sentencing panel's conclusion about his role was material to its sentencing determination." Therefore, the Court remands for the Sixth Circuit to consider the question of how the prosecutor's inconsistencies related to Stumpf's death sentence in particular.

Miller-El v. Dretke, No. 03-9659, 2005 U.S. LEXIS 4658 (June 13, 2005)

In Miller-El's capital murder trial, the prosecutors used peremptory strikes against 10 of the 11 qualified black venire members during jury selection to which he objected. The trial court denied his motion. After the decision in *Batson*, the case was remanded to the trial court which reviewed the *voir dire* record, heard the prosecutor's justifications for the strikes, and found no showing that prospective black jurors were struck because of their race. Subsequently, the Federal District Court denied Miller-El federal habeas relief, and the Fifth Circuit denied a certificate of appealability. The Supreme Court reversed but after granting the certificate of appealability, the Fifth Circuit rejected Miller-El's *Batson* claim on the merits.

After reviewing the facts, the Supreme Court reversed holding that the trial court's conclusion were "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." The Supreme Court cited several instances demonstrating that prosecutors were

selecting and rejecting potential jurors because of race, holding that “the facts correlate to nothing as well as to race.” First, side-by-side comparisons of some black venire panelists who were struck, and white ones who were not, prove purposeful discrimination because the prosecutor's proffered reason for striking a black panelist applies just as well to a white panelist allowed to serve. The Court also noted that the Fifth Circuit could not substitute a reason for excusing a black juror because the prosecutor is responsible for stating a racially neutral explanation for his own actions. Second, the Court noted a broad pattern of discrimination when the prosecution shuffled the jury so that black members of the panel would be seated in back and less likely to undergo *voir dire*. Lastly, the contrasting *voir dire* questions posed respectively to black and non-black panel members also indicate that the State was trying to reject black members. (Prosecutors gave a bland description of the death penalty to 94% of white members, but described the death penalty in graphic terms for 53% of the black members before questioning each on the death penalty.) Judgment reversed.

Wilkinson v. Austin, No. 04-495, 2005 US LEXIS 4839 (June 13, 2005).

Plaintiff inmates alleged that Ohio's Supermax prison facility's policy was in violation of the Fourteenth Amendment Due Process Clause. The district court found that there was a protected liberty interest in avoiding Supermax placement and made procedural and substantive changes to a new policy. On appeal to the Sixth Circuit Court of Appeals, all but the substantive changes were upheld.

The U.S. Supreme Court ruled that there was in fact a protected liberty interest in avoiding placement at a Supermax facility as such a placement is very restrictive- allowing very little human contact, only one hour of recreation time and the other 23 hours (including meal times) spent in cells (where no communication is possible between cells) with the lights always on. That being said, the court found that the nature of one's status as an inmate made the procedural protections limited. The Court found that the facility's new policy was sufficient to meet due process requirements where there were multiple levels of review and power to overturn any decisions that recommended placement and if placement was not recommended the process was terminated. Additionally, inmates were notified of every decision in the process, were given an opportunity to argue against placement without calling witnesses, and were given a review within 30 days of initial placement. The Court ruled that giving the inmates the chance to call witnesses would defeat the State's objective of controlling the prison and the prisoner. The procedural modifications to the policy were overturned, and the case was remanded to determine what, if any, relief is necessary for due process violations under the facility's old policy.

Gonzales v. Raich, 125 S. Ct. 2195, 2005 US LEXIS 4656 (June 6, 2005).

Following seizure of one respondent's marijuana plants by the DEA, though the county officials deemed the production within the terms of California's Compassionate Use Act, respondents sought injunctive and declaratory relief. The respondents argued that the enforcement of the Controlled Substance Act (CSA) against them violates the Commerce Clause and other constitutional provisions. A district court denied the motion, but the Ninth Circuit Court of Appeals reversed holding that this separate class of local activities was beyond the reach of the federal power.

The United States Supreme Court ruled that Congress' regulation of marijuana under the CSA was within its commerce power. The Court ruled that marijuana that is produced solely for home use has a substantial impact on the supply and demand of the national market and as such is subject to federal regulation. The Court held that it is unlikely that use and production of marijuana will stop when the patient has recovered, and that there is a good possibility that any excess will be used to satisfy the great demand for recreational use. Additionally, it is very likely that unscrupulous people will take advantage of California's exemptions for their own commercial use. The Court held that Congress did not err "in determining that none of the characteristics making up the purported class... compelled an exemption from the CSA; rather, the subdivided class of activities... was an essential part of the larger regulatory scheme" (cite omitted). The Court also ruled that the fact that marijuana is being used on advice of a physician is not a distinguishing factor because Congress has classified marijuana as having no acceptable medical uses. The Court stated that other avenues of relief would include continuing to try to get the classification of marijuana changed and using the democratic process. The judgment of the Court of Appeals was vacated and the case remanded.

Supreme Court of Georgia

Jackson v. State, S05A0216, 2005 Ga. LEXIS 436 (June 16, 2005)

Jackson was convicted of malice murder and appeals after his denial for new trial. The Georgia Supreme Court affirmed the conviction denying all grounds of appeal. The 24 year delay between the murder and indictment did not deny Jackson due process. Jackson's claim does not meet the two-prong Wooten test: "1) that the delay caused actual prejudice to the defense, *and* 2) that the delay was the product of deliberate action by the prosecution designed to gain a tactical advantage." The court rejected his claim that his Sixth Amendment right to a speedy trial was violated by a delay of 20 months between indictment and trial because he was prosecuted with the promptness customary of such cases. All four factors weighed against the defendant including the length of the delay, the reason for the delay, the timeliness of the defendant's claim, and prejudice to the defendant. A motion for a mistrial based on the State characterizing witnesses as "defense witnesses" was properly denied. An out-of-court identification was properly admitted.

Lewis v. State, S05A0627, 2005 Ga. LEXIS 439 (June 16, 2005)

Lewis pled guilty to two counts of malice murder and 24 other counts after the State gave notice of its intent to seek the death penalty. Lewis appeals the two consecutive life without parole sentences claiming the State did not prove the statutory aggravating circumstances beyond a reasonable doubt. The Georgia Supreme Court holds that both murders were part of a depraved plan unconnected to the actual victims with the ultimate goal of causing mental distress to his ex-wife and divert suspicion when he shot her. The court affirms the sentences as supported by one aggravating circumstance: "The offense of murder ... was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

Green v. State, S05A0369, 2005 Ga. LEXIS 440 (June 16, 2005)

Green was convicted of malice murder and other counts for a series of crimes stemming from a robbery on September 12, 1999, and he was convicted for a series of crimes resulting from a robbery on August 10, 1999. Green contends that the trial court erred in denying a motion to sever the charges arising from the two separate incidents. The Supreme Court affirmed the denial of the motion to sever. There is an absolute right to severance of charges joined because they are of similar character. Severance is at the discretion of the court when joined because evidence of one offense could be admitted to show a common motive or plan upon the trial of the other offense. There was no error in the denial because the charges fall into the latter category and were not so alike that the jury could not distinguish the evidence and apply the law intelligently to each charge. Also, the in-court identification is valid because any impermissible suggestiveness must come from the police or prosecutor, not television news reports as alleged by the defendant. The in-court identification was not tainted by a possibly improper pre-trial identification because the in-court identification stemmed from an independent origin.

Brodes v. State, G04G2101, 2005 Ga. LEXIS 442 (June 16, 2005)

Brodes was convicted of two counts of armed robbery based solely on the two victims identifying him as the perpetrator. The witnesses stated they were “absolutely certain” the defendant was the robber. The jury instructions permitted considering a witness’s “level of certainty” in assessing the reliability of the identification. The Georgia Supreme Court addressed the propriety of the “level of certainty” language in a jury charge. The court found there was a “scientifically documented lack of correlation between a witness's certainty in his or her identification of someone as the perpetrator of a crime and the accuracy of that identification.” Because of the “critical importance of accurate jury instructions” to guide the jury in reaching a verdict, the court rejected incorporating the “level of certainty” in the jury instructions as a factor to determine the reliability of an identification. Judgment reversed.

Smith v. State, S04G1878, 2005 Ga. LEXIS 420 (June 6, 2005)

Smith was charged by accusation with felony theft by shoplifting and misdemeanor theft by receiving. After arraignment, the accusation was amended. At trial, over Smith’s objections, *nolle prosequi* was entered as to the original accusation and the amended accusation, and Smith was indicted subsequently for the same crimes. Smith appealed on grounds of double jeopardy, but the Court of Appeals affirmed and the Georgia Supreme Court granted certiorari. If the amended accusation is a superceding charging instrument, jeopardy would not attach because there was no arraignment on that superceding charge. If it is not a superceding charge, then jeopardy attached when the jury was impaneled and sworn because the original arraignment was sufficient. The Supreme Court held that even though a felony indictment cannot be amended, OCGA §17-7-70.1, which allowed some felonies to be charged by accusation did not subject these accusations to the same procedural bars as indictments. Changing an accusation regarding any offense arising out of the same conduct as the offense alleged in the original accusation is not a new prosecution or superceding charging instrument. Also, Smith objected to the entering of *nolle prosequi* so he did not contribute to the trial court’s error. Judgment reversed because double jeopardy attached to the amended accusation.

Sims v. State, S04G1689, 2005 Ga. LEXIS 418 (June 6, 2005)

Sims, 32 years old at the time of trial with an IQ of 45, was convicted of aggravated sodomy and sentenced as “guilty but mentally retarded” after being found competent to stand trial by a jury special verdict. The Court of Appeals affirmed the conviction. The Georgia Supreme Court granted certiorari to consider whether the “any evidence” standard of appellate review was the appropriate standard for the Court of Appeals to apply. The Supreme Court held that “the “any evidence” standard of review thwarts genuine review of an appeal from a verdict of competency because the presumption of competency would always provide some evidence in support of a finding of competency.” The court adopted a new standard of appellate review of competency to stand trial hearings that “whether after reviewing the evidence in the light most favorable to the State, a rational trier of fact could have found that the defendant failed to prove by a preponderance of the evidence that he was incompetent to stand trial.” In applying the new standard of review to Sims claim, the court reverses the judgment. It holds that “a rational trier of fact could not have concluded that Sims failed to prove that he was not competent to stand trial by a preponderance of the evidence where the evidence showed that Sims did not have the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or possessed a rational understanding of the proceedings against him.”

Wright v. State, S05A0584, 2005 Ga. LEXIS 414 (June 6, 2005)

Wright was convicted of felony murder and appeals to the Georgia Supreme Court on grounds that the trial court erred in restricting his ability to cross-examine witnesses about their juvenile adjudications. The trial court did not allow Wright to use juvenile adjudications to impeach, show bias, or show bad character. Certified copies of the adjudications were not required to show bias; there only needs to be sufficient facts on the record to allow appellate review. The Supreme Court held that the Sixth Amendment guaranteed the right to inquire about probation status or pending charges to show possible bias even for juvenile adjudications. “The violation of Wright's *Sixth Amendment* right may be held harmless only if the Court is able to declare a belief that it was harmless beyond a reasonable doubt.” Finding the credibility of these witnesses to be crucial to the State’s case, the Supreme Court reversed the judgment because the error may have influenced the verdict.

Riggins v. State, S05A0553, 2005 Ga. LEXIS 412 (June 6, 2005)

Riggins was convicted of felony murder with aggravated assault as the underlying felony. Riggins appeals contending he did not receive effective assistance of counsel. To establish ineffective assistance of counsel, appellant must show deficient performance and prejudice to his defense resulting from the deficient performance. Counsel’s failure to request a charge of voluntary manslaughter was not deficient because the charge was not supported by the evidence. Additionally, Riggins cannot establish prejudice to his defense from the improper impeachment of a witness so his claim of ineffective assistance of counsel fails. Judgment affirmed.

Smith v. State, S05A0832, 2005 Ga. LEXIS 411 (June 6, 2005)

Smith was convicted of felony murder with aggravated assault as the underlying felony. The actual target of the assault ducked so that a bystander was killed instead. Smith contends the actual victim was never assaulted because there was no subjective apprehension of bodily harm so his motion for directed verdict should have been granted. Intent to commit a violent injury toward the intended target can be transferred to the actual victim to establish aggravated assault underlying the felony murder conviction. Apprehension of the actual victim is irrelevant. Finally, the justification defense was disproved beyond a reasonable doubt. Judgment affirmed.

Miley v. State, S05A0771, 2005 Ga. LEXIS 409 (June 6, 2005)

Miley was indicted for murder, rape, aggravated battery, and kidnapping with bodily injury. The trial court held the search warrant was valid because it showed probable cause to search Miley's house. On appeal, the Georgia Supreme Court rejected both grounds for showing probable cause. First, the affidavit tried to use the defendant's refusal to consent in writing to a search to prove guilt. The court stated explicitly that "the exercise of a constitutionally protected right" cannot be used as evidence of guilt. The rest of the affidavit "failed to set forth 'a substantial basis for concluding probably cause existed' for the search." Evidence is suppressed because there is no good faith exception regarding search warrants.

Perkins v. State, S05A0728, 2005 Ga. LEXIS 408 (June 6, 2005).

Perkins pled guilty to reckless driving in Probate Court, and subsequently he was indicted in Superior Court for vehicular homicide and the same reckless driving offense. The Probate Court conviction had been previously set aside for want of subject matter jurisdiction. "The question in this case is whether a criminal defendant's prior conviction by a court lacking subject matter jurisdiction bars retrial of that defendant in a court having subject matter jurisdiction." The court below found there was no double jeopardy and the Georgia Supreme Court affirmed. The Supreme Court held that when a court has no subject matter jurisdiction, the conviction is null and void. A conviction so voided may be retried without "attachment of procedural double jeopardy." The issue of substantive double jeopardy was not before the court because there had not yet been a second conviction.

Schofield v. Gulley, S05A0594, 2005 Ga. LEXIS 405 (June 6, 2005)

Gulley was convicted of malice murder, among other charges, and sentenced to death according to jury recommendations. The habeas court vacated the death sentence on grounds of ineffective assistance of counsel but let stand all convictions to which the warden appeals. “[T]o prevail on an ineffective assistance claim, a petitioner must demonstrate that trial counsel performed deficiently under constitutional standards and that the deficiency in reasonable probability changed the outcome of the trial.” (citing Strickland v. Washington, 466 U. S. 668 (1984)). The Georgia Supreme Court affirmed the habeas court’s findings. First, where counsel relies on family accounts rather than investigating other avenues that present substantially relevant mitigating evidence, counsel performs deficiently (here, there were newspaper stories and hospital records to substantiate accounts that the defendant had saved the life of two people in two different scenarios). Second, the habeas court correct held that this mitigating evidence offers a reasonable probability that the jury would have meted out a different sentence. The defendant’s burden is not to show a different outcome would have been certain or even more likely than not. There was also no error in the habeas conclusion that there was no ineffective assistance of counsel during plea bargaining because nothing on the record discusses what was actually said in the bargaining. Remaining claims “barred by procedural default because they were not raised on direct appeal.”

Murphy v. State, S05A0559, 2005 Ga. LEXIS 415 (June 6, 2005)

Murphy was convicted of malice murder and illegal firearm possession to which he appeals claiming evidentiary errors and ineffective assistance of counsel. First, the Supreme Court held that the evidence was sufficient for the jury to find appellant guilty and reject his claim of self-defense. The trial court correctly excluded evidence of the victim’s prior acts because pre-trial notice was not timely. The defendant’s statement was properly admitted because the audio tape indicates that he was Mirandized and no evidence otherwise was presented at the *Jackson-Denno* hearing. Finally, the voluntary manslaughter charges were not misleading or confusing. As to the second claim, trial counsel was not ineffective because his failure to introduce evidence of the victim’s prior acts did not harm the defense since the defendant testified about the victim’s past history.

Adkins v. State, S05A0840, 2005 Ga. LEXIS 417 (June 6, 2005)

Adkins was convicted of malice murder and aggravated assault to which he appeals claiming that he was entitled to a directed verdict for the aggravated assault and that trial court erred in failing to sever his trial. On a motion for directed verdict, the question is the sufficiency of the evidence, not the sufficiency of the indictment, so Adkins’ claim that the indictment does not identify the aggravated assault victim is improper. The Supreme Court found the evidence was sufficient to establish that bystanders other than the shooting victim were in fear of receiving imminent injury so directed verdict was not warranted. In regards to a motion to sever, the trial court has discretion based on the following factors: ““(1) Will the number of defendants create confusion as to the law and evidence applicable to each? (2) Is there a danger that evidence admissible against one

defendant will be considered against the other despite the court's instructions? (3) Are the defenses of the defendants antagonistic to each other or to each other's rights?" The Supreme Court held (1) there was no confusion because most of the evidence showed the defendant's joint guilt, (2) any evidence used solely against one co-defendant was carefully tailored and explained as applying to that defendant, and (3) the defenses were complimentary since all the defendants claimed the State charged the wrong men. Therefore, Adkins did not meet the burden of demonstrating clear prejudice and denial of due process. Judgment affirmed.

Court of Appeals of Georgia (all are reversals or especially pertinent)

Stapp v. State, A05A0087, 2005 Ga. App. LEXIS 652 (June 23, 2005)

Strapp was convicted of aggravated assault and appeals claiming ineffective assistance of counsel. The Court of Appeals reversed finding counsel was ineffective in two ways which reasonably could have resulted in a different outcome. First, the decisions counsel made before and during trial demonstrate a failure to adequately prepare, not just tactical strategy (counsel only took the case because he thought it was simple, filed no pre-trial motions, did not opt into reciprocal discovery, did not obtain a copy of the police report, and did not move for severance). Second, there was a failure to mount a defense because counsel did not request self-defense charges be added to the jury instructions when it was a viable defense.

State v. Conley, A05A0492, 2005 Ga. App. LEXIS 635 (June 22, 2005)

The trial court granted Conley's motion to suppress field sobriety results in a case charging him with reckless driving and driving under the influence. The motion was granted for "lack of a reasonable articulable suspicion to stop the vehicle." A motion to suppress must state the grounds with specificity to put the State on notice of the legal issues. This court reversed because Conley did not challenge the legal basis for the stop in his motion to suppress.

Pasha v. State, No. A05A0153, 2005 Ga. App. LEXIS 616 (June 21, 2005).

Pasha was indicted for engaging in a conspiracy to violate the RICO Act (racketeering) and theft by receiving stolen property. Pasha submitted an interlocutory appeal challenging 1) the sufficiency of the indictment for conspiracy to violate the RICO Act, and 2) the denial of his motion to suppress illegal wiretap recordings. The Court of Appeals found the allegations in the indictment supported the underlying identical predicate charges of robbery with a dangerous weapon, robbery, and robbery by sudden snatching, and that the indictment clearly gave him notice of his involvement in the conspiracy and the overt acts attributed to him in advancing the conspiracy. Recordings of wiretapped telephone conversations were recorded illegally because they were made outside the 20-day limit imposed by OCGA 16-11-64 then in effect, and thus after the warrant had expired. (Effective July 1, 2002, the 20-day limit on the validity of a wiretap

warrant was removed from this code section). Thus, the trial court erred in failing to suppress the recordings. Testimony by the other person in the recorded conversations was an independent source and was still admissible because the witness had intimate knowledge of the content of the conversations from his first-hand participation in the conversations. Whether the State knew of his involvement as a result of the wiretaps was not decisive. The judgment was affirmed in part and reversed in part.

Miller v. State, No. A05A0821., 2005 Ga. App. LEXIS 612 (June 20, 2005).

Miller was convicted of aggravated assault, terroristic threats, battery, and obstructing a person from making an emergency phone call. Miller appealed, contending that the evidence was insufficient to support the verdict and that the trial court erred in admitting testimony from an absent witness in violation of hearsay rules and his Sixth Amendment rights, and for improperly qualifying a different witness as an expert. The Court of Appeals held that because the convictions for terroristic threats and obstructing a person from making an emergency call were based only on hearsay statements from an unavailable witness, of whom Miller never had a prior opportunity to cross-examine, the convictions were reversed. The hearsay statements violated Miller's Sixth Amendment right to confrontation. However, because Miller admitted to hitting and grabbing the victim, and because of photographs showing the victim's injuries, his convictions for aggravated assault and battery were affirmed. It was not an abuse of discretion to certify the witness as an expert because of they had over 20 years of experience in the field of domestic violence and had an educational background in psychology. The judgments were affirmed in part, reversed in part.

Clue v. State, No. A05A0651, 2005 Ga. App. LEXIS 598 (June 15, 2005).

Clue pled guilty to three counts of armed robbery (Counts 1-3), one count of kidnapping (Count 4), and two counts of false imprisonment (Counts 5 and 6). The trial court sentenced him to serve twenty years for Counts 1-4 and ten years for Counts 5 and 6, all served concurrently. Clue filed a motion to withdraw his guilty plea based on ineffective assistance of counsel for misinforming him that he was eligible for parole after serving ninety percent of his sentence for Counts 1-4, where the law does not provide the possibility of parole for convictions of armed robbery and kidnapping. The trial court found Clue received ineffective assistance of counsel with respect to Counts 1-4 and allowed him to withdraw as to Counts 1-4. But as for Counts 5 and 6, the trial court did not allow Clue to withdraw his plea. The Court of Appeals reversed and held the trial court abused its discretion by not permitting Clue to withdraw his guilty plea for Counts 5 and 6 because a final negotiated plea agreement should be viewed as a "package" deal, and the terms should not be treated as isolated from each other, but as a cohesive whole. All six counts were part of the same negotiated plea deal and involved the same underlying incident. The Court of Appeals concluded Clue would not have pled guilty to the less serious charges because it would have put him at an unfavorable position at trial, as the State would potentially inform the jury that Clue had already plead guilty to Counts 5 and 6 of the same incident (the court noted it may have reached a different result had the plea agreement involve different underlying transactions or events or if the

guilty plea was from a non-negotiated plea agreement; also the court noted the result might be different if the misinformation was for a lesser offense where the sentence ran concurrently with a more serious offense with a longer sentence and where both were in the same plea agreement). Judgment reversed.