Hope for the Best and Prepare for the Worst: The Capital Defender's Guide to Reciprocal Discovery in the Sentencing Phase of Georgia Death Penalty Trials

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HOPE FOR THE BEST AND PREPARE FOR THE WORST: THE CAPITAL DEFENDER’S GUIDE TO RECIPROCAL DISCOVERY IN THE SENTENCING PHASE OF GEORGIA DEATH PENALTY TRIALS

INTRODUCTION

Jeremy Gross was on trial for the violent murder of a young store clerk, and the prosecution pursued the death penalty. His lawyer offered no legal defense as to Jeremy’s guilt because of the insurmountable evidence. Instead, the lawyer provided a sympathetic explanation for the crime Jeremy committed. This explanation came in the form of mitigating evidence offered at the sentencing phase of Jeremy’s trial in an attempt to spare his life. In preparation for the sentencing phase, the defense spent years scouring Jeremy’s background and amassed a wealth of information, which ultimately saved Jeremy from execution. In Georgia, this mitigating evidence is now discoverable to prosecutors in cases where defendants elect to use (opt-in) Georgia’s Criminal Procedure Discovery Act (hereinafter “the Act”). The Act is a major obstacle for defense attorneys hoping to tailor the presentation of mitigating evidence after conducting an exhaustive search that may reveal evidence unfavorable to the defendant.

The purpose of the reciprocal discovery provision of the Act was to promote efficiency and fairness by giving both defendants and prosecutors access to their counterpart’s bounty of potential evidence.

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1. Alex Kotlowitz, *In the Face of Death*, N.Y. TIMES, July 6, 2003, § 6 (Magazine), at 32.
2. Id. Evidence in the trial included a security video showing Mr. Gross shooting the young store clerk at point-blank range while the clerk appeared to beg for his life as he reached out his hands in a last-chance request for help. Id.
3. See id.
4. Id.
5. Id. (including information about his negligent and abusive mother, foster homes, and Jeremy’s unrealized potential as a young boy).
7. See discussion infra Parts I-III. The phrases “opt in” and “opt out” are used to describe a defendant’s decision to use or not use, respectively, the reciprocal discovery provisions of the Act.
in felony trials. Prior to the Criminal Justice Act of 2005, which amended the Act, Georgia's reciprocal discovery statute did not cover items to be used for mitigation during the sentencing phase of death penalty trials.

This Note seeks to highlight the issues associated with the Act and its application in death penalty trials, particularly those created by the recent inclusion of the sentencing phase in reciprocal discovery. Part I explains the Act’s mechanics, history, and adoption of the subsequent amendment making the statute applicable in the sentencing phase. Part II summarizes the Georgia Supreme Court case of State v. Lucious and analyzes its effects on defendants who do not elect (opt out of) reciprocal discovery. Part III applies the analysis of Lucious and its progeny to the amended portion of the Act to determine what effects the amended Act will have on those who opt out. Finally, application of the Act to the sentencing phase of Georgia’s death penalty trials raises interesting constitutional challenges. Section IV analyzes several of the possible challenges and resolves them in favor of finding the Act constitutional. Additionally, Section IV makes suggestions for legislation intended to preempt any constitutional challenges to the Act.

I. THE ACT

The United States Supreme Court has held that due process does not prevent a state from “experimenting with systems of broad

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10. See Governor’s Message, supra note 8.
11. See infra Part I.
12. See infra Part II.
13. See infra Part III.
14. See infra Part IV.
15. See infra Part IV.C.
discovery.” Indeed, states vary widely in their implementation of pre-trial criminal discovery.

In Georgia, the Act provides for a two-way street of discovery in felony trials. Reciprocal discovery in felony cases applies when the defendant chooses to have the Act apply and provides written notice to the prosecuting attorney. Both the prosecutor and defense counsel acquire particular obligations after a defendant opts in to the Act, as discussed below in Part II(C).

A. Discovery Prior to the Act

Prior to the Act, defendants in Georgia had no general right to pre-trial discovery in a criminal trial. Instead, defendants could access certain information as required by the Fourteenth Amendment’s Due Process Clause, the corresponding doctrine of Brady v. Maryland, and a limited number of Georgia statutory and constitutional provisions.

Prior to the Act, prosecutors had access to far less pretrial information than defendants. Prosecutors were restricted to obtaining three categories of information: “[1] notice of the defendant’s intent to rely on an insanity defense, [2] notice of the

19. O.C.G.A. § 17-16-2(a) (Supp. 2007). Note that application of the Act is automatically triggered if a defendant seeks civil discovery under the Georgia Civil Practice Act. O.C.G.A. § 17-16-2(c) (Supp. 2007). Additionally, in a multi-defendant case, if one defendant elects to have the Act apply then the Act will apply to all defendants. O.C.G.A. § 17-16-2(a) (Supp. 2007).
20. See O.C.G.A. § 17-16-4 (Supp. 2007). The Act and its requirements are applicable if, and only if, a defendant elects to have them apply. O.C.G.A. § 17-16-2(a) (Supp. 2007).
22. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment’s Due Process Clause requires the prosecution to disclose evidence favorable to the defendant, but full discovery in the ordinary sense of a civil suit is not implicated. See Moore v. Illinois, 408 U.S. 786, 794-95 (1972).
defendant’s intent to introduce evidence relating to the victim’s prior misconduct, [3] and copies of scientific reports prepared by defense experts of certain evidence.”26 Additionally, general limitations implicated by the Fifth Amendment’s privilege against self-incrimination hampered prosecutorial attempts at pretrial discovery.27

B. Passage of the Act

Motivation to pass the Act included a desire to alleviate overburdened courts by providing more accurate information for use in the bargaining stages of criminal prosecutions.28 Additionally, Georgia legislators and prosecutors harbored a desire to end unsavory trial practices.29

State Representative Thomas E. Cauthorn, III, sponsored the bill, which ultimately became the Act.30 While Representative Cauthorn shepherded the bill through Georgia’s legislature, members from Georgia’s criminal defense bar and prosecutors from several counties provided the substance of the bill.31 After its introduction to the Georgia General Assembly in 1993, the Act became effective on January 1, 1995.32

26. Id. at 55. See also O.C.G.A. § 17-7-130 (requiring defendants to file notice of intent to rely on an insanity defense); Syfrett v. State, 435 S.E.2d 470, 473 (Ga. Ct. App. 1993) (discussing timeliness of notice required to be given by the defendant before introducing evidence of the victim’s prior misconduct); Rower v. State 443 S.E.2d 839, 842 (Ga. 1994) (discussing defendant’s obligation to disclose scientific testing results and specifically those involving written reports by the defendant’s experts intended to be introduced at trial).

27. See generally U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . . .”). But see Williams v. Florida, 399 U.S. 78, 85 (1970) (holding that statutory mandates to disclose possible alibis were outside the scope of Fifth Amendment protection, except when the only witness to disclose is the defendant).


30. Id. at 137 n.1.

31. See Martin, supra note 25, at 55 (stating that both sides compromised).

32. See Hannah, supra note 29, at 137-38.
C. A Two-Way Street

1. Prosecutor’s Disclosures

The prosecutor’s obligatory disclosures are, for the most part, required to be completed at least ten days prior to trial. Information the prosecutor must disclose to the defendant is divided into eight categories: (1) a copy of the indictment and witness list; (2) the defendant’s statements; (3) the defendant’s criminal record; (4) any physical evidence intended to be used by the prosecution at trial or belonging to the defendant; (5) scientific reports and mental and physical examinations; (6) witness statements; (7) evidence relating to alibi rebuttal; (8) evidence in aggravation of punishment intended to be introduced for purposes of sentencing.34

2. Defendant’s Disclosures

The defendant’s obligatory disclosures are, for the most part, required to be completed no later than five days prior to trial and only after the prosecutor has complied with her obligations.35 Information the defendant must disclose to the prosecutor is divided into six sections: (1) tapes, pictures, and other tangible evidence which the defendant intends to use at trial; (2) scientific reports; (3) alibi information; (4) witness statements; (5) a witness list; (6) witness information, medical examinations, scientific reports, and tangible evidence intended to be introduced for purposes of sentencing.36

33. Martin, supra note 25, at 56 (observing that the ten-day time limit is meant as a bare minimum).
See also O.C.G.A. § 17-16-4(a) (Supp. 2007) (listing the evidence that a prosecutor must disclose); O.C.G.A. § 17-16-4(c) (Supp. 2007) (requiring the disclosure of newly discovered information even if discovered during trial).
34. See O.C.G.A. §§ 17-16-4(a)(1-5), -5(b), -7, -8(a), -21 to -23 (Supp. 2007).
35. O.C.G.A. § 17-16-4(b) (Supp. 2007); Martin, supra note 25, at 56.
36. See O.C.G.A. §§ 17-16-4(b)(1-3), -5(a), -7, -8(a) (Supp. 2007); see also O.C.G.A. § 17-16-4(c) (Supp. 2007) (requiring the disclosure of newly discovered information even if discovered during trial).
D. A Subsequent Amendment Targeting the Sentencing Phase of Death Penalty Trials

Rep. Cauthorn and others foresaw refinements to the far-reaching legislation encompassed in the Act. In fact, the Act was amended ten times in the year following its initial passage. Most relevant for this Note, however, is the Criminal Justice Act of 2005, which amended significant portions of the Act, including a provision bringing the sentencing phase of death penalty trials under the guise of the Act.

Specifically, the 2005 amendment to the Act makes it applicable to the sentencing phase for death penalty trials if a defendant elects to participate. While the initial version of the Act makes clear that it applies to cases in which at least one felony has been charged, thus automatically bringing death penalty trials under the Act’s scope, the bifurcated process of death penalty trials creates some ambiguity as to its application.

Currently, “[d]efense counsel [in death penalty trials] shall be reminded of defendant’s option to invoke the provisions of Georgia’s Criminal Procedure Discovery Act . . . .” This provision, taken from Georgia’s Superior Court Unified Appeal Procedure, guidelines for conducting death penalty trials, highlights the importance that Georgia courts place on discovery in death penalty trials and suggests one possible reason for the amendment.

Before a trial begins, prosecutors must, upon the defendant’s election to participate in reciprocal discovery, “provide the defendant

37. See Hannah, supra note 29, at 138.
41. See O.C.G.A. § 17-10-30 (Supp. 2007).
42. GA. UNIF. SUP. CT. R. 34 II(C)(4).
43. See id. at I(A). The Georgia General Assembly does not provide much in the way of legislative history, and the upcoming Peach Sheets published by the Georgia State University Law Review, which provides legislative history on selected pieces of Georgia legislation, does not cover the relevant portion of the Criminal Justice Act of 2005.
with notice of any evidence in aggravation of punishment that the state intends to introduce in sentencing." The defendant, in return, must disclose information according to the following time table: (1) at least five days before trial the defendant must give the prosecutor a list of witnesses intended to be called at presentence hearings and any statements of such witnesses; (2) no later than announcement of the verdict the defendant must give the prosecutor any physical evidence intended to be used at the presentence hearing and; (3) no later than announcement of the verdict the defendant must give the prosecutor any physical or mental examinations and scientific reports intended to be used at the presentence hearing. It remains to be seen exactly how courts will apply the new death penalty sentencing provision of the Act.

II. *State v. Lucious*

*Lucious* demonstrates that the Act, as it appeared in 1999, was constitutional and, at the time, did not apply to the sentencing phase of death penalty trials. Additionally, the dissent in *Lucious* details what information is available to defendants who do not elect to use the Act.

A. *The Case*

Georgia elected to seek the death penalty against John R. Lucious who was charged with “malice murder, two counts of felony murder, possession of a firearm during the commission of a felony, and misdemeanor possession of marijuana . . .” Lucious elected not to

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44. O.C.G.A. § 17-16-4(a)(5) (Supp. 2007) (demanding that the information relating to evidence in aggravation must be disclosed no later than ten days before the start of trial, unless the court orders otherwise, but in no event later than the trial's beginning).
47. See *id.* at 679-81.
48. See *id.* at 684-85 (Fletcher, J., concurring in part and dissenting in part).
49. *Id.* at 679.
use Georgia’s reciprocal discovery statute.\textsuperscript{50} The trial court denied his motion to have the Act declared unconstitutional, “but granted Lucious the unilateral right to discover . . . the State’s trial witness list, scientific reports, and scientific work product.”\textsuperscript{51} The State appealed, asserting that Lucious’s election not to participate in the Act prohibited him from the unilateral discovery granted.\textsuperscript{52}

\textbf{B. The Holding}

The court limited analysis to whether Article 1 of the Act was constitutional and, if so, what items were discoverable to a defendant who elects not to avail herself of the Act.\textsuperscript{53} The court found Article 1 of the Act, the section covering reciprocal discovery in the guilt-innocence phase, constitutional.\textsuperscript{54} It also determined that “election not to invoke the discovery provisions of the Act necessarily entitles a defendant to only that discovery specifically afforded by the Georgia and United States Constitutions, statutory exceptions to the Act, and non-conflicting rules of court.”\textsuperscript{55} Specifically, the court found no merit in the argument that the Act violates a defendant’s right to due process under the United States and Georgia Constitutions because the statute provides for reciprocal discovery from both the defendant and State.\textsuperscript{56}

Presiding Justice Fletcher, in dissent, detailed thirteen items defendants are entitled to in Georgia if they elect not to use the Act.\textsuperscript{57} The list includes “[e]xculpatory material as set forth in \textit{Brady v. Maryland[,]}.\textsuperscript{58} [e]vidence in aggravation that the state intends to rely

\begin{footnotesize}
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  \item 50. \textit{Id.}
  \item 51. \textit{Lucious}, 518 S.E.2d at 679.
  \item 52. \textit{Id.}
  \item 53. \textit{Id.}
  \item 54. \textit{Id.} at 679-81.
  \item 55. \textit{Id.} at 681.
  \item 56. \textit{Id.} at 679-80 (finding the reciprocal nature of the Act satisfies due process concerns). The court also found no merit in the argument that the Act impairs the right to effective representation of counsel by denying defendants the benefit of defense counsel’s judgment of whether and when to reveal aspects of a case to the State. \textit{Id.} at 680-81.
  \item 57. \textit{See id.} at 684-85.
\end{itemize}
\end{footnotesize}
on at presentence hearings and victim impact evidence under O.C.G.A. § 17-10-1.2 and Livingston v. State[,] [i]ndependent examination of critical evidence under the due process clause of the United States Constitution[,] . . . [c]ertain information from the Georgia Crime Information Center under O.C.G.A. § 35-3-34[, and] [a]ccess to records under the Open Records Act.”

In contrast, the majority limited its holding to three categories of information which defendants are not entitled to if they opt out. Specifically, defendants who opt out of the Act are, at least, not entitled to discover the State’s scientific reports, scientific work product, or witness list. After Licious, defendants were advised, absent unique strategic advantages, to avail themselves of the Act’s benefits. The advice is prudent in light of the relatively large number of death row inmates exonerated because of faulty or absent scientific work and erroneous eyewitness testimony that will not be accessible pre-trial to defendants who opt out.

C. Other Cases

Two additional cases discussing the Act warrant mention for their possible effects on defendants. Brown v. State holds that written notice to the prosecuting attorney from the defendant is a prerequisite to obtaining the benefits of the Act. While the Act is explicit in the requirement that defendants must notify the prosecutor in writing, the holding in Brown puts defendants on notice that written notice to the

59. Licious, 518 S.E.2d at 684-85 (internal citations omitted).
60. See id. at 681.
61. Id. The exclusion of a witness list does not apply to witnesses who appeared before the grand jury or such witnesses whose testimony the charges are founded upon. Id. at 682. But see Carpenter v. State, 310 S.E.2d 912, 913 (Ga. 1984) (holding defendants entitled to “critical evidence” if it is subject to conflicting opinions).
65. See id. at 814.
prosecuting attorney is not only sufficient, but necessary if the benefits of the Act are to apply.\textsuperscript{66}

Additionally, \textit{State v. Dickerson}\textsuperscript{67} explains that the requirement to disclose various information under the Act can be excused for a "good cause" showing.\textsuperscript{68} The significance of \textit{Dickerson} is that both prosecutors and defendants acquire affirmative duties to gather discoverable information that cannot be satisfied by merely "looking in [a] file."\textsuperscript{69} As such, defendants should not be lulled into thinking that opting in will grant them access to the State's bounty of information without truly reciprocating the obligation.\textsuperscript{70}

III. SENTENCING FOR DEFENDANTS WHO OPT OUT

Georgia death penalty trials are bifurcated into a guilt-innocence phase and a sentencing phase.\textsuperscript{71} The newly codified portion of the Act, section (f), makes reciprocal discovery explicitly applicable to both phases.\textsuperscript{72} Section (f) of the Act warrants special attention because of the different types of evidence used in the two phases.\textsuperscript{73}

\textbf{A. An Overview of Evidence in Aggravation and Mitigation}

1. Evidence in Aggravation

Imposition of the death penalty in Georgia requires a jury first to "consider if the State has proven the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, [and]
if one of these circumstances is found, the jury must then consider the mitigating and aggravating circumstances relevant to the defendant . . . .”

The statutory aggravating circumstances primarily relate to the charged crime and includes such circumstances as murder against a peace officer, murder or other violent felonies involving torture, and murder performed for the purpose of financial gain. Georgia law requires that a jury or judge find at least one of the ten enumerated aggravating circumstances beyond a reasonable doubt as a prerequisite to imposition of the death penalty for cases not involving treason or aircraft hijacking.

After the jury has found the defendant eligible for the death penalty by committing one of the aggravating circumstances, it must determine whether to impose such a sentence based on all the evidence. Incumbent in the above process is the use of non-statutory aggravating circumstances. Evidence relating to non-statutory aggravating circumstances includes, but is not limited to, the following: (1) evidence of prior convictions and similar transactions; (2) evidence of location of the crime; (3) evidence concerning the defendant's character; (4) evidence of a prior crime without a conviction so long as there was no acquittal; and (5) evidence concerning victim impact. The scope of non-statutory aggravating circumstances is broad, limited only by the rules of evidence.

75. O.C.G.A. §§ 17-10-30(b)(8), (7), (4) (Supp. 2007).
76. O.C.G.A. § 17-10-30(c) (Supp. 2007).
77. See id.
78. See Hicks v. State, 352 S.E.2d 762, 776 (Ga. 1987).
79. See Green v. Zant, 738 F.2d 1529, 1539 (11th Cir. 1984) (noting the Supreme Court’s approval of using prior criminal convictions as aggravating circumstances); Moore v. Balkcom, 716 F.2d 1511, 1524-25 (11th Cir. 1983) (finding consideration of the location of the crime as an aggravating circumstance constitutional); Jefferson v. State, 353 S.E.2d 468, 474 (Ga. 1987) (allowing the admission of a prior crime despite the lack of a conviction for the crime); Fair v. State, 268 S.E.2d 316, 320 (Ga. 1980) (allowing the State to place the defendant's character on trial at the sentencing phase); § 17-10-1.2(b) (providing for introduction of victim impact evidence).
80. See O.C.G.A. § 17-10-30(b) (Supp. 2007); Hicks, 352 S.E.2d at 776.
2. Evidence in Mitigation

If the scope of aggravating circumstances is broad, the scope of mitigating circumstances is virtually limitless. A jury is allowed to consider anything in deciding whether to impose the death penalty. The mitigating evidence, after instruction from the judge, is considered with the aggravating evidence to determine whether the death penalty or mercy should be recommended in a particular case.

While the possibilities for mitigating evidence are endless, several categories are frequently used by defendants. Evidence of a turbulent family history is relevant as mitigating evidence. Such evidence is relevant because research shows that violent patterns set at home can contribute to homicidal tendencies. Also, the Supreme Court has stated that evidence of the accused adjusting well in prison or showing potential for rehabilitation is, by its nature, relevant for purposes of mitigation. Although controversial, residual doubt may be used as a mitigating circumstance. Finally, defendants often introduce evidence concerning their respective mental capabilities.

81. See O.C.G.A. §§17-10-2, -30 (Supp. 2007) (failing to define anywhere the definition of mitigating).
83. See O.C.G.A. §§ 17-10-30 (b), -2(c) (Supp. 2007); see also Waters v. Thomas, 46 F.3d 1506, 1517 (11th Cir. 1995) (observing that Georgia's death penalty statute involves the consideration of both relevant mitigating and aggravating circumstances, but does not ask a jury to weigh the circumstances against each other).
86. See Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986).
B. Lucious on Aggravating Circumstances for Defendants Who Opt Out

The Act makes clear that defendants who opt in will have access to information the prosecutor intends to introduce in aggravation of punishment before trial begins. Less clear, however, is what aggravating circumstances are discoverable to defendants who opt out of the Act’s reciprocal discovery. The majority and dissent in Lucious agree that defendants who elect not to use the Act will still have access to information mandated by the United States and Georgia constitutions and Georgia statutory provisions.

Defendants will, at least, be notified of any victim impact evidence intended to be offered. In Livingston v. State, the Georgia Supreme Court rationalized that the use of victim impact evidence at the sentencing phase is permissible because of the pretrial process used to examine the proffered evidence for any possible inflammatory or unfairly prejudicial material. The Georgia Supreme Court’s decision upholding the statute which requires pre-trial disclosure of such evidence focuses on the unique qualities present in victim impact evidence and is therefore unlikely to apply to other types of evidence. The Georgia Association of Criminal Defense Lawyers’ has categorized Livingston as holding that all evidence intended to be used in aggravation at trial must be disclosed; however this interpretation is overbroad because the court limited its holding to the pretrial disclosure of victim impact evidence.

Additionally, a prosecutor will not be required to disclose aggravating evidence of all prior crimes or similar transactions she

91. See Livingston v. State, 444 S.E.2d 748, 752 (Ga. 1994).
92. 444 S.E.2d 748.
93. Id. at 750-51.
94. See id. at 751 (noting the often unfairly prejudicial information contained in victim impact evidence).
intends to introduce at sentencing.\textsuperscript{96} While defendants are entitled to notice of the State’s intent to introduce evidence of similar transactions, evidence concerning equally damaging but dissimilar transactions is not required to be disclosed.\textsuperscript{97} Specifically, defendants are entitled to notice of the “state’s intent to introduce evidence of similar transactions that do not involve prior difficulties between the defendant and victim . . . .”\textsuperscript{98}

Other common non-statutory aggravators such as evidence of location of the crime and evidence concerning the defendant’s general moral character are not specifically covered by any statutory provisions, at least with respect to their use as aggravating circumstances.\textsuperscript{99} Nonetheless, evidence of the location of the crime appears to be readily available in an indictment of the grand jury.\textsuperscript{100} While the Supreme Court of Georgia in \textit{Fair v. State} has limited evidence of aggravation relating to the general moral character and the defendant’s predisposition to commit other crimes by subjecting them to notice provisions, it is unclear what notice provisions, if any, currently apply to defendants who opt out of the Act.\textsuperscript{101} It appears that any notice provisions concerning general moral character or a defendant’s predisposition to commit other crimes are only accessible to defendants who opt in.\textsuperscript{102}

With respect to statutory aggravating circumstances, it is not certain that defendants who opt out of the Act will have notice of which of the ten statutory aggravators a prosecutor is seeking.\textsuperscript{103} Although defendants must be furnished with a copy of the indictment and notified of the prosecutor’s intention to seek the death penalty,

\textsuperscript{96} See Wall v. State, 500 S.E.2d 904, 907 (Ga. 1998).
\textsuperscript{97} See \textit{id.} at 906; State v. Lucious, 518 S.E.2d 677, 685 (Ga. 1999) (Fletcher, J., dissenting).
\textsuperscript{98} See \textit{Lucious}, 518 S.E.2d at 685 (Fletcher, J., dissenting) (citing Wall v. State, 500 S.E.2d 904 (Ga. 1998)).
\textsuperscript{99} See Fair v. State, 268 S.E.2d 316, 321 (Ga. 1980) (failing to articulate any specific notice provisions but mentioning some nonetheless).
\textsuperscript{100} See O.C.G.A. § 17-7-54 (2004) (requiring that the indictment include the place of the crime).
\textsuperscript{101} \textit{Fair}, 268 S.E.2d at 321 (referencing Georgia’s prior death penalty statute).
\textsuperscript{102} See O.C.G.A. § 17-16-4(6)(5) (Supp. 2007).
\textsuperscript{103} See Blankenship v. State, 277 S.E.2d 505, 509-10 (Ga. 1981) (overruled on other grounds) (allowing the State to rely on aggravating circumstances not included in the indictment).
there is no requirement that the aggravating circumstances be included in the indictment or notice.\textsuperscript{104}

C. Disclosure of Mitigating Evidence for Defendants Who Opt Out

1. Mental Health Disclosures

Perhaps the most vulnerable swath of a defendant’s possibly discoverable information is that of the widely used mental health evaluations.\textsuperscript{105} Defendants are faced with a troubling dilemma: “[E]ither put forward evidence of mental disorder and risk the prosecution’s using it in aggravation or exclude the relevant mitigating evidence entirely.”\textsuperscript{106}

Georgia law, however, protects a defendant’s evidence concerning mental health evaluations in several ways. First, although Georgia law covering insanity defenses requires court appointed psychiatrists, potentially exposing defendants’ evidence to prosecutors, the relevant section is not applicable to a defendant’s motion for expert assistance for sentencing.\textsuperscript{107} Second, defendants seeking “to obtain expert assistance at public expense are entitled to have an ex parte hearing on the motion.”\textsuperscript{108} Finally, attorney-client privilege should protect non-witness defense psychiatric experts.\textsuperscript{109}

\textsuperscript{104} See Sliger v. State, 282 S.E.2d 291, 292-93 (Ga. 1981); GA. UNIF. SUPER. CT. R. 34 II(C)(1).
\textsuperscript{107} See O.C.G.A. § 17-7-130.1 (2004); Bright v. State, 455 S.E.2d 37, 47 (Ga. 1995).
\textsuperscript{108} See Bright, 455 S.E.2d at 45-46 (citing Brooks v. State, 385 S.E.2d 81 (Ga. 1989)).
2. Privileged Communication and Family History

It appears unlikely that defense information concerning family history will be discoverable by prosecutors prior to the sentencing phase, so long as the defendant communicates such information to the lawyer.110 Communications between the lawyer or investigators and people other than the client, however, enjoy no such similar protection.111

If a defense lawyer records conversations with third parties (i.e. family members, friends, or former employers), it is probable that such information is protected as attorney work product.112 Attorney work product is specifically excluded from the Act.113 Digressing further away from the protection of privileged communication is when an investigator records conversations with third parties. Here, the work product doctrine is stretched to its outer bounds, but will still likely apply when such information is gathered under the direction of a lawyer.114

IV. CONSTITUTIONAL CONCERNS ABOUT THE ACT AND SOLUTIONS

Capital defenders faced with the decision of whether to opt in to the Act have a difficult dilemma: if they choose to opt in, they may have access to valuable scientific or aggravating evidence intended to be proffered by the State.115 However, they will risk disclosure of mitigating evidence intended to be used at the sentencing phase.116 This apparent dilemma combined with U.S. Supreme Court decisions concerning capital punishment raises constitutional issues not

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110. See O.C.G.A. § 24-9-21 (1995). But see Tenet Healthcare Corp. v. La. Forum Corp., 538 S.E.2d 441, 444 (Ga. 2000) (finding that Georgia’s attorney-client privilege should be construed as narrowly as possible to avoid the loss of any evidence that may aid in the ascertainment of certain facts).
111. See O.C.G.A. § 24-9-21, -24 (2006) (containing no provisions of privilege for communications to the lawyer other than those given by the client).
115. State v. Lucious, 518 S.E.2d 677, 681 (Ga. 1999) (stating that the discovery of scientific reports requires a defendant to opt-in).
116. See supra Parts II, III.
resolved in *State v. Licious* because the Act at that time did not apply to the sentencing phase of death penalty trials.\textsuperscript{117}

\subsection*{A. Gregg v. Georgia and the Act}

In *Gregg*, Georgia's death penalty statute was challenged on a number of issues, but the most relevant for purposes of this Note was the challenge "to the wide scope of evidence and argument allowed at presentence hearings."\textsuperscript{119} The Court, in disagreeing with the defendant petitioner, declared that the lack of restrictions on information in the sentencing phase was preferable in order to provide the jury with "as much information before it as possible when it makes the sentencing decision."\textsuperscript{120} In the years following *Gregg*, the Court clarified the declaration somewhat by "emphasiz[ing] the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination."\textsuperscript{121} Specifically, "the Eighth and Fourteenth Amendments require that the sentencer 'not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death.'"\textsuperscript{122}

The Act, although treading closely, is most likely not in violation of *Gregg*'s mandate.\textsuperscript{123} Defendants who opt in to the Act may find themselves limiting the scope of their search for mitigating evidence to avoid disclosing potentially damaging material to the prosecutor. The fear, if valid, could place the statute in violation of *Gregg* and its

\begin{thebibliography}{123}
\bibitem{117} See discussion, \textit{supra} Part VI.A.B.
\bibitem{119} \textit{Id.} at 199-206.
\bibitem{120} \textit{Id.} at 203-04.
\bibitem{121} \textit{See} Buchanan v. Angelone, 522 U.S. 269, 276 (1998).
\bibitem{123} \textit{Compare} O.C.G.A. § 17-16-2(f) (Supp. 2007) (making the Act applicable to the sentencing phase of death penalty trials) \textit{with} *Gregg*, 428 U.S. at 204 (requiring virtually limitless amounts of evidence at the sentencing phase).
\end{thebibliography}
progeny by limiting information available to jurors at the sentencing phase.\textsuperscript{124} This fear, however, is unwarranted.\textsuperscript{125} Any concerns about disclosure of mitigating evidence for defendants who opt in are misplaced because, most often, mitigating evidence is not required to be disclosed until the completion of the guilt-innocence phase, leaving a minimal amount of time for a prosecutor’s rebuttal preparation.\textsuperscript{126} Although the defense counsel may be wary about the requirement to disclose relevant mitigating information prior to sentencing, the concerns in\textit{Penry} and\textit{Gregg} focused on state-imposed restrictions preventing juror consideration of the evidence, not a defendant’s unwillingness to present the evidence.\textsuperscript{127} Also, much of the mitigation evidence acquired is protected by either attorney-client privilege or attorney work product doctrine.\textsuperscript{128}

The Act’s optional and reciprocal nature further immunizes it from a\textit{Gregg}-like attack.\textsuperscript{129} The Act places the decision to opt in in the hands of the defendant.\textsuperscript{130} As such, it seems unlikely that the Court will be concerned with defendant-imposed restrictions on mitigating evidence, if prior decisions were concerned with court or state imposed restrictions.\textsuperscript{131}

\textsuperscript{124}\textit{See Gregg}, 428 U.S. at 204;\textit{Buchanan}, 522 U.S. at 276;\textit{Romano v. Oklahoma}, 512 U.S. 1, 6-7 (1994).

\textsuperscript{125}\textit{See infra} Part IV.A.

\textsuperscript{126}\textit{See} O.C.G.A. §§ 17-16-4(b)(3)(A), (B) (Supp. 2007) (setting the time limit for disclosure of physical evidence and mental or physical health examinations at the announcement of the verdict); GA. UNIF. SUPER. CT. R. 34 III(A), (B) (2005) (providing no mandatory pause between the guilt-innocence phase and the sentencing phase).\textit{But see} O.C.G.A. § 17-16-4(b)(3)(C) (Supp. 2007) ("The defendant shall, no later than five days before the trial commences, serve upon the prosecuting attorney a list of witnesses that the defendant intends to call in the presentence hearing.")


\textsuperscript{128}\textit{See supra} Part III.

\textsuperscript{129}\textit{See} O.C.G.A. §§ 17-16-2, -4 (Supp. 2007); discussion\textit{infra} Part IV.B (indicating that the optional nature of the statute is probably irrelevant for purposes of a constitutional challenge).

\textsuperscript{130}\textit{See} O.C.G.A. § 17-16-2(a) (Supp. 2007).

\textsuperscript{131}\textit{See, e.g., Gregg}, 428 U.S. at 203-04.

In Rompilla, a defendant petitioner brought a federal habeas petition claiming ineffective assistance of counsel. The claim focused on ineffective assistance of counsel at the sentencing phase, where defense counsel’s job is to rebut evidence of aggravating circumstances. The Court, in deciding for the petitioner, held that defense counsel must perform a thorough investigation for mitigating evidence or risk being the target of a successful ineffective counsel claim. Specifically, even when a defendant and his family suggest that no mitigating evidence is available, defense counsel must make reasonable efforts to review evidence the prosecution is likely to use in aggravation at the sentencing phase.

1. Failure to Investigate Because of Fears Concerning Disclosure

With respect to the Act, one potential problem arises when defense counsel withholds a full-scale mitigation investigation because of possible fears about disclosing potentially damaging information. A defense counsel’s failure to do a full-scale mitigation investigation, for whatever reasons, most likely violates the mandate set out in Rompilla.

133. Id. at 379.
134. See id.
135. See id. at 388-89. The opinion is based in part on Strickland v. Washington, 466 U.S. 668 (1984), which held that the Sixth Amendment to the United States Constitution grants not only the right to counsel, but the right to effective assistance of counsel. 466 U.S. at 686. Also, the actual risk (i.e. a death sentence) is carried by the defendant and not the attorney who is the focus of an ineffective assistance of counsel claim.
136. Rompilla, 545 U.S. at 389-90.
137. The situation giving rise to the problem is similar to that discussed in Part IV.A. Here, however, a different analysis is required because the focus is the Sixth Amendment and not the due process concerns associated with Gregg.
138. See Rompilla, 545 U.S. at 389-90; Colin Garrett, Death Watch, 29 CHAMPION 52, 52 (2005) ("The case is noteworthy for showing that the Supreme Court is willing to find ineffective assistance in a particular decision by trial attorneys even where the defense performance over all was adequate.").
While the holding in *Rompilla* was narrow, the implications are far-reaching. If it is a Sixth Amendment violation when a lawyer fails to investigate because the defendant urges that no mitigating evidence is available, then it follows that the failure to investigate because of misplaced fears of disclosure will also violate the Sixth Amendment. Thus, *Rompilla* stands for the following proposition: A failure to investigate when mitigating evidence reasonably exists is no longer an acceptable tactical decision.

For reasons similar to those stated in Part IV.A of this Note, potential *Rompilla* problems associated with fears of disclosure, although thorny for defense counsel, do not invalidate the Act. First, the fears are misplaced because most, if not all, of the evidence prepared for mitigation and not intended to be used at trial can be protected as attorney work product or under attorney-client privilege statutes. Second, defendants who opt in will disclose mitigating evidence intended to be used at the sentencing phase only after the guilt-innocence phase, thus removing issues associated with providing prosecutors ample time to scour the information. Third, defendants who opt out are afforded the same attorney-client privilege protections as defendants who opt in with respect to information not intended for use at the sentencing phase. Thus, while *Rompilla* places new pressures on capital defenders to fully investigate all possible mitigating evidence, the Act places no additional undue pressures and is immune to attack under this line of reasoning.

139. See *Rompilla v. Beard*, 545 U.S. 374, 377 (2005). The holding is arguably limited to failures to investigate prior convictions which a defenses attorney knows will be used in the sentencing phase of a death penalty trial. *Id.*

140. *Cf. id.* (holding that it is a Sixth Amendment violation for a defense counsel to not review files he knows the prosecutor is going to use to prove aggravating circumstances).

141. See *id*.; *Garrett, supra* note 142, at 52.

142. See *supra* Part IV.A.

143. See discussion, *supra* Part III.

144. See O.C.G.A. §§ 17-16-4(b)(3)(A), (B) (Supp. 2007). *But see* O.C.G.A. § 17-16-4(b)(3)(C) (Supp. 2007) (stating the defense’s witness list for the sentencing hearing must be turned over to the prosecution at least five days before the trial starts).


146. See *supra* Part IV.A.1.
2. *Rompilla*’s Affects on the Decision to Opt in

*Rompilla* creates the greatest problem with the new pressure to obtain and review everything a prosecutor may reasonably use in the aggravation phase. This new pressure is a result of *Rompilla*’s explicit mandate to defense counsel: Failure to investigate evidence that will be used in aggravation deprives a defendant of her Sixth Amendment rights. Thus, *Rompilla* may remove any meaningful reason to opt out of the Act, if doing so inhibits access to aggravating evidence.

*a. Pressures to Opt in and Reciprocity*

This new pressure to investigate all avenues of possible aggravation evidence arguably removes the decision to opt in from the defendant because defense counsel are now eager to unveil all prior convictions and their details, despite a defendant’s urging to the contrary. Placing this decision in the defendant’s hands was instrumental in obtaining the Georgia Criminal Defense Bar’s support for the Act because they felt the opt in provisions were at the heart of creating reciprocal discovery. Unclear, however, is why a voluntary decision to participate in the Act is necessary to make the Act reciprocal. The Georgia Supreme Court, thus far, has not shared the belief that placing the decision to opt in in the hands of defendants is essential or even necessary to the reciprocity of the Act.

147. *See Rompilla*, 525 U.S. at 377. *Rompilla* involved defense counsel’s failure to obtain and review a prior conviction, a commonly used aggravating factor. *See id.* at 382. It is unclear and outside the scope of this article to determine what information a defense counsel should reasonably expect a prosecutor to use in aggravation. *Id.* at 396 (Kennedy, J., dissenting) (characterizing the prior conviction as “an old case file” where the defense might have “stumble[d] upon something . . . .”).

148. *Id.* at 377 (describing the Sixth Amendment as providing a right to representation measured by a standard of reasonable competence that includes a duty to investigate potentially aggravating evidence).


151. *See id.*

152. *See State v. Lucious, 518 S.E.2d 677, 679 (Ga. 1999).*
In upholding the constitutionality of the Act prior to the sentencing phase amendment, the Georgia Supreme Court specifically looked to reciprocity in upholding the constitutionality of the Act.\textsuperscript{153} Supporting the Georgia Supreme Court’s decision is \textit{Wardius v. Oregon},\textsuperscript{154} indicating the United States Supreme Court’s preference for reciprocal criminal discovery statutes.\textsuperscript{155} The preference for reciprocal criminal discovery is borne out of a concern that nonreciprocal discovery will minimize the presentation of reliable evidence.\textsuperscript{156}

While the Georgia Criminal Defense Bar has benefited from a voluntary opt in provision, such provisions are nonessential to the constitutionality of the Act.\textsuperscript{157} The two-way road of reciprocal discovery preferred by both the United States and Georgia Supreme courts is not blocked by new pressures created by \textit{Rompilla} limiting the decision to opt in.\textsuperscript{158}

\textbf{b. Effective Assistance of Counsel and the Pressure to Opt In}

The same pressures that remove the voluntary nature of the decision to opt in also affect a defense counsel’s discretion in whether to reveal information.\textsuperscript{159} The argument is that now that defense counsel are pressured to opt in to secure aggravating evidence, they will then have to give information according to the time tables of the Act, rather than use their own judgment.\textsuperscript{160} This

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\textsuperscript{153} \textit{Id.} at 679-80.
\textsuperscript{155} \textit{See id.} at 474-75 n.6; \textit{Rower v. State}, 443 S.E.2d 839, 842 (Ga. 1994) (adopting a preference for reciprocal criminal discovery under the due process clause of the Georgia Constitution).
\textsuperscript{156} \textit{See Lucious}, 518 S.E.2d at 680.
\textsuperscript{158} \textit{See supra} Part IV.B.2.a.
\textsuperscript{159} The concern here is similar to that in Part IV(B)(1), but differs in that it focuses on a capital defender’s ability to control trial tactics and not the general duty to perform mitigation investigations. \textit{See supra} Part IV.B.1.
\textsuperscript{160} \textit{See Part IV.B.2.a; see generally} O.C.G.A. § 17-16-4 (Supp. 2007) (establishing the time table for disclosing information to the other side).
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forced time table, the argument goes, deprives defendants of their right to effective assistance of counsel.\textsuperscript{161}

Assuming the absolute truth of the immediately preceding argument, the Georgia Supreme Court is likely to dismiss the complaint quickly as it did in \textit{Lucious}.\textsuperscript{162} The Georgia Supreme Court has clearly stated its indifference to the Act's timing issues and recognizes the adversary system does not afford defense counsel carte blanche in determining when and where to release information.\textsuperscript{163}

\section*{C. Alternatives to the Constitutional Challenges}

The Act will remain immune to constitutional challenges concerning its applicability to the sentencing phase of capital trials, while the decision in \textit{Lucious} remains good law.\textsuperscript{164} With judicial remedies off of the table, the Georgia Association of Criminal Defense Attorneys may wish to seek solutions in the legislative branch. In particular, legislation bifurcating the decision process between the guilt-innocence and sentencing phases, strengthening protections for attorney work product, and mandating disclosure of any prior convictions intended for use in aggravation will strengthen the effects of the Act's intended goals and relieve constitutional ambiguity from the amendment making it applicable to the sentencing phase.\textsuperscript{165}

\subsection*{1. Bifurcating the Decision Process}

Georgia death penalty trials are bifurcated into a guilt-innocence phase and sentencing phase.\textsuperscript{166} Logistically, allowing the Act to apply separately to each phase will allow defendants the opportunity to opt in at either or both phases of the trial. Such a provision is prudent in

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\textsuperscript{161} See U.S. CONST. amend VI; Ga. CONST., art. I, § I, para. XIV.
\textsuperscript{162} See \textit{Lucious}, 518 S.E.2d 677 (1999).
\textsuperscript{163} Id. at 680-681. (citing United States v. Nobles, 422 U.S. 225, 241 (1975)).
\textsuperscript{164} See supra Parts IV.A., B.
\textsuperscript{165} See infra Part IV.C.
\textsuperscript{166} See GA. UNIF. SUPER. CT. R. 34(III)(A)-(B).
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light of the vastly different types of evidence required in the two phases.\textsuperscript{167} Additionally, bifurcating the decision to opt in will remove many of the concerns associated with defense counsel’s ability and duty to represent her client through the selective presentation of evidence.\textsuperscript{168}

2. \textit{Strengthening the Attorney Work Product Protections}

Attorney work product protections are not explicit in Georgia’s privilege statute.\textsuperscript{169} The Act, however, specifically excludes from its provisions any evidence protected as attorney work product.\textsuperscript{170} However, without clarifying what types of work product are excluded from the Act, capital defenders may hesitate to fully investigate possibly mitigating evidence out of a fear that it will not be protected as attorney work product.\textsuperscript{171} Legislation clearly defining information relating to a mitigation investigation in a death penalty trial as attorney work product will likely alleviate concerns inhibiting mitigation investigations.\textsuperscript{172}

3. \textit{Mandating Disclosure of Prior Convictions}

While the dissent in \textit{Lucious} suggested that prosecutors are required to disclose information intended to be used in aggravation at the sentencing phase regardless of whether a defendant opts in, the conclusion was overly broad.\textsuperscript{173} In regard to sentencing phase evidence, the prosecutor is only required to disclose victim impact evidence to defendants who opt out.\textsuperscript{174}

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\textsuperscript{167} Compare O.C.G.A. §§ 16-5-1 (stating the requirements that must be proved to convict for murder), with §§ 17-10-30(b)-(c) (listing ten aggravating factors and requiring that the jury find at least one of them beyond a reasonable doubt before it can recommend death).
\textsuperscript{168} See supra Parts IV.A., B.
\textsuperscript{170} O.C.G.A. § 17-16-2(d) (Supp. 2007).
\textsuperscript{171} See supra Part IV.A.
\textsuperscript{172} See id.
\textsuperscript{174} See O.C.G.A. § 17-10-1.2 (2004).
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Rompilla v. Beard\textsuperscript{175} makes clear that defense counsel must review prior convictions that may be used at the sentencing phase.\textsuperscript{176} To alleviate pressure to opt in as necessary to obtain such information, legislation mandating disclosure of convictions is beneficial for two reasons: 1) the words of the Act will have meaning by giving defendants an actual choice concerning the decision to opt-in and 2) capital defenders will more easily conform with Rompilla’s mandates by being notified of prior convictions regardless of the decision to opt in.\textsuperscript{177}

CONCLUSION

The Act, when applied to the sentencing phase of Georgia death penalty trials, provides reciprocal obligations to both prosecutors and defendants.\textsuperscript{178} Defendants who opt in will have access to most, if not all, of the prosecutor’s information intended to be used in the sentencing phase prior to trial.\textsuperscript{179} Defendants, on the other hand, can refrain from disclosing evidence intended to be introduced in mitigation until the close of the guilt-innocence phase, with the exception of witness lists.\textsuperscript{180} While reciprocal, the Act reflects a preference for defendants in light of the awesome power of the State.\textsuperscript{181}

Furthermore, defendants who elect not to avail themselves of the benefits of the statute will still have access to significant amounts of evidence the prosecutor intends to use in aggravation.\textsuperscript{182} Specifically, defendants will have access to victim impact evidence, evidence concerning the location of the crime, and evidence of prior similar

\textsuperscript{175} Rompilla v. Beard, 545 U.S. 374 (2005).
\textsuperscript{176} See id. at 377.
\textsuperscript{177} See supra Part IV.B.
\textsuperscript{178} See O.C.G.A. §§ 17-16-2, -4 (Supp. 2007).
\textsuperscript{179} See O.C.G.A. § 17-16-4(a) (Supp. 2007).
\textsuperscript{180} See supra Part I.C.
\textsuperscript{181} See O.C.G.A. § 17-16-4 (Supp. 2007) (allowing the defendant to disclose information at a later date than the prosecution must disclose the same information).
\textsuperscript{182} See supra Part III.A.
transactions.\textsuperscript{183} Defendants are not required to disclose significant portions of evidence intended to be used in mitigation, unless they opt in.\textsuperscript{184}

The reciprocal attributes of the Act and prior judicial interpretation of the Act cut short relevant constitutional challenges. First, a challenge that the Act’s application to the sentencing phase limits the introduction of possibly mitigating evidence and thus violates Eighth and Fourteenth Amendment requirements is ineffective because the limitations are the result of a defendant’s choice, not a state or court prohibition.\textsuperscript{185} Second, a challenge that the Act could promote ineffective assistance of counsel by discouraging full scale mitigation investigations is also muted because any such discouragement is the result of irrational fears.\textsuperscript{186} Third, attacks that \textit{Rompilla v. Beard}\textsuperscript{187} removes an actual choice to opt in, while true, are ineffective because the Act’s constitutionality is not contingent on such a choice.\textsuperscript{188} The Act effectively and constitutionally promotes its purpose of reducing trial tactics involving surprise and promotes the disclosure of information relevant to the determination of facts in issue. Further, the amendment to the Act, making it applicable to the sentencing portion of death penalty trials, is also in line with the Act’s reason for existence. While providing possible obstacles for capital defenders, the amended portion of the Act is reciprocal, thus providing the needed safety valves to support its continued existence.

\textit{Adam Levin}

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\item \textsuperscript{183} See supra Part III.A.
\item \textsuperscript{184} See supra Part III.B.
\item \textsuperscript{185} See supra Part IV.A.
\item \textsuperscript{186} See supra Part IV.B.1.
\item \textsuperscript{187} \textit{545 U.S. 374} (2005).
\item \textsuperscript{188} See supra Part IV.B.2.a.
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