Death Penalty

by Sarah Gerwig-Moore*

The Mercer Law Review's *Annual Survey of Georgia Law* has for some time included a summary of opinions in criminal cases, but the last several editions have not included a separate section dedicated to capital cases. There has been little reason to devote an entire segment of the book to this topic, since the Georgia Supreme Court has considered very few direct appeals from capital cases since 2014.[1]

Time was when that court—which holds exclusive jurisdiction over all interim appeals in capital cases,[2] all direct appeals in murder cases (whether or not a capital sentence was imposed),[3] and all appeals from habeas corpus cases[4]—was kept significantly busier with death penalty litigation. That is less and less true. There are a few reasons for this. The most direct and significant reason for this is the fact that no Georgia jury

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1. To date, the last Georgia jury to return a death sentence was in March of 2014 following the trial of Adrian Hargrove, who was convicted of murdering an Augusta family of three. Max Blau, *Why Did Georgia Execute More Prisoners in 2016 than Any Other State?*, ATLANTA MAG. (Apr. 5, 2017), http://www.atlantamagazine.com/news-culture-articles/why-georgia-execute-prisoners-2016-other-state/. Before June 2018, it had been two years since the State's highest court heard a direct appeal from a death case. Bill Rankin, *Death Sentences becoming Increasingly rare in Georgia*, ATLANTA J. CONST. (June 4, 2018), https://www.myajc.com/news/crime--law/death-sentences-becoming-increasingly-rare-georgia/Bm66HgMVnZI7lP2xDbTGzL/.

2. *See* Ga. Sup. Ct. R. 37.

3. "Unless otherwise provided by law, the Supreme Court shall have appellate jurisdiction of . . . [a]ll cases in which a sentence of death was imposed or could be imposed." GA. CONST. art. VI, § 6, para. 3; *see also* Neal v. State, 290 Ga. 563, 567, 722 S.E.2d 765, 770 (2012) (stating that the Georgia Supreme Court has direct appellate jurisdiction in murder cases, irrespective of penalty sought or imposed).

4. *See* GA. CONST. art. VI, § 6, para. 3(4).

has returned a sentence of death since 2014.[5] Other cases in which death was noticed but did not proceed to a jury trial have pleaded out before a verdict is returned, and Georgia has only a very limited right to appeal from pleas of guilty.[6] Likewise, a case resolved in a guilty plea often obviates the need for an interim appeal.

It seems useful, however—despite the relative dearth of reported opinions in capital cases—to examine what decisions there are, no matter how small the *n*. What cases have reached the Georgia Supreme Court, and what themes or patterns emerge in opinions reported over the past year? From June 1, 2017 through May 31, 2018, the Georgia Supreme Court has considered several cases that raised issues peculiar to the death penalty (or that triggered procedures unique to capital cases). *White v. State*[7] was a case in which death was noticed but was resolved in a guilty plea.[8] *Moore v. State*[9] was an older conviction traveling once again through the appellate system to a post-conviction challenge.[10] *Gary v. State*[11] and *Butts v. State*[12] were cases in which the court reviewed pending execution warrants.[13] However, during the last year, the Georgia Supreme Court did not consider a case involving both a conviction and sentence of death; it is unclear whether this is part of a trend, but this may have been unthinkable a decade ago.

5. Blau, *supra* note 1; *see also* Crime and Justice News, *Death Penalty Is Becoming Rare in Georgia*, THE CRIME REPORT (June 5, 2018), https://thecrimereport.org/2018/06/05/death-penalty-is-becoming-rare-in-georgia/.

6. A defendant may only appeal directly from a plea of guilty if the issue can be resolved by facts appearing in the record. *See* Barnes v. State, 291 Ga. 831, 732 S.E.2d 752 (2012); Smith v. State, 287 Ga. 391, 697 S.E.2d 177 (2010); Childs v. State, 311 Ga. App. 891, 717 S.E.2d 509 (2011); Shelton v. State, 307 Ga. App. 599, 705 S.E.2d 699 (2011); Belcher v. State, 304 Ga. App. 645, 697 S.E.2d 300 (2010). Further, an untimely request for direct appeal of a guilty plea may be considered only if counsel's error caused the appeal's untimeliness, *Belcher*, 304 Ga. App. at 646, 697 S.E.2d at 302, or if the defendant's right to appeal was frustrated by the trial court's failure to inform the defendant of his right to appeal. Carter v. Johnson, 278 Ga. 202, 205, 599 S.E.2d 170, 173 (2004).

7. 302 Ga. 315, 806 S.E.2d 489 (2017).

8. *Id.* at 315–16, 806 S.E.2d at 490.

9. 303 Ga. 743, 814 S.E.2d 676 (2018).

10. *Id.* at 743–44, 814 S.E.2d at 677.

11. 260 Ga. 38, 389 S.E.2d 218 (1990); *3/15/18—State's High Court Dismisses Gary's Motion for Stay*, SUP. CT. OF GA, https://www.gasupreme.us/dismisses-garys-motion-for-stay/ (last visited Sept. 20, 2018).

12. 273 Ga. 760, 546 S.E.2d 472 (2001); *5/4/18—Butts Denied Stay of Execution*, SUP. CT. OF GA., https://www.gasupreme.us/butts-denied-stay-of-execution/ (last visited Sept. 20, 2018).

13. SUP. CT. OF GA., *supra* notes 11–12.

I. CAPITAL CASES HEARD ON INTERLOCUTORY REVIEW

In *Putnal v. State*,[14] which reached the Georgia Supreme Court on interlocutory review, the defendant raised a number of issues related to his due process rights to *ex parte* requests for a mental health expert.[15] Putnal had been charged with a number of crimes related to the death of a minor child, and the State had filed a notice of intention to seek death. Represented by counsel from the Georgia Office of the Capital Defender, Putnal filed motions *ex parte* and under seal requesting mental health evaluations while incarcerated and awaiting trial. The Polk County Superior Court considered these motions and signed the proposed orders with the clerk but indicated at the time of filing the subject matter of the motions and failed to file them under seal. When the defense objected, he was granted a certificate of immediate review, and filed a request for interlocutory appeal. [16] The court accepted the case, directing the parties to address "[w]hether the trial court erred in denying Putnal's motion to proceed ex parte and under seal with regard to matters pertaining to his expert mental health investigation."[17] Following precedent well-established in *Zant v. Brantley*,[18] the court held that a defendant does have a due process right to *ex parte* communications on requests for mental health examinations and experts, and the case was remanded for a hearing on whether the defense had been prejudiced by the trial court's disclosure.[19]

Although the cases described below ultimately resolved without sentences of death, they were at some point capital cases or specifically implicate unusual procedural rules that relate to death penalty cases.

II. CAPITAL CASES ULTIMATELY RESOLVED IN GUILTY PLEAS

Moore v. State[20] is a very old case working its way back through the courts after the defendant's 1977 death sentence was vacated on federal habeas corpus review. In 2002, Moore pleaded guilty to rape and malice murder and received a sentence of life without the possibility of parole. In June 2017, Moore filed a *pro se* motion for an out-of-time appeal raising a number of claims, including that his sentence was void, that his sentence contravened public policy, and that his counsel had been

14. 303 Ga. 569, 814 S.E.2d 307 (2018).
15. *Id.* at 569, 814 S.E.2d at 308.
16. *Id.* at 569–71, 814 S.E.2d at 309–10.
17. *Id.* at 569, 814 S.E.2d at 309.
18. 261 Ga. 817, 411 S.E.2d 869 (1992).
19. *Putnal*, 303 Ga. at 582–83, 814 S.E.2d at 317–18.
20. 303 Ga. 743, 814 S.E.2d 676 (2018).

ineffective. On September 20, 2017, the Monroe County Superior Court denied the motion on the merits.[21] On October 3, 2017, Moore filed an "Amended Motion for Out of Time Appeal," and the court both denied it on the merits and rejected it as untimely filed.[22] Moore appealed to the Georgia Supreme Court, and the court declined to grant relief.[23] Citing *Parker v. Leeuwenburg*,[24] it held "Moore's attempt to amend the already adjudicated motion for out-of-time appeal was untimely and jurisdictionally improper before the trial court."[25]

Pope v. State[26] began as a death penalty case but resolved in a guilty plea without a death sentence.[27] Some six years after he was indicted for aggravated battery, malice murder, and felony murder for killing his fiancée by lighting her on fire, the defendant entered an *Alford*[28] plea to life without the possibility of parole plus twenty years in prison.[29] Shortly after his plea, the superior court filed a "Factual Support of Aggravating Circumstances Justifying Sentence of Life Without Possibility of Parole," setting forth facts and circumstances in aggravation of the murder charges.[30]

Several years after his guilty plea, Pope filed motions challenging his conviction and sentence; those motions were denied by the Bibb County Superior Court.[31] Pope appealed, and the Georgia Supreme Court reversed and remanded the lower court's order and sentence.[32] The issue hinged on the superior court's obligation to specify an aggravating circumstance at the time of sentencing: "a defendant pleading guilty in a death penalty case cannot be sentenced to life without the possibility of parole unless the sentencing court makes a specific finding of a statutory aggravating circumstance beyond a reasonable doubt, contemporaneously with the sentencing."[33]

> As to the propriety of the superior court's denial of Pope's motion to withdraw his Alford (guilty) plea and his motion for appointment of

21. *Id.* at 743–44, 814 S.E.2d at 677.
22. *Id.* at 744, 814 S.E.2d at 677.
23. *Id.* at 744, 814 S.E.2d at 677–78.
24. 300 Ga. 789, 797 S.E.2d 908 (2017).
25. *Moore*, 303 Ga. at 746, 814 S.E.2d at 678.
26. 301 Ga. 528, 801 S.E.2d 831 (2017).
27. *Id.* at 528, 801 S.E.2d at 831.
28. *See* N.C. v. Alford, 400 U.S. 25 (1970).
29. *Pope*, 301 Ga. at 528–29, 801 S.E.2d at 831.
30. *Id.* at 529, 801 S.E.2d at 831.
31. *Id.*
32. *Id.* at 528, 532, 801 S.E.2d at 831, 833.
33. *Id.* at 530, 801 S.E.2d at 832–33.

> counsel, such rulings are inextricably linked to the court's erroneous denial of Pope's motion to vacate his sentence of life in prison without the possibility of parole. The superior court denied his motion to withdraw the Alford (guilty) plea based primarily upon its finding that the motion was untimely as it was filed more than two years after Pope's sentence was imposed, and it denied his motion for appointment of counsel after finding that Pope had no right to the appointment of counsel because his motion to withdraw his plea was untimely. Because the superior court's denial of these motions was premised on timeliness in relation to sentencing, and [the supreme court] . . . determined that Pope's sentence of life without the possibility of parole was void ab initio, such motions must [now] be reconsidered.[34]

In *White v. State*,[35] the defendant pleaded guilty to felony murder and a number of other crimes. After he was sentenced to life in prison with the possibility of parole, plus a total of fifteen consecutive years, White wrote a letter requesting to withdraw his guilty plea[36] and another letter requesting conflict counsel to represent him in his motion. Some weeks later, counsel representing him in his plea withdrew from the case, new counsel filed a notice of entry, and a hearing was had on the request to withdraw the guilty plea (which had also been amended by new counsel). The trial court dismissed the motion to withdraw White's guilty plea.[37]

On appeal, the Georgia Supreme Court held the *pro se* motions to withdraw his guilty plea were "legal nullities" which could not be cured by subsequent amendments by new counsel.[38] Responding to a claim that a defendant in a capital case should be "deemed unrepresented" after sentencing, the court held that no current authority stands for the proposition that "representation of a criminal defendant, whether facing the death penalty or otherwise, terminates the moment that a judgment of conviction and sentence is entered."[39] Such a holding, the court reasoned, would "deprive defendants of the 'guiding hand of counsel,'" during stages of the proceedings when a number of decisions may still need to be made or explained.[40] As White's plea counsel had not withdrawn from his case at the time of his *pro se* letters, the *pro se* letters were properly regarded by the trial court as a nullity.[41] As subsequent

34. *Id.* at 531, 801 S.E.2d at 833.

35. 302 Ga. 315, 806 S.E.2d 489 (2017).

36. At the time he served this letter requesting to withdraw the plea, counsel who had shepherded his guilty plea were still counsel of record in his case.

37. *White*, 302 Ga. at 315–17, 806 S.E.2d at 490–91.

38. *Id.* at 319, 806 S.E.2d at 492.

39. *Id.* at 317–18, 806 S.E.2d at 491.

40. *Id.* at 318, 806 S.E.2d at 492 (quoting Powell v. Alabama, 287 U.S. 45 (1932)).

41. *Id.* at 319–20, 806 S.E.2d at 493.

counsel's amendments of letters that were null at the time of their filing occurred after the close of the term of court of White's sentencing, they too were properly dismissed.[42]

III. CAPITAL DEFENDANTS SENTENCED TO LESS THAN DEATH

In *Lewis v. State*,[43] the appellant challenged a Houston County conviction and sentence in a case that at some point had been noticed for death. In his direct appeal, he raised an issue that uncorroborated testimony of his accomplice was not sufficient to support his convictions.[44] The court held that "corroborating evidence may be circumstantial and slight, and need not be sufficient in and of itself to warrant a conviction, so long as it is independent of the accomplice's testimony and directly connects the defendant to the crime or leads to the inference of guilt."[45] Responding to other claims, the court explained that a letter in which he claimed the accomplice recanted trial testimony was rather more likely to impeach the defendant's own trial testimony, and that the defendant's sentence to life without the possibility of parole did not improperly increase the mandatory minimum sentence for the jury's verdict.[46]

Leslie v. State[47] was another Georgia Supreme Court case challenging a Houston County conviction and sentence in a case that had once been noticed for death.[48] Leslie was not sentenced to death but was convicted after a jury trial of malice murder, possession of a firearm during the commission of a crime, and possession of cocaine with intent to distribute.[49]

The Georgia Supreme Court affirmed the conviction and sentence, finding the evidence was sufficient to support the convictions and that no Fourth Amendment protection required that a letter read by jail personnel be excluded as evidence.[50] The bulk of the appellate opinion focused on the defendant's speedy trial claims, which were likewise unsuccessful.[51] Leslie was initially represented by counsel from the Houston County Public Defender's Office, which filed a speedy trial

42. *Id.* at 320, 806 S.E.2d at 493.
43. 301 Ga. 759, 804 S.E.2d 82 (2017).
44. *Id.* at 761–62, 804 S.E.2d at 85.
45. *Id.* at 761, 804 S.E.2d at 85.
46. *Id.* at 762, 765, 804 S.E.2d at 86, 88.
47. 301 Ga. 882, 804 S.E.2d 351 (2017).
48. *Id.* at 882 n.1, 804 S.E.2d at 353 n.1.
49. *Id.* at 882–83, 804 S.E.2d at 353–54.
50. *Id.* at 887, 804 S.E.2d at 356–57.
51. *Id.* at 884–87, 804 S.E.2d at 355–56.

demand. After Leslie's original indictment was dismissed, he was re-indicted, and the record reflected a conversation between the prosecutor and defense counsel indicating the State's intention to seek the death penalty. Leslie's original trial counsel withdrew the speedy trial notice and shortly thereafter new counsel from the Office of the Capital Defender entered the case. That office continued to represent Leslie for more than a year, until it was permitted to withdraw because the State had not, in that time, formally sought the death penalty. Just after a third attorney was appointed to represent Leslie, the State filed its formal notice of intention to seek the death penalty, and the counsel from the Office of the Capital Defender re-entered the case. Thereafter, counsel filed another speedy trial demand, which was denied in June 2011.[52] The Georgia Supreme Court found Leslie's arguments unpersuasive in light of the fact that none of his defense counsel asserted his right to speedy trial after the initial motion was filed shortly after his first indictment.[53] The court found that there was no bad faith on the part of the State, but rather that defense counsel had the obligation to pursue the issue diligently.[54]

The Georgia Supreme Court also decided *Franklin v. State*,[55] another case originating as a capital case but resulting in a life without parole sentence. In this appeal out of Douglas County, Tracen Franklin challenged his convictions for malice murder, felony murder, and aggravated assault. The State filed notice of its intention to seek the death penalty against Franklin, which he challenged in a pretrial motion and after his trial the jury returned guilty verdicts against him. After the same jury was deadlocked on the issue of punishment, the trial court sentenced Franklin to life without the possibility of parole.[56] Franklin challenged the trial court's rulings related to the State's pretrial notice of intent to seek the death penalty and on the insufficiency of the aggravating circumstances to support a capital sentence.[57] The Georgia Supreme Court "decline[d] to adopt the views of what appears to be a minority of states that a prosecutor's decision to pursue the death penalty is subject to pre-trial review" and held that the trial court did not err by granting the defendant's challenge to the State's listed aggravating circumstances.[58] Likewise, Franklin's challenge to the grand jury pool

52. *Id.* at 884, 804 S.E.2d at 354–55.
53. *Id.* at 886, 804 S.E.2d at 356.
54. *Id.*
55. 303 Ga. 165, 810 S.E.2d 118 (2018).
56. *Id.* at 165–66, 810 S.E.2d at 119.
57. *Id.* at 167–68, 810 S.E.2d at 120.
58. *Id.* at 169, 810 S.E.2d at 121.

due to changing demographics in Douglas County was denied.[59] His convictions and his sentence to life without the possibility of parole were both affirmed.[60]

With a sample size of only a handful of cases deciding substantive issues, it is hard to currently read any synthesis or trends into Georgia jurisprudence in capital cases. What is clear, though, is that both with interim appeals decided in cases awaiting both capital trials and in appellate challenges, the appellate review of such cases is diminishing. Whether this trend will continue remains to be seen, but for now the distinctive challenges and consideration unique to capital cases remains rare at best.

59. *Id.* at 170–71, 810 S.E.2d at 122.

60. *Id.* at 171, 810 S.E.2d at 122.