Alderman v. State: The Georgia Supreme Court Takes a Hard Look at Procedural Due Process in Murder Cases

During the April term of 1978, *Alderman v. State*[1] was brought for hearing before the Georgia Supreme Court both as a matter of appeal and under the Georgia provisions for mandatory review of the death sentence.[2] Alderman had been convicted of the murder of his wife, and sentenced to death. The jury had found the existence of statutory aggravating circumstances warranting the death penalty, in that the murder had been committed for the purpose of receiving benefits from an insurance policy on the life of the deceased, and the crime had involved an aggravated battery on the victim.[3]

In considering a number of enumerations of error, each dealing with an alleged violation of procedural due process,[4] the Georgia Supreme Court made two significant rulings. The first of these dealt with voir dire examination of prospective jurors. The court found that the alleged improper exclusion of several veniremen for cause was harmless error since the prosecution had remaining, after empaneling a jury, a sufficient number of peremptory challenges to strike these jurors. The second of these rulings dealt with testimony by a prosecution witness, that defendant had exer-

1. 241 Ga. 496, 246 S.E.2d 642, *cert. denied*, 99 S.Ct. 543 (1978).

2. GA. CODE ANN. § 27-2537(c)(1-3) (1978).

3. 241 Ga. at 497-98, 246 S.E.2d at 644.

4. A variety of other enumerations of error were discussed in this comprehensive opinion and found to be without merit, including:

(a) The trial court erred in not granting a continuance on the ground of the absence of a witness who was "subpoenaed but not served." 241 Ga. at 502-03, 246 S.E.2d at 647.

(b) The trial court erred in permitting the state to "fortify" the testimony of a key witness by reference to a polygraph test. *Id.* at 508, 246 S.E.2d at 650.

(c) The trial court erred in not granting a directed verdict on the grounds of failure to prove venue in Chatham county. *Id.* at 509, 246 S.E.2d at 650.

(d) The trial court erred in not granting a directed verdict on the ground that key witness Brown's (an admitted accomplice) testimony was uncorroborated pursuant to GA. CODE ANN. § 38-121 (1974). 241 Ga. at 509-10, 246 S.E.2d at 651.

(e) The trial court erred in failing to permit complete examination of defendant's expert witness pertaining to hypnotic treatment. *Id.* at 510-11, 246 S.E.2d at 651.

(f) The court rejected defendant's allegation that he was denied effective assistance of counsel based on several of the other enumerations. *Id.* at 511, 246 S.E.2d at 651-52. *See* MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), Pitts v. Glass, 231 Ga. 638, 203 S.E.2d 515 (1974).

(g) The court rejected defendant's plea that the death penalty was unconstitutional, *citing* Gregg v. Georgia, 428 U.S. 153 (1976) (Upholding validity of Georgia's death penalty statute). 241 Ga. at 511-12, 246 S.E.2d at 652.

cised his right to remain silent and had requested the presence of an attorney during questioning by police. The court found not only that the defendant had waived objections to the testimony by failing to make a contemporaneous objection during trial, but also that the testimony did not violate any due process right. The court further found that even if the testimony were deemed improper, its admission was harmless error beyond a reasonable doubt because the prosecution had not "focused on" or "highlighted" the defendant's silence.

I. IMPROPER EXCLUSION OF VENIREMEN

During individual voir dire, three prospective jurors stated that they were not "conscientiously opposed to capital punishment."[5] The prosecutor then asked each venireman whether, if elected to serve as foreman of the jury, he could follow the instructions of the court by signing the death sentence. Each responded that he could not write out the death verdict. The court, over appellant's objections, excused these three veniremen for cause. After empaneling the twelfth juror, the state had three peremptory challenges remaining.[6]

Alderman's contention on appeal was that the exclusion of these three jurors for cause was a violation of the principles of *Witherspoon v. Illinois.*[7] *Witherspoon,* a case decided by the U.S. Supreme Court in 1968, extended to those cases involving the death sentence, the Court's previous rulings that it is essential to a criminal defendant's right to a jury trial that the jury empaneled represent a fair cross-section of the community.[8] The Court specifically held:

> [A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.[9]

The Court further stated: "Unless a venireman states unambiguously that

5. 241 Ga. at 499, 246 S.E.2d at 645.

6. *Id.* at 499-500, 246 S.E.2d at 645-46.

7. 391 U.S. 510 (1968).

8. The U.S. Supreme Court has consistently so held. This issue initially arose in regard to the systematic exclusion of blacks from grand juries, an act which was held to be violative of the equal protection clause of the fourteenth amendment. Smith v. Texas, 311 U.S. 128, 130 (1940). A 1967 Supreme Court case, *Whitus v. Georgia,* 385 U.S. 545 (1967), reversed a conviction where it was shown that the taxpayer list, from which the grand jury list was drawn, indicated the taxpayer's race. The trend continues to the present with the newly placed emphasis on women's rights, as represented by *Taylor v. Louisiana,* 419 U.S. 522 (1975). In *Taylor,* a conviction was overturned where the practical effect of the state's jury selection process was the exclusion of women.

9. 391 U.S. at 522-23 (footnotes omitted). *See also* 391 U.S. at 515-16 n.9.

he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position."[10]

The underlying principles of *Witherspoon* are that the jury is generally given discretion in determining "whether or not death *is* 'the proper penalty' in a given case,"[11] and that a jury composed exclusively of veniremen who support capital punishment cannot possibly speak for the community's conscience.[12]

Neither the U.S. Supreme Court nor the Georgia Supreme Court has specifically dealt with the issue of whether a death sentence may be upheld when the prosecution has remaining a sufficient number of peremptory challenges to strike those veniremen alleged to have been improperly excluded for cause.[13] However, the majority in *Alderman* cited Justice Rehnquist's dissent in *Davis v. Georgia*[14] for the proposition that *Witherspoon* did not decide the effect of unexercised peremptory challenges on the improper exclusion of a limited number of veniremen.[15] In *Davis,* the Georgia Supreme Court found that the exclusion of one of the prospective jurors for cause was in violation of *Witherspoon,* but had sustained the conviction because there was no evidence of a systematic and intentional exclusion of qualified jurors which would have denied Davis a jury composed of a fair cross-section of the community.[16] The U.S. Supreme Court, summarily reversing the Georgia court, ruled that the imposition of the death penalty where the venireman had been improperly excluded could not stand.[17]

---

10. *Id.* at 515-16 n.9.

11. *Id.* at 519 (emphasis in original).

12. *Id.* at 520. *Witherspoon* has been applied where voir dire questions did not clearly evoke a response of unequivocal opposition to capital punishment. *See* Boulden v. Holman, 394 U.S. 478, 482-83 (1969) (Judgment vacated and case remanded where eleven veniremen were excluded for cause because they responded affirmatively when asked whether they had a "fixed opinion against capital punishment"). *See also* Maxwell v. Bishop, 398 U.S. 262 (1970) (Judgments vacated and remanded for a finding on the *Witherspoon* issue.)

13. 241 Ga. at 501, 502, 246 S.E.2d at 646, 647.

14. 429 U.S. 122 (1976).

15. 241 Ga. at 502, 246 S.E.2d at 647, *citing* 429 U.S. at 124. The court's use of Justice Rehnquist's dissent in *Davis* creates some conflict in the *Alderman* opinion. Justice Rehnquist stated that the majority in *Davis* created a per se rule which precludes a finding of harmless error where a *Witherspoon* violation is present. 429 U.S. at 123-24. Also, in criticizing the *Davis* majority, Justice Rehnquist wrote: "[S]urely *Witherspoon* does not decide whether the presence of unexercised peremptory challenges might render harmless the improper exclusion of a limited number of verniremen." *Id.* at 124. Thus, the majority in *Alderman* can cite Justice Rehnquist's dissent for the proposition that the effect of peremptory challenges on *Witherspoon* is an open question, while the dissent in *Alderman* can cite Justice Rehnquist's dissent for the proposition that a finding of harmless error is precluded where a *Witherspoon* violation is present.

16. State v. Davis, 236 Ga. 804, 809-10, 225 S.E.2d 241, 244-45 (1976).

17. 429 U.S. at 123.

To a certain extent, the court in *Alderman* sidestepped the issue of a *Witherspoon* violation by finding that, because the state had remaining three unused peremptory challenges, any possible error was harmless.[18] The court based this finding on what it saw to be sound trial tactics. In examining the voir dire record from the court below, the supreme court found a specific example of a venireman wavering on the issue of capital punishment.[19] After the state's challenge for cause had been denied by the trial court, the state had used one of its peremptory challenges to strike the venireman from the panel.[20] The Georgia Supreme Court said that "[i]n reaching a decision in this case, we are persuaded by the state's contention that it would be folly for an attorney to unsuccessfully challenge for cause and then fail to utilize an available peremptory challenge in order to strike the juror from the panel."[21]

The court thus found that the state would have exercised its three remaining peremptory challenges had the lower court denied the state's motion to remove the jurors for cause. Indeed, the court saw this as the reasonable course for the state to take had its motion been denied. Therefore, the exclusion was harmless error.

In regard to the proper standard to be applied in determining when an error denying a constitutional right would be held harmless, the court cited, without elaboration, *Chapman v. California,*[22] in which the U.S. Supreme Court formulated the rule that the court considering the error "must be able to declare a belief that it was harmless beyond a reasonable doubt."[23] The result which the Georgia Supreme Court arrived at is that, where the state has unused peremptory challenges equal to the number of veniremen allegedly or actually improperly excluded, it is harmless error beyond a reasonable doubt.

Justice Hill, dissenting in *Alderman,*[24] quoted *Davis v. Georgia,* in which the U.S. Supreme Court wrote:

> Unless a venireman is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings," he cannot be excluded; if a venireman is improperly excluded even though

18. 241 Ga. at 502, 246 S.E.2d at 647.

19. *Id.*

20. *Id.*

21. *Id.*

22. 386 U.S. 18 (1967).

23. 386 U.S. at 24. Justice Douglas found this standard adhered to the meaning of the rule formulated in Fahy v. Connecticut, 375 U.S. 85 (1963), that the inquiring court must determine "whether there is a reasonable possibility that the evidence complained of might have contributed to the verdict obtained."

24. Justice Hall also wrote a separate opinion in which he dissented from the majority's decision on the *Witherspoon* issue, though he concurred with the majority on the *Miranda-Doyle* issue. 241 Ga. at 513, 246 S.E.2d at 652-53.

> not so committed, any subsequently imposed death penalty cannot stand.[25]

Justice Hill, reading this rather emphatic language as precluding a finding of harmless error in the presence of a *Witherspoon* violation, noted that the *Davis* opinion uses language similar to that of *In Re Anderson,* in which the California Supreme Court refused to "engage in conjecture that the prosecutor would have used his peremptory challenges to excuse all such jurors."[27] Justice Hill reads *Davis* as approving the California Supreme Court's analysis of the effect of peremptory challenges on a *Witherspoon* violation.[28]

In bolstering his position that a finding of harmless error is precluded where a *Witherspoon* violation is found, Justice Hill cited *Harris v. Texas,*[29] which summarily reversed, without opinion, the death penalty verdict where one juror had been improperly excluded, although the state had four unused peremptory challenges. Relying on these decisions, Justice Hill disagreed with the majority's finding that the impact of unexercised peremptory challenges equal to the number of *Witherspoon* violations is an open question, and would reverse the death sentance of defendant Alderman.

II. Allowance of Testimony Concerning Defendant's Silence

The second enumeration of error to be considered concerns the testimony of a GBI agent who revealed to the jury that Alderman had exercised his right to an attorney and had remained silent during questioning by police. This information came out during the direct examination of the GBI agent by the prosecution. The testimony concerned an interview the agent had with Alderman in the sherriff's office after Alderman had identified the body of the deceased at the Effington County Hospital. After the prosecution elicited testimony that the defendant was not under arrest when the interview began, the prosecutor asked whether the GBI agent had questioned Alderman about the blood stains on his trousers. The GBI agent responded that he had not, because:

> toward the end of the interview, he [defendant] sort of became frustrated with the nature of the questions being asked him, *and he decided at that time he would exercise his right to an attorney, and so at that time the interview was just terminated when he stated that he wished to remain silent. He was asked no questions regarding the stains.*[30]

25. 429 U.S. at 123, *quoted in* 241 Ga. at 517, 246 S.E.2d at 654-55.
26. 69 Cal. 2d 613, 447 P.2d 117, 73 Cal. Rptr. 21 (1968), *cert. denied,* 406 U.S. 971 (1972).
27. *Id.* at ___, 447 P.2d at 122, 73 Cal. Rptr. at 26.
28. 241 Ga. at 517, 246 S.E.2d 655.
29. 403 U.S. 947 (1971).
30. 241 Ga. at 503-04, 246 S.E.2d at 648. (Emphasis supplied by the court).

Defendant's counsel, at no time during the trial, made any objections regarding this testimony.

The court, in deciding this question, surveyed the constitutional development of a defendant's right to silence from *Miranda v. Arizona,*[31] to *Doyle v. Ohio.*[32] The underlying problem faced by the U.S.Supreme Court in *Miranda* was how a court could realistically know the voluntariness of confessions and declarations against interest made when the accused is held incommunicado.[33] The Court's solution was to prohibit the prosecution from using defendant's statements (unless there is a showing of the use of procedural safeguards to protect the accused's rights) when the statements resulted from "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[34]

In *United States v. Hale,*[35] the Court was presented with the question of whether a defendant's silence might be used at trial to impeach his testimony. The Court found that the probative value of the evidence was outweighed by the prejudice to defendant because silence is so ambiguous as to be of slight probative value.[36]

One year leater, in *Doyle v. Ohio,* the U.S. Supreme Court held that the use for impeachment purposes of petitioner's silence at the time of arrest and after receiving *Miranda* warnings would violate the due process clause of the Fourteenth Amendment. *Doyle* used the *Hale* rationale, but expanded its impact by finding it fundamentally unfair to the defendant to use for impeachment purposes his silence in the face of *Miranda* warnings.[37]

The court in *Alderman,* while analyzing defendant's enumeration, noted initially that his counsel never objected at trial to the district attorney's question or to the GBI agent's response which referred to the defendant's silence.[38] This failure to object below constituted a waiver of the objection under Georgia law.[39] The contemporaneous objection rule has been upheld

31. 384 U.S. 436 (1966). *Miranda*'s impact on the American criminal justice system has been profound. The basis for *Miranda* is found in the Bill Of Rights guarantees of the right to assistance of counsel and the right not to incriminate one's self. 384 U.S. at 442; *See* U.S. CONST. amends. V, VI.

32. 426 U.S. 610 (1976).

33. 384 U.S. at 445.

34. *Id.* at 444.

35. 422 U.S. 171 (1975).

36. *Id.* at 180.

37. 426 U.S. at 619.

38. 241 Ga. at 504, 246 S.E.2d at 648.

39. GA. CODE ANN. § 24-3362 Rule 62. "All grounds of Motion for nonsuit, in arrest of judgment, for continuance, all objections to testimony, and all exceptions to Petitions must be urged and insisted upon at once. After a decision upon one or more grounds, no others afterwards urged shall be heard by the Court." *See, e.g.,* Reeves v. State, 241 Ga. 44 (1978) (Failure to object at trial results in waiver).

by the U.S. Supreme Court in *Wainwright v. Sykes,*[40] on the grounds of according adequate respect to the coordinate judicial branch,[41] encouraging finality of judgment in the criminal justice system,[42] and discouraging intentional "sandbagging" by defendants who would gamble on a favorable jury verdict and then raise the objection on appeal.[43]

While the court primarily based its holding on Alderman's failure to satisfy the contemporaneous objection rule, it said that even if this enumeration of error were to be considered on the merits, a reversal of Alderman's conviction would not be required.[44] The court found that at the time Alderman had exercised his right to remain silent and had requested the presence of an attorney, he had not yet been subjected to "custodial interrogation." Thus, *Miranda* did not come into play. The GBI agent's testimony intimated to the court that the defendant was not a suspect until after he had exercised his right to remain silent, and the blood stains had been noticed on his clothes.[45] "Anything said prior to appellant's being taken into custody would be admissible even in the absence of *Miranda* warnings."[46] The majority distinguished *Doyle* and *Hale* on this basis, and on the fact that *Doyle* and *Hale* dealt with the prosecutor's intentional use of a defendant's silence for impeachment.[47]

Not satisfied with two bases for its ruling, the court further held that, even assuming a violation of *Doyle,* such violation was harmless error beyond a reasonable doubt. Relying on *United States v. Davis,*[48] the court found that a violation of *Doyle* would be harmless where the prosecution did not "highlight" or "focus on" a defendant's silence.[49] The court noted that there was only one reference to the defendant's silence: a spontaneous remark of a witness, not a remark deliberately elicited by the prosecutor.

In dissent, Justice Hill suggested that the majority's comprehensive analysis of this issue was aimed at deterring federal review by offering alternative reasons for its holding, and at the same time was aimed at precluding state habeas review by holding that the constitutional questions were already decided.[50] Noting that the Georgia habeas corpus stat-

40. 433 U.S. 72 (1977).

41. *Id.* at 88. The court rejected the broad language of Fay v. Noia, 372 U.S. 391 (1963), "which would make federal habeas review generally available to state convicts absent a knowing and deliberate waiver of the federal constitutional contention." 433 U.S at 87.

42. 433 U.S. at 88.

43. *Id.* at 89.

44. 241 Ga. at 504-06, 246 S.E.2d at)48-49.

45. *Id.* at 506 n.5, 246 S.E.2d at 649 n.5.

46. *Id.*

47. *Id.* at 505, 246 S.E.2d at 649.

48. 546 F.2d 583 (5th Cir. 1977).

49. 241 Ga. at 507, 246 S.E.2d at 649.

50. 241 Ga. at 516, 246 S.E.2d at 654. Justice Hill's reasoning is that the federal courts would not review the constitutional question raised by a potential *Doyle* violation in deference to the state statute that objections are waived by a defendant failing to contemporaneously

ute does not allow constitutional rights to be waived without a showing of knowing waiver,[51] Justice Hill observed that the *Alderman* decision would make habeas corpus proceedings more attractive than the normal appeals process.[52]

Looking then to the facts, Justice Hill implied that the interview, in which the right to remain silent was exercised, at some point crossed the threshold of a "custodial interrogation," bringing *Miranda* and *Doyle* protections into play. Justice Hill placed emphasis on the fact that the defendant became frustrated with the questions being asked him, and on the absence of any detail in the record concerning when the GBI agent read the defendant his *Miranda* rights or effected an arrest. Thus, in Justice Hill's view, the majority's distinction based on the absence of custodial interrogation is error because it amounts to speculation on facts not in the record.[53]

Justice Hill felt that the use of the defendant's silence was impermissible regardless of intention or how little it was emphasized, because it set before the jury evidence of little probative value, yet of a highly prejudicial nature.[54]

III. CONCLUSION

In analyzing the courts decision in *Alderman,* it is necessary to infer several of the steps taken by the court in reaching its conclusion. This is most evident in the court's failure to discuss *Chapman v. California.* In both of the defendant's enumerations discussed in this note, the majority found that any possible error was harmless, citing *Chapman,* and yet there was no elaboration on the precise standard set by *Chapman.*

In regard to the disposition of Alderman's first enumeration of error, that the exclusion of the three jurors was harmless error, if error at all, because of the presence of an equal number of unused peremptory challenges on the part of the prosecution, the weakness of the Georgia Supreme Court's ruling is twofold.

The first weakness lies in the majority's analysis of *Davis v. Georgia.* A strict reading of *Davis* indicates that where a venireman is improperly excluded, the death penalty cannot stand. The implication in *Davis* is that the severity and finality of the death sentence demands a properly empaneled jury, thus precluding a finding of harmless error. Indeed, this weak-

object. By having gone on to find any violation of *Doyle* to be harmless, the Georgia Supreme Court may later say to Alderman that state habeas corpus relief is not available because the constitutional questions have already been answered.

51. GA. CODE ANN. § 50-127(1) (1977).

52. 241 Ga. at 516, 246 S.E.2d at 654.

53. *Id.* at 514-15, 246 S.E.2d at 653.

54. *Id.* at 515, 246 S.E.2d at 654.

ness is one which was pointed out by Justice Hill in his dissent in *Alderman.*

The second area of weakness concerns the standard for finding harmless error when there is a claim of a constitutional right being denied. *Chapman v. California* requires belief that the error is harmless beyond a reasonable doubt; therefore in *Alderman,* the court must believe *beyond a reasonable doubt* that the prosecutor would have used his last peremptory challenges to strike those jurors who were improperly removed for cause. Speculation on what the prosecutor would have done based on one instance where the prosecutor did use a peremptory challenge lacks the certainty required to meet the high standard set by *Chapman.*

Refusing to speculate was the approach taken by the California Supreme Court in *In Re Anderson,* which the U.S. Supreme Court also refused to review. Because of this obvious conflict in jurisdictions, the effect of remaining peremptory challenges on possible *Witherspoon* violations is fast becoming ripe for U.S. Supreme Court adjudication.

Since the *Alderman* decision, the Georgia Supreme Court has twice cited it for the principle that any possible *Witherspoon* violation is harmless where the prosecutor has sufficient peremptory challenges remaining to exclude the alleged violations.[55] In the most recent decision, *Jones v. State,*[56] the Georgia Supreme Court affirmed a murder conviction death penalty sentence because the state *could* have used its remaining challenges to remove the prospective jurors who were improperly excluded.[57] The implication is that in the future, the court need not look for specific instances where a prosecutor *did* use a peremptory challenge to dismiss a venireman after a challenge for cause was denied.

With the Georgia Supreme Court's approach to *Witherspoon,* it behooves the prosecutor seeking a death sentence to always challenge for cause veniremen equivocal about capital punishment, and to attempt to conserve peremptory challenges. Where there are a number of peremptory challenges remaining to the state, a defendant's reliance on *Witherspoon* will be for the most part foreclosed. The defense counsel wanting to preserve a potential *Witherspoon* appeal should seek to tactically emphasize *Witherspoon's* mandate from the beginning of voir dire and insure a perfected record with a specific contemporaneous objection.

In the last analysis, it is impossible to balance court time and the state's expense of another trial against the value of a human life. The Georgia Supreme Court should have determined clearly whether a violation of *Witherspoon* had occurred. If a venireman was found to have been improperly excluded, Alderman's death sentence should have been overturned.

55. Ruffin v. State, 243 Ga. 95, 252 S.E.2d 472 (1979); and Jones v. State, 243 Ga. 820, 256 S.E.2d 907 (1979).

56. 243 Ga. 820, 256 S.E.2d 907.

57. *Id.* at 822, 256 S.E.2d at 910.

Alderman lost his *Miranda-Doyle* enumeration when counsel failed to make a contemporaneous objection after the "silence" of the defendant was brought to the jury's attention. Despite this waiver by failing to object, the court held that there was no *Miranda-Doyle* violation anyway. This was based on the court's finding of no "custodial interrogation" at the point defendant exercised his right to silence. As pointed out in Justice Hill's dissent, the questions in Alderman's interview with the GBI agent were frustrating enough for the defendant to end the interview and request a lawyer.

Interestingly, the majority went further to find that even if there was a violation of *Miranda-Doyle,* it was harmless error since the prosecution did not "focus on" or "highlight" that silence. It is the finding of harmless error after pointing out several reasons to deny Alderman's enumeration that is the significant extra step for the Georgia Supreme Court. While it is extremely unlikely that any prosecutor would purposefully allow a defendant's silence to come out at trial, because of the ethical considerations involved as well as the risk of reversal, a criminal defendant's *Miranda-Doyle* right to silence is to an extent being limited. Appellate decisions should be studied to see whether other cases will use the *Alderman v. State* rule that defendant's silence is harmless where the prosecution does not "focus on" or "highlight" that silence.

One thing is made clear from a reading of *Alderman v. State.* The Georgia Supreme Court is taking a hard look at due process defenses which would tend to overturn murder and death sentence convictions in this state.

CHARLES A. WILEY, JR.