Death Penalty Law

by Therese Michelle Day*

This Article provides a survey of death penalty case law in Georgia from June 1, 2008 through May 31, 2009.[1] The cases included in this Survey were decided by the Georgia Supreme Court on interim appeal and direct appeal,[2] and in one instance, on denial of certiorari by the United States Supreme Court. Discussion is limited to claims that present new issues of law, refine existing law, or are otherwise instructive.

I. INTERIM REVIEW CASES

The Georgia Supreme Court reviewed five cases[3] pursuant to interim appellate review of death penalty cases under the Unified Appeal Procedure.

In *Fair v. State*,[4] Antron Dawayne Fair and Damon Antwon Jolly were charged with the murder of a Bibb County deputy, Joseph Whitehead; and the State filed notice of its intention to seek the death

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1. For analysis of Georgia death penalty law during the prior survey period, see Therese M. Day, *Death Penalty Law, Annual Survey of Georgia Law*, 60 MERCER L. REV. 105 (2008).

2. Due to space restrictions, four state habeas cases have been omitted: *Hall v. McPherson*, 284 Ga. 219, 663 S.E.2d 659 (2008); *Schofield v. Cook*, 284 Ga. 240, 663 S.E.2d 221 (2008); *Whatley v. Terry*, 284 Ga. 555, 668 S.E.2d 651 (2008); and *Hall v. Brannan*, 284 Ga. 716, 670 S.E.2d 87 (2008).

3. *Reaves v. State*, 284 Ga. 181, 664 S.E.2d 211 (2008), and *Reaves v. State*, 284 Ga. 236, 664 S.E.2d 207 (2008), have been omitted because they are not instructive.

4. 284 Ga. 165, 664 S.E.2d 227 (2008). Fair's case number is S08A0426, and Jolly's is S08A0427. *Id.*

penalty.[5] The supreme court granted the defendants' applications for interim review and directed the parties to address three issues.[6]

The court first addressed whether the trial court erred in denying the defendants' pretrial motions requesting immunity from prosecution pursuant to section 16-3-24.2 of the Official Code of Georgia Annotated (O.C.G.A.),[7] which provides: "A person who uses threats or force [in defense of habitation or other personal or real property] shall be immune from criminal prosecution . . . ."[8] Jolly and Fair filed motions to dismiss their indictments, arguing they were immune from prosecution pursuant to this code section. After considering the matter during a pretrial hearing, the trial court reserved its ruling until the conclusion of the evidence at trial and prior to the jury charge. Fair and Jolly argued that pursuant to the statute, the issue must be decided prior to trial. The State conceded this issue and both parties filed motions to reconsider. The trial court denied the motions.[9]

The supreme court noted that although the construction of O.C.G.A. § 16-3-24.2 was an issue of first impression, the issue of immunity from prosecution had been correctly decided in *Boggs v. State*[10] by the Georgia Court of Appeals.[11] In *Boggs* the court of appeals examined the plain language of the statute and held that criminal proceedings are barred against persons using force pursuant to the circumstances within O.C.G.A. § 16-3-23 and O.C.G.A. § 16-3-24.[12] The court of appeals also determined that because O.C.G.A. § 16-3-24.2 provides that "such person[s] 'shall be immune from criminal prosecution,'" a trial court is required to make immunity determinations prior to trial.[13] Deciding that the issue had been correctly analyzed in *Boggs*, the supreme court held that the trial court erred in refusing to make a pretrial determination of immunity from prosecution.[14]

The court next addressed whether, under O.C.G.A. § 17-10-30(b)(8),[15] the trial court erred in denying the defendants' motions to have the jury

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5. *Id.* at 165, 664 S.E.2d at 229–30.
6. *Id.*, 664 S.E.2d at 230.
7. O.C.G.A. § 16-3-24.2 (2007).
8. *Id.*; *see also* O.C.G.A. § 16-3-23 (2007) (authorizing the use of force in defense of habitation); O.C.G.A. § 16-3-24 (2007) (authorizing the use of force in defense of property other than habitation).
9. *Fair*, 284 Ga. at 165, 664 S.E.2d at 230.
10. 261 Ga. App. 104, 581 S.E.2d 722 (2003).
11. *Fair*, 284 Ga. at 166, 664 S.E.2d at 230.
12. *Boggs*, 261 Ga. App. at 106, 581 S.E.2d at 723; *see also supra* note 8.
13. *Id.* (quoting O.C.G.A. § 16-3-24.2).
14. *Fair*, 284 Ga. at 166, 664 S.E.2d at 230.
15. O.C.G.A. § 17-10-30(b)(8) (2008).

charged regarding an alleged scienter element within one of the statutory aggravating circumstances.[16] This statute provides for an aggravating circumstance when "[t]he offense of murder was committed against any peace officer, corrections employee, or firefighter while engaged in the performance of his official duties."[17]

The supreme court noted that both Fair and Jolly were indicted on one count of malice murder and three counts of felony murder, predicated on, inter alia, the felony of aggravated assault.[18] The court directed the parties to address whether the trial court erred in refusing to give the victim-status scienter instruction during the sentencing phase of the trial.[19] However, Fair and Jolly made an additional argument. They argued that the State had to prove, during the merits phase of the trial and beyond a reasonable doubt, that they knew the victim was a police officer engaged in the performance of his duties at the time they shot him. Fair and Jolly's argument stemmed from the indictment, which included the victim's name and his title as a police officer.[20] Fair and Jolly made this argument even though they conceded the predicate offense for felony murder was aggravated assault pursuant to O.C.G.A. § 16-5-21(a)[21] and not aggravated assault upon a peace officer pursuant to O.C.G.A. § 16-5-21(c).[22] The court relied upon established law distinguishing between material and non-material information within an indictment, reasoning that "[t]he identification of the victim as a law enforcement officer by appending 'Bibb County Sheriff's Deputy' to his name describes neither the offenses charged nor the manner in which they were committed."[23] Therefore, the court held that the trial court properly denied the accused's motions requesting a jury instruction on scienter during the merits phase of the trial.[24]

The court next addressed whether the O.C.G.A. § 17-10-30(b)(8) aggravating circumstance required the State to prove beyond a reasonable doubt that Fair and Jolly knew the victim was a peace officer engaged in his official duties.[25] Fair and Jolly argued that a scienter element is implicit in the statute despite the fact that the statute is silent regarding the accused's knowledge of the officer's status. The

16. *Fair*, 284 Ga. at 165, 664 S.E.2d at 230.
17. O.C.G.A. § 17-10-30(b)(8).
18. *Fair*, 284 Ga. at 166, 664 S.E.2d at 230.
19. *Id.* at 167, 664 S.E.2d at 231.
20. *Id.*
21. O.C.G.A. § 16-5-21(a) (2007).
22. O.C.G.A. § 16-5-21(c) (2007); *Fair*, 284 Ga. at 167–68, 664 S.E.2d at 231.
23. *Fair*, 284 Ga. at 167, 664 S.E.2d at 231.
24. *Id.*
25. *Id.* (citing O.C.G.A. § 17-10-30(b)(8)).

State countered, arguing that because the statute fails to include the word *knowingly*, there should be no requirement that the defendants knew the victim was a peace officer.[26] The court noted that the matter was an issue of statutory construction, which required the court "to glean the intent of the legislature."[27]

The court acknowledged that the word *knowingly* is included in the criminal statute defining aggravated assault against a peace officer as well as in the criminal statute defining aggravated battery against a peace officer.[28] Furthermore, both crimes have been construed by the state appellate courts to require a scienter element including the victim's status as a police officer.[29] The court also emphasized the significance of the fact that the Georgia General Assembly adopted these statutes subsequent to the adoption of the revised death penalty statute, which included the O.C.G.A. § 17-10-30(b)(8) aggravating circumstance without a knowledge requirement.[30] Moreover, the court noted that the O.C.G.A. § 17-10-30(b)(3)[31] aggravating circumstance, which was enacted simultaneously with O.C.G.A. § 17-10-30(b)(8),[32] has a scienter requirement.[33] The court reasoned that the statutory history indicated the General Assembly knew how to apply the scienter element, and the court concluded that it "'must presume that its failure to do so was a matter of considered choice.'"[34] The court also recognized the distinction between a crime resulting in injury and a crime resulting in death and reasoned that it was "logical to conclude that the General Assembly purposely made such a distinction."[35] The court noted that in cases like the present one, "'the offender takes his victim as he finds him.'"[36] Accordingly, the court held that the O.C.G.A. § 17-10-30(b)(8) statutory aggravating circumstance does not require the defendant to know "that the victim was a peace officer or other designated official engaged in the

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26. *Id.* at 168, 664 S.E.2d at 231.
27. *Id.* at 167–68, 664 S.E.2d at 231.
28. *Id.* at 168, 664 S.E.2d at 231 (citing O.C.G.A. §§ 16-5-21(c), -24(c)).
29. *Id.*
30. *Id.*, 664 S.E.2d at 232 (citing 1973 Ga. Laws 159, 163–65).
31. O.C.G.A. § 17-10-30(b)(3) (2008).
32. *See* 1973 Ga. Laws at 164–65.
33. *Fair*, 284 Ga. at 168, 664 S.E.2d at 232. There is an aggravating circumstance under O.C.G.A. § 17-10-30(b)(3) when "[t]he offender, by his act of murder, armed robbery, or kidnapping, *knowingly* created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person." O.C.G.A. § 17-10-30(b)(3) (emphasis added).
34. *Fair*, 284 Ga. at 168, 664 S.E.2d at 232 (quoting Inland Paperboard & Packaging, Inc. v. Ga. Dep't of Revenue, 274 Ga. App. 101, 104, 616 S.E.2d 873, 876 (2005)).
35. *Id.* at 169, 664 S.E.2d at 232.
36. *Id.* (quoting United States v. Feola, 420 U.S. 671, 685 (1975)).

performance of his duties."[37] Therefore, the supreme court held that the trial court did not err when it denied the defendants' requests for a jury instruction on scienter during the penalty phase of the trial.[38]

The final issue the court reviewed related solely to Fair and addressed whether the trial court erred when it denied his motion to suppress evidence.[39] The evidence produced at trial was the product of a no-knock search warrant that authorized a search "for evidence of the crime of Violation of Georgia Controlled Substance[s] Act."[40] Fair first contended that the warrant was void for failing "to state with sufficient particularity the things to be seized."[41] The court stated that for a warrant to be valid, it must provide a description of items that "is sufficient to enable a prudent officer executing the warrant to locate it definitely and with reasonable certainty."[42] The court noted that "'the degree of the description's specificity is flexible and will vary with the circumstances involved.'"[43] Moreover, the court reasoned that "several jurisdictions have held that [m]ore specificity is not required by the Constitution where items to be seized [are] limited to those relating to the smuggling, packing, distribution and use of controlled substances."[44] Accordingly, the court held that the evidence to be seized in Fair's case was "sufficiently described" such that the officers could locate the evidence "'definitely and with reasonable certainty.'"[45]

Fair next argued that the warrant lacked probable cause because the warrant's affidavit relied upon information from a concerned citizen as well as two sources that were of questionable reliability and veracity.[46] The court noted that although the trial court disregarded the information from Source Two as unreliable and stale, the information provided by the concerned citizen and Source One "still provided the magistrate with a substantial basis for finding probable cause."[47] The court

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37. *Id.* at 170, 664 S.E.2d at 233.

38. *Id.*

39. *Id.* at 171, 664 S.E.2d at 233.

40. *Id.* at 170, 664 S.E.2d at 233 (alteration in original) (emphasis and internal quotation marks omitted). The Georgia Controlled Substances Act can be found at O.C.G.A. §§ 16-13-20 to -56 (2007 & Supp. 2009).

41. *Fair*, 284 Ga. at 170, 664 S.E.2d at 233.

42. *Id.* (internal quotation marks omitted) (quoting Bishop v. State, 271 Ga. 291, 294, 519 S.E.2d 206, 209 (1999)).

43. *Id.* (quoting Dobbins v. State, 262 Ga. 161, 164, 415 S.E.2d 168, 171 (1992)).

44. *Id.* (alterations in original) (internal quotation marks omitted) (quoting United States v. Ladd, 704 F.2d 134, 136 (4th Cir. 1983)).

45. *Id.* at 171, 664 S.E.2d at 233 (quoting *Bishop*, 271 Ga. at 294, 519 S.E.2d at 209).

46. *Id.*, 664 S.E.2d at 233–34. The two challenged sources in the affidavit were confidential informants designated as "Source One" and "Source Two." *Id.*

47. *Id.*, 664 S.E.2d at 234.

reasoned that Source One "'kn[ew] what [m]arijuana look[ed] like and how it is packaged for sale,' had in the preceding [seventy-two] hours been on the premises at 3135 Atherton Street[,] and had witnessed at least two individuals therein package marijuana for distribution."[48] Moreover, the court noted that Deputy Whitehead averred in the warrant that "he had known Source [O]ne for approximately three years and that he or she had provided information leading to drug seizures and approximately ten felony arrests."[49] The court, therefore, held that this was sufficient to establish Source One's reliability and veracity.[50]

Although the court rejected the validity of the information from the concerned citizen because it was conclusory and unverified by Deputy Whitehead, it nonetheless held that the warrant affidavit provided "a substantial basis for concluding that a fair probability existed that evidence of a crime would be found at the premises."[51] The court also denied Fair's remaining challenges to the warrant and, accordingly, affirmed the trial court's judgment in part, reversed it in part, and remanded it with direction in both cases.[52]

In *Martin v. State*,[53] DeKelvin Rafael Martin was indicted for, inter alia, the murders of his girlfriend's grandparents and twelve year old son and the rape of his girlfriend, Tymika Wright. The State filed notice of its intention to seek the death penalty. The supreme court granted Martin's application for interim review and ordered the parties to address the sole issue of whether it was error for the trial court to deny Martin's motion in limine to preclude admission of the surviving victim's pretrial testimony when the victim was unavailable for trial due to her subsequent death.[54]

Martin pleaded guilty to all counts in his indictment on January 4, 2005, and sentencing was held before the trial court rather than a jury. During the penalty phase, Wright testified for the State. In December 2006, following his conviction and sentence, Martin was permitted to withdraw his guilty plea because the trial court had failed to inform him of all of his constitutional rights.[55] Prior to his new trial, Martin

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48. *Id.* at 172, 664 S.E.2d at 234 (first and third alterations in orginal) (quoting affidavit).

49. *Id.*

50. *Id.*

51. *Id.* (citing State v. Hunter, 282 Ga. 278, 280, 646 S.E.2d 465, 467 (2007)).

52. *Id.* at 172–78, 664 S.E.2d at 234–37.

53. 284 Ga. 504, 668 S.E.2d 685 (2008).

54. *Id.* at 504–05, 668 S.E.2d at 686–87.

55. *Id.* at 505, 668 S.E.2d at 687. The court noted that the applicable constitutional rights are set out in *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). *Martin*, 284 Ga. at 505, 668 S.E.2d at 687.

moved to prevent the admission of Wright's testimony from the merits phase of his first trial.[56] The trial court denied his motion and held that Wright's testimony was admissible pursuant to O.C.G.A. § 24-3-10[57] and would not violate the Confrontation Clause[58] under *Crawford v. Washington*.[59]

The supreme court first noted that the admissibility of this testimony was a matter of both state evidentiary law and federal constitutional law, and "'[i]n keeping with the well-established principle that this Court will not decide a constitutional question if the appeal can be decided upon other grounds, we first address the [evidentiary] issue[] raised by the appeal.'"[60] The court then addressed the admissibility of this testimony pursuant to Georgia statutory law.[61] The court determined that there are three requirements for the admission of prior testimony: "'(1) the declarant is unavailable as a witness at trial; (2) the testimony was given under oath at a hearing or other proceeding; and (3) the parties and issues are substantially similar.'"[62]

Although Martin conceded that the three requirements were met, he argued that because the issues at the penalty phase of his first trial "were not substantially similar" to the issues that would be presented at the merits phase of his new trial, the scope of the testimony at the first trial "did not provide him with an adequate opportunity to cross-examine Ms. Wright."[63] Martin analogized his case to cases holding that

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56. *Martin*, 284 Ga. at 505, 668 S.E.2d at 687.

57. O.C.G.A. § 24-3-10 (1995). This statute provides:

> The testimony of a witness since deceased . . . for any cause which was given under oath on a former trial upon substantially the same issue and between substantially the same parties may be proved by anyone who heard it and who professes to remember the substance of the entire testimony as to the particular matter about which he testifies.

Id.

58. U.S. CONST. amend. VI.

59. Crawford v. Washington, 541 U.S. 36 (2004); *Martin*, 284 Ga. at 505, 668 S.E.2d at 687.

60. *Martin*, 284 Ga. at 505, 668 S.E.2d at 687 (alterations in original) (quoting Powell v. State, 270 Ga. 327, 327–28, 510 S.E.2d 18, 20 (1998)).

61. *See id.*

62. *Id.* (quoting Pope v. Fields, 273 Ga. 6, 7–8, 536 S.E.2d 740, 742 (2000)). These three requirements constitute the "prior testimony" exception to the hearsay rule. *Id.* (citing O.C.G.A. § 24-3-10).

63. *Id.* at 505–06, 668 S.E.2d at 687. The court noted that *substantially*, as defined under the statute, meant "something less than 'identical.'" *Id.* at 506, 668 S.E.2d at 687 (quoting Atlanta & W. Point R.R. v. Venable, 67 Ga. 697, 699 (1881)). However, it also noted that "there must be 'sufficient similarity so that there was previously an adequate opportunity for cross examination.'" *Id.*, 668 S.E.2d at 687–68 (quoting Prater v. State, 148 Ga. App. 831, 837, 253 S.E.2d 223, 228 (1979)); *see also* Craft v. State, 154 Ga. App. 682,

testimony given at a bond hearing was inadmissible at trial because "'the issues involved in the two proceedings were not so sufficiently similar that it can be said that the previous opportunity for cross-examination of the witness . . . was adequate.'"[64] Martin argued that because the penalty phase of the first trial focused solely on the sentence he would receive and because Wright's testimony related to "the impact the crime . . . had on her life,"[65] Martin "had no reason to cross-examine Ms. Wright regarding issues of his culpability or Ms. Wright's credibility, because his guilt was not at issue."[66]

The court rejected Martin's argument, noting that "evidence relating to guilt or innocence is relevant to sentence and, thus, admissible, in a sentencing trial . . . 'because the [fact finder] needs to examine the circumstances of the offense[s] . . . in order to decide . . . punishment.'"[67] The court further noted that despite Martin's guilty plea, the State was still required to prove the existence of a statutory aggravating circumstance beyond a reasonable doubt before a sentence of death could be considered.[68] The court reasoned that several of the alleged statutory circumstances were also the offenses for which Martin was charged; therefore, the State was required to prove that the offenses were committed in the commission of the murders and rape of the victims.[69] Moreover, the State was required to prove beyond a reasonable doubt that the murder of Wright's son "involved torture, depravity of mind, or an aggravated battery to him," and that Martin committed an aggravated battery against Wright's grandmother, a crime to which Martin did not plead guilty.[70]

The court decided that Wright's testimony at the penalty phase of the first trial helped the State demonstrate beyond a reasonable doubt the existence of the alleged statutory aggravating circumstances because "it included Ms. Wright's account of Martin's alleged commission of her own

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269 S.E.2d 490 (1980).

64. *Martin*, 284 Ga. at 507, 668 S.E.2d at 688 (alteration in original) (quoting *Craft*, 154 Ga. App. at 683, 269 S.E.2d at 492); *see also* Dickson v. State, 281 Ga. App. 539, 540, 636 S.E.2d 721, 723 (2006).

65. *Martin*, 284 Ga. at 507, 668 S.E.2d at 688 (alteration in original) (internal quotation marks omitted).

66. *Id.*

67. *Id.* at 507–08, 668 S.E.2d at 688 (second and third alterations in original) (quoting Alderman v. State, 254 Ga. 206, 210, 327 S.E.2d 168, 173 (1985)); *see also* Romine v. State, 256 Ga. 521, 528, 350 S.E.2d 446, 453 (1986); Blankenship v. State, 251 Ga. 621, 624, 308 S.E.2d 369, 371 (1983).

68. *Martin*, 284 Ga. at 508, 668 S.E.2d at 688–89.

69. *Id.*

70. *Id.* (citing O.C.G.A. § 17-10-30(b)(2), (b)(7), (c) (2008)); *see also Romine*, 256 Ga. at 528, 350 S.E.2d at 453.

rape, the murders of her son and her grandfather, and the aggravated battery of her grandmother that ultimately resulted in a third murder charge against Martin for her death."[71] The court also determined that Martin was not restricted in the manner in which he cross-examined Wright during the first trial.[72] Therefore, the court concluded that the testimony during the penalty phase of the first trial, which helped the State establish the existence of the statutory aggravating circumstances beyond a reasonable doubt, was "substantially the same . . . as the issue of ultimate proof of guilt . . . [which] provided Martin a meaningful opportunity to cross-examine Ms. Wright."[73] Accordingly, the supreme court held that the trial court did not err when it denied Martin's motion in limine.[74]

II. DIRECT APPEAL CASES

The Georgia Supreme Court reviewed only one case pursuant to the automatic review procedure in Georgia's death penalty statute,[75] following conviction and imposition of the death penalty.[76]

In *O'Kelley v. State*,[77] Dorian Frank O'Kelley was convicted by a jury of two counts of malice murder and two counts of first degree arson, among other crimes, and was sentenced to death.[78] The supreme court first determined that the trial court erred by failing to merge the two first-degree arson counts at sentencing.[79] The court noted that

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71. *Martin*, 284 Ga. at 509, 668 S.E.2d at 689.

72. *Id.*

73. *Id.*, 668 S.E.2d at 689–90 (citing *Prater*, 148 Ga. App. at 831, 837, 253 S.E.2d at 223, 228).

74. *Id.*, 668 S.E.2d at 690. The court also noted, "[W]e express no opinion on whether portions of Ms. Wright's prior testimony might be subject to any other form of objection." *Id.*

75. O.C.G.A. § 17-10-35 (2008).

76. The court also addressed a funding issue related to death penalty cases in *Georgia Public Defender Standards Council v. State*, 285 Ga. 169, 675 S.E.2d 25 (2009), holding that the council was responsible for paying indigent defense costs pursuant to former O.C.G.A. § 17-12-127(b) (2004) (repealed 2008), in a case that was indicted prior to January 1, 2005, the date on which the Office of the Georgia Capital Defender was established. *Ga. Pub. Defender Standards Council*, 285 Ga. at 170, 172–73, 675 S.E.2d at 26, 28. The court reasoned that the statute did not expressly exclude reimbursement by the council for defendants indicted prior to the creation of the Office of the Georgia Capital Defender, when counsel had been appointed after January 1, 2005, especially when the statute explicitly provided for payment of counsel with council funds. *Id.* at 172–73, 675 S.E.2d at 27–28.

77. 284 Ga. 758, 670 S.E.2d 388 (2008).

78. *Id.* at 758, 670 S.E.2d at 391.

79. *Id.* at 760, 670 S.E.2d at 393.

although O'Kelley and his co-defendant, Daryl Stinski,[80] set multiple fires within the victim's residence, O'Kelley's actions constituted one act of arson because only one house was burned.[81] The supreme court, therefore, directed the trial court to strike the sentence as to one count of arson.[82]

The court next addressed a number of claims related to the improper qualification of prospective jurors.[83] O'Kelley argued that the trial court erroneously qualified six prospective jurors whose views regarding the death penalty should have prevented them from serving as jurors.[84] The court noted that the proper standard in reviewing such claims "is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[85]

On review of the issue of whether prospective juror Hopkins was improperly qualified to serve, the court determined that his leanings toward imposing the death penalty or life without the possibility of parole did not disqualify him when he stated on voir dire that "[a]s an open-minded adult, he could reasonably consider . . . life with the possibility of parole . . . and all three sentencing options."[86] The court, likewise, determined there was no error in qualifying prospective juror Carter despite Carter having "expressed support for the death penalty during his successful campaign for election as a state representative and because he stated on his juror questionnaire that 'if [O'Kelley] is guilty, he should get the death sentence.'"[87] The court noted that despite Carter explaining that he had no hesitation about imposing a death sentence in a case in which there was overwhelming evidence of guilt, "Mr. Carter repeatedly indicated that he would consider all three sentencing options, and he specifically stated that he could consider a

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80. For a discussion of Stinski's case, see *Stinski v. State*, 281 Ga. 783, 642 S.E.2d 1 (2007).

81. *O'Kelley*, 284 Ga. at 760–61, 670 S.E.2d at 393.

82. *Id.* at 761, 670 S.E.2d at 393. The trial court erroneously sentenced O'Kelley to two consecutive twenty-year sentences for the two arson counts. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* (internal quotation marks omitted) (quoting Nance v. State, 272 Ga. 217, 222, 526 S.E.2d 560, 566 (2000)). In *Nance* the supreme court held that "the relevant inquiry is whether the trial court's qualification of the prospective juror is supported by the record as a whole." 272 Ga. at 222, 526 S.E.2d at 566. The court also held that reviewing courts are required to defer to "the trial court's resolution of any equivocations or conflicts in the prospective juror's responses on voir dire." *Id.* at 222, 526 S.E.2d at 566–67.

86. *O'Kelley*, 284 Ga. at 761, 670 S.E.2d at 393–94 (first alteration in original) (internal quotation marks omitted).

87. *Id.* at 761–62, 670 S.E.2d at 394 (alteration in original).

sentence of life with the possibility of parole where an intentional murder with aggravating circumstances was found."[88] Further, although Carter "acknowledged that he would want his constituents to know that he favored the death penalty or a life without parole sentence and that he 'care[d] very much about public service and . . . [his] political career,'" he nonetheless stated he "'would sacrifice that to do the right thing.'"[89]

The court next considered the trial court's qualification of prospective juror Biskup, who was the fifty-eighth qualified juror.[90] The court noted that the trial court qualified sixty prospective jurors despite the fact that it had determined that a panel of fifty-four jurors was needed for selection of the jury and four alternates.[91] Thus, the court concluded that any alleged error regarding jurors numbered fifty-five or higher would be harmless because "even if both sides used all their allotted strikes, it would be impossible for those jurors to be reached during the selection of either the jury or the alternate jurors."[92]

The court next considered the qualification of prospective jurors Martin, Gnann, and Lanier.[93] The court noted that Gnann and Lanier "were initially somewhat confused about the bifurcated trial procedure, the three sentencing options, and the consideration of mitigating evidence."[94] However, once these issues were clarified, "they stated repeatedly that they could listen to the evidence and consider all three sentencing options."[95] Therefore, the supreme court held that the trial court "did not err by qualifying these jurors."[96] Similarly, the court held that Martin was qualified despite expressing "her personal feeling against the sentence of life with the possibility of parole" when she also stated that she would "probably consider all three [sentencing] possibili-

88. *Id.* at 762, 670 S.E.2d at 394.

89. *Id.* (alterations in original).

90. *Id.*

91. *Id.*

92. *Id.* The court noted that it could not determine whether the jurors were called in the order set by the jury clerk because the trial court allowed the parties to strike the jury silently. *Id.* at 763, 670 S.E.2d at 394. The court cautioned trial courts to follow the Unified Appeal Procedure, which requires that all proceedings in death penalty cases be transcribed. *Id.*, 670 S.E.2d at 394–95; *see also* GA. R. UNIFIED APP. P. note, *available at* http://www.gasupreme.us/rules/rules_uap/.

93. *O'Kelley*, 284 Ga. at 763, 670 S.E.2d at 395. The court noted that although these three jurors would not be selected for the panel based on their juror numbers, they could have been selected as alternates; therefore, any error would not necessarily be harmless. *Id.*

94. *Id.* at 764, 670 S.E.2d at 395.

95. *Id.*

96. *Id.*

ties" as well as "any mitigating evidence offered in making the determination on sentencing."[97]

The court also rejected O'Kelley's claim that the trial court improperly rehabilitated prospective jurors by asking general questions related to "whether a juror would follow the law."[98] The court determined that the trial court's questions were not the kind of "general fairness and follow the law questions"[99] disapproved in *Morgan v. Illinois*,[100] but were, instead, "targeted questions . . . [that] aided the court in resolving the equivocations and conflicts in their responses."[101] The court, therefore, determined this claim had no merit.[102]

The court next addressed whether it was error for the trial court to deny O'Kelley's request to make an opening statement prior to his presentation of evidence at the penalty phase of his trial.[103] The court noted that the trial court initially granted O'Kelley's request; however, upon the State's objection that O'Kelley was not entitled to make an opening statement because the State had opted not to make one itself, the trial court denied O'Kelley's request.[104] Although the supreme court initially observed that "[o]pening statements in the sentencing phase of a death penalty trial are not specifically required by 'statute, rule or caselaw,'" the court recognized that it had noted "on more than one occasion that . . . 'it is the better practice to allow the parties to outline for the jury their expected evidence in aggravation or mitigation.'"[105] The court emphasized that

> in recognition of the importance of opening statements to the trial process, this Court has promulgated a rule entitled, "Opening Statements in Criminal Matters." That rule provides that "[d]efense counsel may make an opening statement immediately after the state's opening statement and prior to introduction of evidence, or following the conclusion of the state's presentation of evidence."[106]

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97. *Id.* (alteration in original) (internal quotation marks omitted).

98. *Id.*, 670 S.E.2d at 395–96. O'Kelley referred to the trial court's questions as "talismanic" rehabilitation. *Id.*, 670 S.E.2d at 396.

99. *Id.*, 670 S.E.2d at 396 (internal quotation marks omitted) (quoting Morgan v. Illinois, 504 U.S. 719, 734 (1992)).

100. 504 U.S. 719, 734–35 (1992).

101. *O'Kelley*, 284 Ga. at 764–65, 670 S.E.2d at 396.

102. *Id.* at 765, 670 S.E.2d at 396.

103. *Id.*

104. *Id.*

105. *Id.* (quoting Smith v. State, 270 Ga. 240, 250, 510 S.E.2d 1, 11 (1998)); *see also* Wilson v. State, 271 Ga. 811, 818, 525 S.E.2d 339, 347 (1999).

106. *O'Kelley*, 284 Ga. at 765–66, 670 S.E.2d at 396 (alteration in original) (quoting GA. UNIF. SUPER. CT. R. 10.2).

The court reasoned that "[t]he primary rationale for the opening statement is 'to inform the jury in a general way of the nature of the action and defense so that they may better be prepared to understand the evidence.'"[107] Accordingly, the court held that the same rationale applies during the penalty phase of a capital murder trial.[108] The court noted that the two phases of a capital murder trial address very different issues and that the bifurcated trial procedure "was created to withhold matters inadmissible on the issue of guilt or innocence from the jury until that issue ha[s] been determined."[109] Therefore, an opening statement at the merits phase of the trial would not necessarily address the issues and evidence to be presented during the penalty phase.[110]

Moreover, the court reasoned, "Without the opportunity to make an opening statement at the sentencing phase, a defendant is left without the means to provide a roadmap to guide the jurors during the presentation of his mitigating evidence."[111] Continuing, the court noted, "This is not an insignificant deprivation, given the complexity of many mitigation defenses and the fact that, in many death penalty trials, the defendant's focus is not so much on his guilt or innocence as it is on why a death sentence should not be imposed on him."[112] Accordingly, the court held that the trial court erred when it refused O'Kelley's request to make an opening statement prior to presenting his evidence during the penalty phase of the trial.[113] However, the court decided that the error was harmless because O'Kelley's actual mitigation themes were "straightforward" and not complex.[114] Moreover, O'Kelley's proposed opening statement, which was presented to the court at his motion for a new trial hearing, consisted of "a single paragraph actually addressing the evidence to be presented."[115]

The court summarily rejected O'Kelley's remaining claim challenging Georgia's lethal injection protocol, holding that O'Kelley failed to present any evidence that had not already been considered by the court.[116]

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107. *Id.* at 766, 670 S.E.2d at 396 (quoting Best v. District of Columbia, 291 U.S. 411, 415 (1934)); *see also* Sims v. State, 251 Ga. 877, 879, 311 S.E.2d 161, 164 (1984).

108. *O'Kelley*, 284 Ga. at 766, 670 S.E.2d at 397.

109. *Id.* (alteration in original) (internal quotation marks omitted) (quoting Smith v. State, 236 Ga. 12, 20, 222 S.E.2d 308, 315 (1976)); *see also* Gregg v. Georgia, 428 U.S. 153, 190–92 (1976).

110. *O'Kelley*, 284 Ga. at 766–67, 670 S.E.2d at 397.

111. *Id.* at 767, 670 S.E.2d at 398.

112. *Id.* at 767–78, 670 S.E.2d at 398.

113. *Id.* at 768, 670 S.E.2d at 398.

114. *Id.* at 769, 670 S.E.2d at 398.

115. *Id.*, 670 S.E.2d at 398–99.

116. *Id.* at 770, 670 S.E.2d at 399.

Moreover, the court concluded that O'Kelley failed to demonstrate that Georgia's lethal injection protocol created "'a substantial risk of serious harm.'"[117] The court also conducted the required statutory review[118] and held that (1) O'Kelley's death sentence did not result from passion, prejudice, or any other arbitrary factor; (2) "the evidence was clearly sufficient to authorize the jury to find beyond a reasonable doubt the existence of the statutory aggravating circumstances"; and (3) his sentence of death was "not excessive or disproportionate to the penalty imposed in similar cases."[119] Accordingly, the court affirmed the lower court's judgment.[120]

III. DENIAL OF PETITION FOR WRIT OF CERTIORARI

The United States Supreme Court's denial of certiorari[121] from the Georgia Supreme Court case of *Walker v. State*[122] is included in this Survey because the "[s]tatement . . . respecting the denial" of certiorari, signed by Justice Stevens, provides thoughtful analysis regarding proportionality review of capital cases in Georgia.[123] Justice Stevens brings clarity to the issue, especially in light of the Georgia Supreme Court's treatment of proportionality review[124] following the United States Supreme Court's opinion in *Pulley v. Harris*.[125]

In *Walker v. Georgia*,[126] Artemus Rick Walker petitioned the United States Supreme Court for a writ of certiorari.[127] The question presented was whether Georgia's capital sentencing scheme violates the Eighth

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117. *Id.* (quoting Baze v. Rees, 128 S. Ct. 1520, 1531 (2008)).

118. *See* O.C.G.A. § 17-10-35(c).

119. *O'Kelley*, 284 Ga. at 770, 670 S.E.2d at 399 (citing O.C.G.A. § 17-10-35(c)(2)–(3); Jackson v. Virginia, 443 U.S. 307, 324 (1979)).

120. *Id.* at 771, 670 S.E.2d at 400.

121. Walker v. Georgia, 129 S. Ct. 453 (2008) (mem.) (Stevens, J., statement respecting denial of cert.).

122. 282 Ga. 774, 653 S.E.2d 439 (2007).

123. *Walker*, 129 S. Ct. at 453.

124. *See id.* at 456–57.

125. 465 U.S. 37 (1984). In *Pulley* the Court addressed the constitutionality of California's capital scheme, which did not include proportionality review. *Id.* at 41, 53. The Court held that proportionality review was not required for California's death penalty statute to be constitutionally compliant. *Id.* at 54. However, this is not to say that proportionality review is never required. As the Court noted in *Zant v. Stephens*, 462 U.S. 862 (1983), "Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality." *Id.* at 890.

126. 129 S. Ct. 453 (2008) (mem.) (Stevens, J., statement respecting denial of cert.).

127. *Id.* at 453.

Amendment's[128] guarantee against arbitrary and discriminatory sentences.[129] Walker specifically alleged that the Georgia Supreme Court "'fail[ed] to: (1) conduct meaningful proportionality review, and (2) enforce reporting requirements under Georgia's capital sentencing scheme.'"[130] The Court denied Walker's petition because he failed to raise these claims in state court.[131] Justice Stevens wrote a statement with respect to the denial of Walker's petition "to emphasize that the Court's denial has no precedential effect . . . and to note that petitioner's submission is supported by our prior opinions evaluating the constitutionality of the Georgia statute."[132]

Justice Stevens initially noted that in *Furman v. Georgia*,[133] Justice Stewart "observed that death sentences imposed pursuant to Georgia's capital sentencing scheme were 'cruel and unusual in the same way that being struck by lightning is cruel and unusual.'"[134] At the time of *Furman*, the Georgia statute provided juries with absolute discretion in sentencing, which resulted "in the arbitrary, and often discriminatory, issuance of capital sentences."[135] Justice Stevens noted that following *Furman*, the Georgia General Assembly amended its capital sentencing scheme to include new procedural protections against the imposition of arbitrary death sentences.[136] One of these statutory protections required the Georgia Supreme Court to "'compar[e] each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate.'"[137] Justice Stevens noted, "We assumed that the court would consider whether there were similarly situated defendants who had *not* been put to death because that inquiry is an essential part of any meaningful proportionality review."[138]

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128. U.S. CONST. amend. VIII.

129. *Walker*, 129 S. Ct. at 453.

130. *Id.* at 453–54 (alteration in original) (quoting petition for cert.).

131. *Id.* at 454.

132. *Id.*

133. 408 U.S. 238 (1972). Justice Stevens credits Justice Stewart with being the "principal architect of [the Court's] death penalty jurisprudence." *Walker*, 129 S. Ct. at 454.

134. *Walker*, 129 S. Ct. at 454 (quoting *Furman*, 408 U.S. at 309 (Stewart, J., concurring)). In *Furman* Justice Stewart concluded that "the Eighth . . . Amendment[] cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed." 408 U.S. at 310 (Stewart, J., concurring).

135. *Walker*, 129 S. Ct. at 454.

136. *Id.*

137. *Id.* (alteration in original) (quoting Gregg v. Georgia, 428 U.S. 153, 198 (1976)).

138. *Id.* (internal quotation marks omitted).

Justice Stevens observed that the Court's assumptions were confirmed in *Zant v. Stephens*[139] when the Court considered "whether a death sentence was valid notwithstanding the jury's reliance on an invalid aggravating circumstance."[140] Justice Stevens determined that the decision to uphold the sentence in *Zant* "'depend[ed] in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality.'"[141] Justice Stevens found it to be particularly important that the Georgia Supreme Court "expressly stated that its proportionality review 'uses for comparison purposes not only similar cases in which death was imposed, but similar cases in which death was not imposed.'"[142] Justice Stevens reasoned that this was a judicious approach given that cases in which a death sentence was not imposed "might well provide the most relevant evidence of arbitrariness in the sentence before the court."[143]

Justice Stevens also expressed his concern about the "risk of arbitrariness in cases that involve black defendants and white victims."[144] Noting there is "some indication that those risks have diminished over time," Justice Stevens concluded that "the race-of-victim effect persists."[145] Justice Stevens was particularly troubled by the fact that this case involved an African-American defendant and a white victim.[146] Justice Stevens noted that following Walker's conviction and sentence of death, the Georgia Supreme Court performed "an utterly perfunctory review" rather than "a thorough proportionality review to mitigate the heightened risks of arbitrariness and discrimination in this case."[147] For instance, Justice Stevens noted that the Georgia Supreme Court's proportionality review in *Walker* was limited to "a single paragraph" consisting of "a string citation of [twenty-one] cases in which the jury imposed a death sentence[,] . . . mak[ing] no reference to the facts of those cases or to the aggravating circumstances found by the jury."[148]

Moreover, Justice Stevens emphasized that "[h]ad the Georgia Supreme Court looked outside the universe of cases in which the jury

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139. 462 U.S. 862 (1983).
140. *Walker*, 129 S. Ct. at 454.
141. *Id.* (alteration in original) (quoting *Zant*, 462 U.S. at 890).
142. *Id.* (quoting *Zant*, 462 U.S. at 880 n.19).
143. *Id.* at 454–55.
144. *Id.* at 455.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*

imposed a death sentence, it would have found numerous cases involving offenses very similar to petitioner's in which the jury imposed a sentence of life imprisonment."[149] Further, Justice Stevens noted that in a number of other similar cases, the State did not even seek the death penalty.[150]

Justice Stevens observed that the Georgia Supreme Court's practice of limiting proportionality review began after the Court decided *Pulley v. Harris*,[151] in which the Court held that "the Eighth Amendment does not require comparative proportionality review of every capital sentence."[152] Justice Stevens clarified the Court's position in *Pulley*, stating, that its "assertion was intended to convey our recognition of differences among the States' capital schemes and the fact that we consider statutes as we find them . . . . [I]t was not meant to undermine our conclusion in *Gregg* and *Zant* that such review is an important component of the Georgia scheme."[153] Justice Stevens concluded, "The Georgia Supreme Court owes its capital litigants . . . [a] duty of care and must take seriously its obligation to safeguard against the imposition of death sentences that are arbitrary or infected by impermissible considerations such as race."[154]

149. *Id.* at 455–56 (citing Jones v. State, 279 Ga. 854, 622 S.E.2d 1 (2005); Spickler v. State, 276 Ga. 164, 575 S.E.2d 482 (2003); Cross v. State, 271 Ga. 427, 520 S.E.2d 457 (1999); Jenkins v. State, 268 Ga. 468, 491 S.E.2d 54 (1997); LeMay v. State, 265 Ga. 73, 453 S.E.2d 737 (1995); Cobb v. State, 250 Ga. 1, 295 S.E.2d 319 (1982)).

150. *Id.* at 456 (citing Davis v. State, 281 Ga. 871, 644 S.E.2d 113 (2007); Wiggins v. State, 280 Ga. 627, 632 S.E.2d 80 (2006); Escobar v. State, 279 Ga. 727, 620 S.E.2d 812 (2005); Stanley v. State, 261 Ga. 412, 405 S.E.2d 493 (1991)).

151. 465 U.S. 37 (1984).

152. *Walker*, 129 S. Ct. at 456 (citing *Pulley*, 465 U.S. at 44–46).

153. *Id.*

154. *Id.* at 457.

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