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Death Penalty Law

by Therese M. Day*

This Article provides a survey of death penalty case law in Georgia from June 1, 2006 through May 31, 2007. The cases include those that were heard by the Georgia Supreme Court on interim appeal and direct appeal,¹ and discussion is limited to claims which present new issues of law, refine existing law, or are otherwise instructive. This Article does not discuss holdings in capital cases that are common to all criminal appeals because these are discussed elsewhere in this Survey.

I. DECISIONS OF THE GEORGIA SUPREME COURT

A. *Interim Review Cases*

The Georgia Supreme Court reviewed four cases pursuant to interim appellate review of death penalty cases under the Unified Appeal Procedure.²

In *Bailey v. State*,³ Phillip Ray Bailey was indicted for murder and other crimes, and the State filed its notice to seek the death penalty. The court granted Bailey's application for interim review and directed the parties to address whether the trial court erred in denying Bailey's motion to quash his indictment when a clerical error resulted in the misspelling of the first name of a grand juror.⁴

According to the record, "A man named Harvey D. Giddens was summoned for grand jury service and served as one of the grand jurors

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1. Due to space restrictions, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007), a state habeas case, has been omitted.

2. GA. R. UNIFIED APP. P. I-IV; *Stinski v. State*, 281 Ga. 783, 642 S.E.2d 1 (2007); *Edwards v. State*, 281 Ga. 108, 636 S.E.2d 508 (2006); *Rice v. State*, 281 Ga. 149, 635 S.E.2d 707 (2006); *Bailey v. State*, 280 Ga. 884, 635 S.E.2d 137 (2006).

3. 280 Ga. 884, 635 S.E.2d 137 (2006).

4. *Id.* at 884, 635 S.E.2d at 137.

who indicted Bailey.⁵ Subsequently, Mr. Giddens's name was mistyped as "Henry D. Giddens" when the list of grand jurors was transcribed to Bailey's new indictment.⁶ Bailey filed a special demurrer, asserting that he was entitled to an indictment perfect in form and substance, and he requested his indictment to be quashed based on the misspelling.⁷ The court recognized that the standard requiring a perfect indictment reflects the goal of providing trials free from harmful defects.⁸ However, the court also noted that under the current version of the Official Code of Georgia Annotated ("O.C.G.A.") regarding the required elements of an indictment, if the form substantially complies with the requirements of the statute, the court must give full effect to any case when "a defendant's right to a fair trial will not be adversely affected."⁹ The court concluded that "[i]n Bailey's case, defense counsel [could] have easily determined the identity of the grand juror whose name was misspelled on Bailey's indictment."¹⁰ Therefore, the court held that because the misspelling of the grand juror's name was not material and because it was clear that Bailey would not suffer prejudice, the trial court did not err in overruling Bailey's special demurrer.¹¹ Accordingly, the Georgia Supreme Court affirmed the lower court's judgment.¹²

In *Rice v. State*,¹³ Lawrence Rice was charged with the murder of two victims and related crimes, and the State announced its intent to seek the death penalty.¹⁴ The court granted Rice's application for interim review and directed the parties to address three issues:

[1] whether the trial court erred in denying Rice's motion concerning the composition of the grand and traverse jury lists; [2] whether the trial court erred in ruling that the pretrial deposition testimony of Trevor Mincher would be admissible at trial; and [3] whether the trial

5. *Id.*

6. *Id.*

7. *Id.*, 635 S.E.2d at 137-38.

8. *Id.*, 635 S.E.2d at 138 (citing *State v. Shepherd Constr. Co.*, 248 Ga. 1, 3, 281 S.E.2d 151, 155 (1981); *State v. Eubanks*, 239 Ga. 483, 488, 238 S.E.2d 38, 42 (1977)).

9. *Id.* at 885, 635 S.E.2d at 138 (citing O.C.G.A. § 17-7-54(a) (2004)).

10. *Id.*

11. *Id.* The court subsequently disapproved of the language in *Bailey* regarding prejudice. See *Wagner v. State*, 282 Ga. 149, 646 S.E.2d 676 (2007). In *Wagner* the court noted that while "questions of materiality and prejudice may be coextensive, harmless error review is appropriate only in the post-conviction setting, not in pre-trial proceedings or on pre-trial appeal." *Id.* at 150, 646 S.E.2d at 678. Therefore, the court disapproved of the language in *Bailey* that could be construed to hold that a material defect that is not prejudicial to the defendant does not require the quashing of the indictment. *Id.*

12. *Bailey*, 280 Ga. at 885, 635 S.E.2d at 138.

13. 281 Ga. 149, 635 S.E.2d 707 (2006).

14. *Id.* at 149, 635 S.E.2d at 708.

court erred in refusing to allow a second pretrial deposition of Lillian Heaton.¹⁵

Rice first alleged that the lists from which his grand jury was drawn and from which his traverse jury would be drawn were unconstitutional because they reflected an underrepresentation of Hispanic persons.¹⁶ The court ruled that Rice failed to demonstrate that Hispanics were underrepresented.¹⁷ In fact, according to the court, Rice's own expert and evidence at the hearing supported a determination that there was a slight overrepresentation of Hispanics in Cobb County.¹⁸ Therefore, the court held that the trial court did not err in denying Rice's claim.¹⁹

In Rice's second claim, he alleged that the trial court erred in admitting the pretrial deposition testimony of Trevor Mincher in violation of *Crawford v. Washington*²⁰ because Mincher died prior to the trial and Rice did not have an adequate opportunity to cross-examine him.²¹ According to the record, the State filed a motion on March 9, 2005, seeking to take the pretrial deposition of Mincher, the husband of the female victim and the father of the young male victim.²² At the hearing on March 16, 2005, Mincher testified that he had been diagnosed with esophageal cancer which had metastasized.²³ He further testified that while his doctors did not tell him there was no hope of recovery, it was his belief that they would not "express a complete lack of hope to him, even if no hope really existed."²⁴ The trial court found that Mincher's medical condition satisfied the requirements for taking pretrial depositions to preserve testimony in criminal proceedings and allowed the State to proceed with direct examination; however, the court acknowledged the defense's need for "adequate time to prepare for cross-examination" and scheduled the cross-examination portion of the deposition for March 31, 2005.²⁵ Despite this ruling, the State requested Rice to begin cross-examination following its direct examination. Before Rice could respond, the trial court interjected and reiterated its prior ruling, noting the lack of notice

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. 541 U.S. 36, 68 (2004).

21. *See Rice*, 281 Ga. at 150, 635 S.E.2d at 709.

22. *Id.*, 635 S.E.2d at 708.

23. *Id.*

24. *Id.*

25. *Id.*, 635 S.E.2d at 709.

and need for preparation prior to cross-examination. Rice did not object to the trial court's ruling.²⁶

At some time prior to the scheduled date for the cross-examination of Mincher's deposition testimony, the State contacted Rice to inform him that Mincher's health was failing and that he had been hospitalized. Several hours later, Mincher died.²⁷ Rice moved to exclude Mincher's deposition testimony under *Crawford* based on the fact that the defense did not have the opportunity to cross-examine Mincher.²⁸ The trial court denied Rice's motion and stated:

"There was an opportunity to cross-examine Mr. Mincher. There was notice. The Defense chose not to cross-examine him. . . . It was clear when he was sitting here that the man wasn't well. I don't expect anybody anticipated his demise before we finished the deposition. I certainly didn't. I would have scheduled it sooner if I had."²⁹

The court held that the trial court was correct in ruling that Rice waived his opportunity to cross-examine Mincher.³⁰ The court determined that under statutory law, Rice had notice that the trial court could order "the deposition [to] occur at *any* time within 30 days of the hearing."³¹ The court acknowledged that while the opportunity to cross-examine Mincher was not ideal given the lack of more than six days notice of the hearing, Rice was "afforded a sufficient opportunity for cross-examination and . . . the lack of cross-examination . . . [was] the result of his waiving that opportunity."³² Accordingly, the court held that the trial court did not err in ruling that Mincher's testimony was admissible at trial.³³

In Rice's third claim, he alleged error based on the trial court's denial of his request for a second deposition of a State witness in order to conduct further cross-examination. The State initially requested the deposition of Lillian Heaton, the next door neighbor of the victims, and her deposition was taken with the consent of Rice. During this deposition, Rice learned that Heaton took several medications, including Neurontin.³⁴ When asked by defense counsel whether this drug

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 150-51, 635 S.E.2d at 709.

30. *Id.* at 151, 635 S.E.2d at 709.

31. *Id.* (citing O.C.G.A. § 24-10-130(f) (1995 & Supp. 2006)).

32. *Id.*

33. *Id.*

34. *Id.*

affected her memory, Heaton responded, “No.”³⁵ Following her testimony, the trial court “repeatedly directed defense counsel to consult with his client and with co-counsel before finally accepting counsel’s statement that he had no further cross-examination.”³⁶ Ten months following the deposition, Rice filed a motion for a second deposition, stating that he had learned that Neurontin could have affected her memory. The trial court denied the motion.³⁷

The court noted that there was no case law on point regarding when or whether a trial court is required to permit a second pretrial deposition; however, the court determined that case law governing when a trial court may allow a witness to be recalled at trial was instructive.³⁸ Based on this line of cases, the court held that because Rice had the opportunity to question Heaton about her medications and their effects, the trial court did not err in denying a second deposition.³⁹ Accordingly, the court affirmed the lower court’s judgment.⁴⁰

In *Edwards v. State*,⁴¹ Joseph Alan Edwards was indicted for murder and related crimes, and the State filed its notice of intent to seek the death penalty.⁴² The court granted interim review and directed the parties to address whether the trial court erred in denying Edwards’s motion to quash the indictment when the grand jury that returned the indictment was selected from a list that reflected a 6.04% underrepresentation of white persons, a cognizable group.⁴³

The claim arose when Edwards filed a pretrial motion challenging the composition of the grand jury and traverse jury lists of Hall County.⁴⁴ During the pendency of Edwards’s case, Hispanic persons were found to be a cognizable group in Hall County, and the trial court held in another death penalty case that Hispanic persons were underrepresented on Hall County’s jury lists.⁴⁵ In an effort to construct a grand jury list that represented a fair cross-section of the county’s residents who were

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*, 635 S.E.2d at 710.

40. *Id.*

41. 281 Ga. 108, 636 S.E.2d 508 (2006).

42. *Id.* at 108, 636 S.E.2d at 508.

43. *Id.* at 108-09, 636 S.E.2d at 508-09.

44. *Id.* at 108, 636 S.E.2d at 508-09.

45. *Id.*, 636 S.E.2d at 509. In *Smith v. State*, 275 Ga. 715, 571 S.E.2d 740 (2002), the court affirmed the trial court’s finding that Hispanic persons were a cognizable group in Hall County but held that the defendant did not show a legally-significant underrepresentation of Hispanic citizens. *Id.* at 726, 571 S.E.2d at 749.

eligible to serve as jurors, the jury commission took measures to ensure that it used the proper number of Hispanic citizens in its calculations. However, it failed to make other adjustments including adjusting the total population of all persons based on citizenship, resulting in an underrepresentation of white persons on the grand jury by 6.04 percentage points.⁴⁶

The court held that the trial court correctly found that an underrepresentation of a cognizable group by 6.04 percentage points was generally not unconstitutional; however, the court held that it exceeded the acceptable limit specified under the Unified Appeal Procedure,⁴⁷ which requires significant underrepresentation of any cognizable group to be corrected before trial.⁴⁸ The court ruled that the only way to correct the underrepresentation of white persons on Edwards's grand jury list was for the trial court to quash Edwards's indictment.⁴⁹ However, the court concluded that it could not require the trial court to quash the indictment because such an order would exceed the court's constitutional power.⁵⁰ The court explained that while it had authority under the state constitution and statutory law to promulgate rules, it did not have the authority to abrogate or interfere with otherwise valid statutory enactments, including the procedure by which prosecutors procure indictments and conduct criminal prosecutions.⁵¹ The court concluded that because the indictment had been procured in a manner consistent with Georgia statutory law and with the federal and state constitutions, the court did not have the authority to require the trial court to quash Edwards's indictment.⁵² Therefore, the court affirmed the trial court's decision not to quash Edwards's indictment.⁵³

In *Stinski v. State*,⁵⁴ Darryl Scott Stinski was indicted for two counts of malice murder and related crimes, and the State filed its notice of intent to seek the death penalty.⁵⁵ The Georgia Supreme Court granted interim review and directed the parties to address four issues,

46. *Edwards*, 281 Ga. at 108-09, 636 S.E.2d at 509.

47. GA. R. UNIFIED APP. P. II(c)(6)(b).

48. *Edwards*, 281 Ga. at 109-10, 636 S.E.2d at 509.

49. *Id.* at 110, 636 S.E.2d at 509-10.

50. *Id.*, 636 S.E.2d at 510.

51. *Id.*

52. *Id.*

53. *Id.*

54. 281 Ga. 783, 642 S.E.2d 1 (2007).

55. *Id.* at 783, 642 S.E.2d at 4.

including whether the trial court erred in denying Stinski's motions concerning the amended discovery statute.⁵⁶

According to the record, Stinski filed a written notice of his election to participate in the criminal discovery procedure pursuant to O.C.G.A. sections 17-16-1 to 17-16-10⁵⁷ on June 19, 2002.⁵⁸ Subsequent to this filing, the discovery statute was amended by the Criminal Justice Act of 2005⁵⁹ (the "Act"), which was made applicable to "all trials which commence on or after July 1, 2005."⁶⁰ Stinski challenged the validity of the Act and its applicability to his case on several bases.⁶¹

Stinski first argued that the amended discovery provisions were inapplicable to him because he elected to participate in the discovery procedure prior to enactment of the Act.⁶² The court denied his claim, reasoning that the Georgia General Assembly enacted the amendments with knowledge of the existing discovery procedure and did not create an exception for defendants with pending cases who had elected to participate in the procedure prior to the changes.⁶³ Accordingly, the court held that the amendments to the discovery procedure were applicable "to Stinski's case and that his previous election to participate in that procedure continues to be binding upon him."⁶⁴ Therefore, Stinski was prevented from opting out of the discovery procedure "as a matter of statutory law."⁶⁵

The court also denied Stinski's claim that the amended discovery procedure was unconstitutional because it failed to impose reciprocal discovery obligations on the State.⁶⁶ The court acknowledged that "the two disclosures do seem, at first blush, to be unequal . . ."⁶⁷ However, the court held that because the State is required to provide the same

56. *Id.* Stinski raised an additional argument alleging that the trial court erred in denying his motion to quash the indictment based on the participation of an ineligible grand juror. *Id.*

57. O.C.G.A. §§ 17-16-1 to -10 (2004 & Supp. 2006).

58. *Stinski*, 281 Ga. at 786-88, 642 S.E.2d at 6-8.

59. 2005 Ga. Laws 20, §§ 12-13 (codified as amended at O.C.G.A. §§ 17-16-2(f), -4(a)(5), -4(b)(3) (Supp. 2006)); 2005 Ga. Laws 474, § 1 (codified as amended at O.C.G.A. § 17-16-2(a)-(e)).

60. 2005 Ga. Laws 20, § 17.

61. *See Stinski*, 281 Ga. at 786-88, 642 S.E.2d at 6-8.

62. *See id.* at 786, 642 S.E.2d at 6.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 787, 642 S.E.2d at 6 (citing *Wardius v. Oregon*, 412 U.S. 470 (1973)).

67. *Id.*, 642 S.E.2d at 7 (comparing the discovery requirements for defendants under O.C.G.A. § 17-16-4(b)(3)(A)-(C) with the discovery requirements for the State under O.C.G.A. §§ 17-16-2(f), -4(a)(5)).

discovery in the sentencing phase as during the merits phase, its discovery obligation "exactly mirrors the discovery required [by] the defendant. . . ."⁶⁸ The court also held that "the scope of non-statutory, aggravating evidence is similarly broad" to the scope of mitigating evidence and that any difference is "too minimal to be of constitutional significance on the question of reciprocity of discovery."⁶⁹

The court summarily denied Stinski's remaining arguments regarding the amended discovery procedure and denied his claim that the amended discovery statute constituted an ex post facto law and a bill of attainder.⁷⁰ Further, the court held that an inquiry into whether Stinski made a valid waiver of his rights was irrelevant because the additional discovery requirements were imposed by the general assembly rather than the trial court.⁷¹ The court denied all other claims and, accordingly, affirmed the judgment of the lower court.⁷²

B. Direct Appeal Cases

The Georgia Supreme Court reviewed three capital cases on direct appeal.⁷³ The first is a pretrial direct appeal from an order of *nolle prosequi* regarding one of two indictments brought against a defendant by the State.⁷⁴ It is a noteworthy case because it established that defendants do not have a statutory right to plead guilty in criminal cases.⁷⁵ The remaining two cases were appealed following conviction and the imposition of the death penalty, and they were reviewed pursuant to the automatic review procedure in Georgia's death penalty statute.⁷⁶ These latter cases do not present new issues of law due to their posture. However, this Article briefly mentions certain portions to emphasize the court's reasoning, which may be helpful in future cases

68. *Id.*

69. *Id.* at 788, 642 S.E.2d at 7.

70. *Id.*, 642 S.E.2d at 7-8. The court held, without analysis, that the "amended statute is not an ex post facto law because it affects purely procedural rights and duties." *Id.*, 642 S.E.2d at 7. Due to the lack of analysis, it is unclear whether the court considered as an argument that the procedural changes affected the substantial rights of the defendant, which under the ex post facto doctrine may have amounted to error. *See id.*

71. *Id.*, 642 S.E.2d at 8.

72. *Id.* at 788-89, 642 S.E.2d at 8.

73. *Walker v. State*, 281 Ga. 157, 635 S.E.2d 740 (2006); *Williams v. State*, 281 Ga. 87, 635 S.E.2d 146 (2006); *Sanders v. State*, 280 Ga. 780, 631 S.E.2d 344 (2006).

74. *Sanders*, 280 Ga. at 780, 631 S.E.2d at 344.

75. *See id.* at 783-84, 631 S.E.2d at 346-47.

76. *See generally Walker*, 281 Ga. 157, 635 S.E.2d 740; *Williams*, 281 Ga. 87, 635 S.E.2d 146.

when claims have not been waived by trial counsel or are adequately framed on appeal.

In *Sanders v. State*,⁷⁷ Donald Steve Sanders was indicted on December 15, 2004, by a Gwinnett County grand jury for malice murder and other crimes in connection with the death of Doris Joyner. On the same day, the grand jury returned a second indictment against Sanders for felony murder and armed robbery of Joyner. On March 4, 2005, the State filed its notice of intent to seek the death penalty in the first indictment. Sanders was arraigned on charges in the first indictment on May 13, 2005, and he entered a plea of not guilty. Sanders postponed his arraignment on the second indictment to seek different counsel. At the reset arraignment on July 18, 2005, Sanders's attorney announced that Sanders would enter a plea of guilty to the second indictment because the State did not file a notice to seek the death penalty on the second indictment.⁷⁸ Sanders's attorney tendered a signed indictment to the court and a petition to enter a non-negotiated plea, requesting the court to "sentence accordingly."⁷⁹

The trial court questioned the State about its reason for maintaining the second indictment and stayed the hearing to consider the issue and allow the State to respond. Later the same day, the hearing was resumed and the State requested an order of *nolle prosequi* regarding the second indictment. The State noted that it intended the second indictment to be an alternative to the first indictment on which the State was seeking the death penalty. Sanders objected on the basis that the trial court did not have discretion to reject his pleas. The trial court allowed both parties time to file briefs on the issue, and on August 18, 2005, the trial court entered an order of *nolle prosequi* on the second indictment.⁸⁰

The State first complained that the Georgia Supreme Court did not have jurisdiction to hear the appeal because: (1) there was no judgment subject to direct appeal, and (2) if there was a judgment subject to direct appeal, the Georgia Court of Appeals would be the appropriate reviewing court because Sanders had not been convicted of a capital felony.⁸¹ The court dismissed the latter basis, holding that because the case involved an indictment for murder, jurisdiction was appropriate in the Georgia Supreme Court despite the fact that the case was in a pretrial pos-

77. 280 Ga. 780, 631 S.E.2d 344 (2006).

78. *Id.* at 780-81, 631 S.E.2d at 344-45.

79. *Id.* at 781, 631 S.E.2d at 345.

80. *Id.*

81. *Id.*

ture.⁸² Regarding the State's complaint that an order of *nolle prosequi* is not a judgment subject to direct appeal, the court first noted that when a prosecuting attorney recommends an order of *nolle prosequi*, it is within the trial court's discretion whether or not to grant it.⁸³ Additionally, the court noted that "an order of *nolle prosequi* may be entered without the consent of the accused at any time prior to the attachment of jeopardy."⁸⁴ In Sanders's case, because jeopardy had not attached at the time the court entered the *nolle prosequi* order, it was within the power of the trial court to grant the order.⁸⁵ The court further noted that a defendant "may appeal such an order as final."⁸⁶

The court next addressed Sanders's argument that the trial court was required to accept his pleas of guilty to the second indictment.⁸⁷ Sanders conceded that there is not a federal constitutional right to plead guilty but argued that such a right existed under state statutory law and pursuant to the Georgia Uniform Superior Court Rules.⁸⁸ Sanders first argued that O.C.G.A. section 17-7-93⁸⁹ confers a right to plead guilty, but the court rejected this argument and stated that this code section merely provides for the sequence of events during an arraignment process.⁹⁰ To support its rejection of Sanders's argument, the court quoted *Pass v. State*,⁹¹ which concerned a similar issue under the predecessor statute to O.C.G.A. section 17-7-93:

"A plea of guilty is but a confession of guilt in open court and a waiver of trial [I]t ought to be scanned with care and received with caution. The judge is not bound to receive such a plea at all, and in capital cases frequently declines to do so."⁹²

The court concluded that O.C.G.A. section 17-7-93, therefore, did not require the trial court to accept Sanders's pleas.⁹³

82. *Id.* at 782, 631 S.E.2d at 345.

83. *Id.*

84. *Id.* (citing O.C.G.A. § 17-8-3 (2004)).

85. *Id.*, 631 S.E.2d at 346.

86. *Id.* (citing *Layman v. State*, 280 Ga. 794, 631 S.E.2d 107 (2006)).

87. *See id.*

88. *Id.*; GA. UNIF. SUPER. CT. R. 30.2, 33.2, 33.10.

89. O.C.G.A. § 17-7-93 (2004).

90. *Sanders*, 280 Ga. at 783, 631 S.E.2d at 346.

91. 227 Ga. 730, 182 S.E.2d 779 (1971).

92. *Sanders*, 280 Ga. at 783, 631 S.E.2d at 346 (quoting *Pass*, 227 Ga. at 730, 182 S.E.2d at 782).

93. *Id.*

Sanders also argued that O.C.G.A. section 17-10-32.1⁹⁴ provides a statutory right to plead guilty.⁹⁵ The court rejected this argument as well, noting that the statute provides for “the duties of the judge in sentencing a person who is subject to the death penalty or life without parole upon a plea of guilty.”⁹⁶ The court noted that the statute was clear, indicating that a defendant “‘may’ enter a plea of guilty” but that acceptance of the plea was within the discretion of the trial judge.⁹⁷

The court also rejected Sanders’s argument that Uniform Superior Court Rules 30.2,⁹⁸ 33.1,⁹⁹ and 33.10¹⁰⁰ “create a ‘legal right’ to plead guilty.”¹⁰¹ The court held that Rule 30.2 “merely provides the procedure for the call for arraignment.”¹⁰² The court also held that Rules 33.1 and 33.10 did not create an implicit right to plead guilty.¹⁰³ Accordingly, the court affirmed the judgment of the lower court.¹⁰⁴

In *Williams v. State*,¹⁰⁵ Joseph Williams pleaded guilty to malice murder, and following a sentencing trial before a jury, he was sentenced to death. Williams sought review solely on the basis of the trial court’s denial of his motions challenging the validity of Georgia’s death penalty statutes. First, Williams argued that the lethal injection procedure employed by Georgia is cruel and unusual punishment under both the federal and state constitutions.¹⁰⁶ The court denied this claim, holding that Williams “failed to identify any particular aspect of the evidence admitted in the trial court that would require this Court to depart from its prior decisions holding lethal injection to be a constitutional form of execution.”¹⁰⁷

The court also rejected Williams’s other challenges to Georgia’s death penalty statutes because the remaining claims were “‘so lacking in specific argument that they [were] incapable of being meaningfully discussed’ and [were], therefore, deemed abandoned.”¹⁰⁸ The court then conducted the required statutory review and held that Williams’s

94. O.C.G.A. § 17-10-32.1 (2004).

95. *Sanders*, 280 Ga. at 783, 631 S.E.2d at 346.

96. *Id.* at 783-84, 631 S.E.2d at 346.

97. *Id.* at 784, 631 S.E.2d at 346-47 (quoting O.C.G.A. § 17-10-32.1).

98. GA. UNIF. SUPER. CT. R. 30.2.

99. GA. UNIF. SUPER. CT. R. 33.1.

100. GA. UNIF. SUPER. CT. R. 33.10.

101. *Sanders*, 280 Ga. at 784, 631 S.E.2d at 347.

102. *Id.*

103. *Id.*

104. *Id.*

105. 281 Ga. 87, 635 S.E.2d 146 (2006).

106. *Id.* at 87-88, 90, 635 S.E.2d at 147, 149.

107. *Id.*

108. *Id.* (quoting *Head v. Hill*, 277 Ga. 255, 269, 587 S.E.2d 613, 626 (2003)).

death sentence was neither excessive nor disproportionate and was not imposed under the influence of passion, prejudice, or any other arbitrary factor.¹⁰⁹ Accordingly, the court affirmed the lower court's judgment.¹¹⁰

In *Walker v. State*,¹¹¹ Gregory Walker was convicted of malice murder and related firearms charges, and a jury sentenced him to death.¹¹² The court summarily denied a number of Walker's claims without analysis because the issues were either resolved by prior decisions of the court, or Walker failed to support his claims with any argument or citation to authority.¹¹³

The first claim the court reviewed was whether the State failed to timely notify Walker of the statutory aggravating circumstances it intended to rely upon in seeking a death sentence because the State failed to allege them in the indictment.¹¹⁴ The court acknowledged that this issue had been previously decided in *Terrell v. State*,¹¹⁵ however, the court noted that while the State complied with the procedure within the Unified Appeal Procedure by timely announcing its intent to seek the death penalty, the State did not inform Walker of the statutory aggravating circumstances it intended to prove at trial until the first day of voir dire.¹¹⁶ Nonetheless, the court held that even if this amounted to a constitutional violation, it was harmless beyond a reasonable doubt.¹¹⁷ In support of its holding, the court noted that the indictment contained a separate charge alleging that the murder was committed while Walker was engaged in a kidnapping involving bodily injury,¹¹⁸ which the State relied upon and the jury found beyond a reasonable doubt.¹¹⁹ The court, therefore, concluded that Walker received sufficient notice of this aggravating circumstance and held that there was no error.¹²⁰

The court also reviewed a number of claims alleging the improper excusal of prospective jurors.¹²¹ Walker argued that the trial court

109. *Id.*

110. *Id.* at 91, 635 S.E.2d at 149.

111. 281 Ga. 157, 635 S.E.2d 740 (2006).

112. *Id.* at 157, 635 S.E.2d at 743.

113. *See id.* at 157-62, 635 S.E.2d at 743-46.

114. *Id.* at 160, 635 S.E.2d at 744.

115. *Id.*, 635 S.E.2d at 744-45; 276 Ga. 34, 40-42, 572 S.E.2d 595, 602-03 (2002).

116. *Walker*, 281 Ga. at 160, 635 S.E.2d at 744-45.

117. *Id.* at 160-61, 635 S.E.2d at 745.

118. *Id.* at 161, 635 S.E.2d at 745.

119. *Id.*

120. *Id.*

121. *See id.* at 162-64, 635 S.E.2d at 746-47.

erroneously excused nine prospective jurors for cause due to their purported opposition to the death penalty.¹²² 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.”¹²³ The court also noted that it must review the prospective juror’s voir dire testimony as a whole and accord deference to the trial court where responses are equivocal.¹²⁴

Upon the court’s review of the claim that prospective juror Dutton was improperly excused, the record showed that while Dutton initially indicated that he could consider the death penalty as a sentencing option, he later vacillated and stated he did not know if he would vote for death.¹²⁵ After further questioning by the trial court, Dutton stated that “the death penalty was against his nature” and indicated that he could not vote for it regardless of the circumstances.¹²⁶ The court noted that the trial court relied in large part on Dutton’s demeanor and body language in making its determination.¹²⁷ The court accorded deference to the trial court’s findings, and after reviewing Dutton’s testimony as a whole, the court held that there was no abuse of discretion in disqualifying him.¹²⁸

On review of Walker’s claim that prospective juror Rodgers was improperly disqualified, the record showed that while Rodgers initially, albeit hesitantly, stated that he could consider voting for death in some circumstances, he later went on to state that “he believed his reservations about the death penalty would interfere with his ability to realistically consider it as a punishment option. . . .”¹²⁹ Rodgers then went one step further, indicating that he could not vote for death under any circumstances and would, instead, always opt for a sentence of life with or without the possibility of parole.¹³⁰ The court held that in view

122. *Id.* at 162, 635 S.E.2d at 746.

123. *Id.* (citations and internal quotation marks omitted) (quoting *Greene v. State*, 268 Ga. 47, 48, 485 S.E.2d 741, 743 (1997)).

124. *Id.*

125. *Id.* at 162-63, 635 S.E.2d at 746-47.

126. *Id.* at 162, 635 S.E.2d at 746.

127. *Id.* at 162-63, 635 S.E.2d at 746. Such a holding was supported in the recent case of *Uttecht v. Brown*, 127 S. Ct. 2218, 2224 (2007) (holding that deference is owed to the trial court which “is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors”).

128. *Walker*, 281 Ga. at 163, 635 S.E.2d at 746-47.

129. *Id.*, 635 S.E.2d at 747.

130. *Id.*

of Rodgers's testimony as a whole, the trial court was authorized to find him unqualified to serve.¹³¹

The court also denied Walker's claim that prospective jurors Brashier, Aldridge, Geter, Alderman, and Porter were improperly disqualified.¹³² According to the record, prospective juror Brashier "indicated that she would automatically vote against" the imposition of death in any case, regardless of the circumstances, even if the State proved the existence of a statutory aggravating circumstance beyond a reasonable doubt.¹³³ Prospective juror Aldridge indicated he would not consider the death penalty "under any circumstances."¹³⁴ "Prospective juror Geter stated that she was conscientiously opposed to the death penalty" and could not consider any factors that might warrant death.¹³⁵ Prospective juror Alderman voiced her opposition to the death penalty and stated that she could not consider death under any circumstances.¹³⁶ Finally, prospective juror Porter was emphatic "that she could not consider the death penalty under any circumstances."¹³⁷ The court held that given the testimony of each of these prospective jurors, "[t]he trial court was authorized to find that these jurors' views would prevent or substantially impair the performance of their duties in accordance with their instructions and oaths . . ." ¹³⁸ Accordingly, the court held that there was no error in disqualifying these prospective jurors.¹³⁹

The court also rejected Walker's argument that prospective jurors Lett and Rowell were improperly disqualified because both stated that they "would not consider life in prison without parole, regardless of the circumstances."¹⁴⁰ The court held that the trial court did not err in excusing them because they "gave the impression they would be unable to apply the law faithfully and impartially."¹⁴¹

Walker next argued that he was entitled to a trial before a separate jury on the charge of possession of a firearm by a convicted felon. Following the jury's verdict on the charges of malice murder and possession of a firearm during the commission of a crime, the trial court conducted a separate trial before the same jury on the charge of

131. *Id.*

132. *Id.* at 163-64, 635 S.E.2d at 747.

133. *Id.* at 163, 635 S.E.2d at 747.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 163-64, 635 S.E.2d at 747.

139. *See id.* at 164, 635 S.E.2d at 747.

140. *Id.*

141. *Id.*

possession of a firearm by a convicted felon.¹⁴² The court noted the existence of a limited exception which bifurcates a charge of possession of a firearm by a convicted felon from other charges arising from the same conduct.¹⁴³ However, according to the court, it had never before held and refused to hold here that a defendant was entitled to a separate trial before a new jury on such a charge.¹⁴⁴

The court likewise denied Walker's argument that conducting the trial on possession of a firearm by a convicted felon prior to the sentencing phase of his capital murder trial prejudiced the jury by impermissibly placing his character in issue.¹⁴⁵ The court held that because the State could have introduced evidence of prior convictions during the sentencing phase, it was not error to conduct the trial on this charge at the end of the merits phase of Walker's capital murder trial.¹⁴⁶

Walker's final claim, concerning the charge of possession of a firearm by a convicted felon, was that the evidence against him was insufficient for a conviction because the only evidence the State submitted during trial on this issue was a certified copy of Walker's indictment, his guilty plea, and his sentence for the felony offense of theft by taking.¹⁴⁷ The court denied this claim, stating that it was proper for the trial court to instruct the jury that it was authorized to consider the evidence presented during the merits phase of the capital murder trial, in addition to the evidence introduced at the subsequent trial for possession of a firearm by a convicted felon.¹⁴⁸ The court held that by incorporating by reference the evidence from the merits phase of the capital murder trial, "the jury was authorized to find that Walker possessed a firearm" and that "[e]vidence of Walker's prior conviction of a felony provided the additional element necessary for conviction."¹⁴⁹ The court denied Walker's remaining claims and affirmed the lower court's judgment.¹⁵⁰

142. *Id.*, 635 S.E.2d at 747-48.

143. *Id.*, 635 S.E.2d at 748.

144. *Id.*

145. *Id.* at 164-65, 635 S.E.2d at 748.

146. *Id.* at 165, 635 S.E.2d at 748.

147. *Id.*

148. *Id.*

149. *Id.*

150. *See id.* at 165-68, 635 S.E.2d at 748-50.
