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Death Penalty Law

by **Therese M. Day***

This Article provides a survey of death penalty caselaw in Georgia from June 1, 2007 through May 31, 2008. The cases included in this Survey were heard by the Georgia Supreme Court on interim appeal and direct appeal.¹ Discussion is limited to claims that present new issues of law, refine existing law, or are otherwise instructive.

I. GEORGIA SUPREME COURT DECISIONS

A. *Interim Review Cases*

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

In *Wagner v. State*,³ Crystal Mae Wagner was indicted for murder, felony murder, and concealment of death, and the State filed its notice to seek the death penalty.⁴ The court granted Wagner's application for interim review and directed the parties to address five issues; Wagner raised two additional issues.⁵

The court first addressed whether the trial court erred in denying Wagner's motion to quash her indictment when the State charged her with felony murder.⁶ Count Two of Wagner's indictment contained the phrase "intentionally and with malice aforethought," language applicable

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1. Due to space restrictions, *Gibson v. Head*, 282 Ga. 156, 646 S.E.2d 257 (2007), a state habeas case, and *Davis v. State*, 283 Ga. 438, 660 S.E.2d 354 (2008), a post federal habeas extraordinary motion for new trial case, have been omitted.

2. O.C.G.A. § 17-10-36 (2008).

3. 282 Ga. 149, 646 S.E.2d 676 (2007).

4. *Id.* at 149-50, 646 S.E.2d at 677.

5. *Id.* at 150, 646 S.E.2d at 677.

6. *Id.*, 646 S.E.2d at 678.

to malice murder and not felony murder.⁷ The court held that the charge mixed the elements of the two offenses rather than charging them in the alternative.⁸ The court noted that “where a special demurrer points out an *immaterial* defect, the trial court should strike out or otherwise correct the immaterial defect.”⁹ However, when a special demurrer identifies a material defect, the trial court “must quash the defective count of the indictment.”¹⁰ The court held that the mixing of the elements of malice murder and felony murder in the indictment constituted a material defect, requiring that Count Two of Wagner’s indictment be quashed.¹¹

In reaching this conclusion, the court reconsidered its prior decision in *Bailey v. State*,¹² in which it held “that a trial court does not err by denying a special demurrer ‘where the defect in an indictment is not material and does not prejudice the defendant’s rights.’”¹³ The court noted that while “questions of materiality and prejudice may be coextensive,” a court should only employ harmless error review after a conviction has resulted and not in pretrial proceedings or a pretrial appeal.¹⁴ Therefore, the court disapproved of the language in *Bailey* to the extent that it could be construed to hold that a material defect that is not prejudicial to the defendant does not require the indictment to be quashed.¹⁵

The court next addressed whether the trial court erred in denying Wagner’s motion to quash the indictment for the State’s failure to allege in the malice murder count that the murder victim was a “human being.”¹⁶ The court held that the failure to state that a specifically named victim was a human being was not a material defect, and therefore, the trial court did not err by refusing to quash the malice murder count of the indictment.¹⁷

In reviewing Wagner’s third claim, the court addressed whether the trial court erred in denying Wagner’s motion to quash the indictment because the State listed the wrong code section for the “Concealment of

7. *Id.*

8. *Id.*

9. *Id.* (citing *Bailey v. State*, 280 Ga. 884, 885, 635 S.E.2d 137, 138 (2006)).

10. *Id.*

11. *Id.* at 151, 646 S.E.2d at 678.

12. 280 Ga. 884, 635 S.E.2d 137 (2006).

13. *Wagner*, 282 Ga. at 150, 646 S.E.2d at 678 (quoting *Bailey*, 280 Ga. at 885, 635 S.E.2d at 138).

14. *Id.*

15. *Id.*

16. *Id.* at 151, 646 S.E.2d at 678.

17. *Id.*

a Death” charge even though the elements of the offense were properly charged.¹⁸ The court held that the name of a code section in an indictment is “mere surplusage,” and any misnaming is not a material defect.¹⁹ Therefore, it was not error for the trial court to refuse to quash this count of the indictment.²⁰ The court then directed the trial court to strike the incorrect code section from the indictment.²¹

In response to Wagner’s fourth claim, the court addressed whether the trial court erred in denying Wagner’s motion to have challenges for cause heard outside the presence of prospective jurors.²² The court held that while it is better for some matters to be raised outside the presence of the jurors, the trial court has discretion to control voir dire and, therefore, did not err when it refused to require that all challenges for cause be heard outside the presence of prospective jurors.²³

The final issue the court directed the parties to address was whether the trial court erred in denying Wagner’s motion to compel the district attorney to testify about his decision to seek the death penalty.²⁴ The court noted that a prosecutor’s discretion to seek the death penalty is limited by the code section enumerating statutory aggravating circumstances²⁵ as well as by the strength of the evidence of the case and the jury’s verdict.²⁶ The court then stated that policy considerations require a defendant to raise a prima facie case of unconstitutional conduct before a prosecutor will be required to testify regarding a decision to seek the death penalty.²⁷ The court held that because Wagner had been charged with a crime for which the federal and state constitutions permit the imposition of the death penalty, the trial court did not err by refusing to require the district attorney to testify about his decision to seek the death penalty in Wagner’s case.²⁸

Wagner raised two issues in addition to the issues the court directed the parties to address.²⁹ The first issue was whether the trial court erred when it refused to dismiss one of the statutory aggravating circumstances listed in the State’s death notice when the language

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*, 646 S.E.2d at 679.

23. *Id.*

24. *Id.*

25. O.C.G.A. § 17-10-30 (2008).

26. *Wagner*, 282 Ga. at 152, 646 S.E.2d at 679.

27. *Id.* (citing *McCleskey v. Kemp*, 481 U.S. 279, 297 n.18 (1987)).

28. *Id.*

29. *Id.* at 150, 646 S.E.2d at 677.

stated, “[t]he offense of murder in this case was committed for the purpose of receiving money’ rather than . . . ‘[t]he offender’ committed the murder for the purpose of receiving money,”³⁰ as provided for in section 17-10-30(b)(4) of the Official Code of Georgia Annotated (O.C.G.A.).³¹ The court recognized that because two defendants were charged with murder in this case, it was conceivable that while Wagner’s codefendant committed the murder for pecuniary gain, Wagner’s own participation was not for that purpose.³² Nonetheless, the court held that any confusion raised by the language in the notice could be cured by an instruction from the judge to the jurors and that the notice fulfilled its purpose of notifying Wagner of what she must defend against at trial.³³ Therefore, the court held that the trial court did not err when it refused to dismiss the statutory aggravating circumstance.³⁴

The second issue raised by Wagner was whether the State’s notice to seek the death penalty was defective for failing to list which aspects of the murder involved “depravity of mind.”³⁵ The court again ruled that the State’s notice was sufficient to place Wagner on notice of the charges that she would have to defend against at trial and, therefore, found no error.³⁶ Accordingly, the court affirmed the lower court’s decision in part, affirmed with direction in part, and reversed in part.³⁷

In *Muhammad v. State*,³⁸ Anjail Durriyyah Muhammad was indicted for malice murder, felony murder, and related charges, and the State filed its notice to seek the death penalty.³⁹ After granting Muhammad’s application for interim review, the court instructed the parties to address whether the trial court erred by denying Muhammad’s motions that challenged Georgia’s amended criminal discovery statute.⁴⁰

Two months following her indictment, Muhammad elected to participate in the Criminal Procedure Discovery Act (the Act).⁴¹ However, following Muhammad’s decision to participate, the Act was amended by the Criminal Justice Act of 2005 (the 2005 Act).⁴² The

30. *Id.* at 152, 646 S.E.2d at 679 (alterations in original).

31. O.C.G.A. § 17-10-30(b)(4) (2008).

32. *Wagner*, 282 Ga. at 152, 646 S.E.2d at 679.

33. *Id.* at 153, 646 S.E.2d at 679.

34. *Id.*

35. *Id.*, 646 S.E.2d at 679-80.

36. *Id.*, 646 S.E.2d at 680.

37. *Id.*

38. 282 Ga. 247, 647 S.E.2d 560 (2007).

39. *Id.* at 247, 647 S.E.2d at 561.

40. *Id.* (citing O.C.G.A. §§ 17-16-1 to -23 (2008)).

41. O.C.G.A. §§ 17-16-1 to -23 (2008).

42. *Muhammad*, 282 Ga. at 247, 647 S.E.2d at 561; 2005 Ga. Laws 29.

2005 Act applies “to all trials which commence on or after July 1, 2005.”⁴³ Because Muhammad’s trial had not yet commenced, the trial court ruled that the 2005 Act applied to her case. Muhammad challenged the validity of the 2005 Act and its applicability to her case on several bases.⁴⁴

The supreme court initially noted that several of Muhammad’s claims had already been decided adversely to her in *Stinski v. State*.⁴⁵ The court applied its holding in *Stinski*, concluding that the 2005 Act did not constitute an ex post facto law or bill of attainder, did not violate due process because it imposed reciprocal discovery on the State, and did not prevent Muhammad from presenting mitigating evidence.⁴⁶ Furthermore, the court held that any additional discovery duties did not arise through an invalid waiver of the defendant’s right not to participate, as Muhammad’s earlier election remained valid.⁴⁷

Muhammad also alleged that the 2005 Act violated her constitutionally guaranteed right to effective assistance of counsel under the Sixth Amendment to the United States Constitution⁴⁸ and article I, section I, paragraph XIV of the Georgia constitution.⁴⁹ Muhammad argued that the 2005 Act interfered with the defense counsel’s ability to perform the constitutionally mandated penalty phase investigation when there was a possibility that counsel’s efforts may result in the discovery of harmful evidence that must be disclosed to the State.⁵⁰

The court noted that the relevant portions of the 2005 Act require the defendant “to produce, *at or before the announcement of a guilt/innocence verdict*,” certain items of tangible and documentary evidence to the State for inspection if the defendant intends to introduce them as evidence during the penalty phase of the trial.⁵¹ The court also acknowledged that the 2005 Act requires the defendant to disclose “*at or before the guilt/innocence verdict*,” reports relating to mental health evaluations or scientific tests that the defendant intends to introduce during the penalty phase.⁵² Finally, the court recognized

43. *Muhammad*, 282 Ga. at 247, 647 S.E.2d at 561-62 (quoting 2005 Ga. Laws 29) (noting that an uncodified section of the 2005 Act made it applicable to this time frame).

44. *Id.*, 647 S.E.2d at 562.

45. *Id.* at 248, 647 S.E.2d at 562; *Stinsky v. State*, 281 Ga. 783, 642 S.E.2d 1 (2007).

46. *Muhammad*, 282 Ga. at 248, 647 S.E.2d at 562 (citing *Stinski*, 281 Ga. at 786-88, 642 S.E.2d at 6-8).

47. *Id.*

48. U.S. CONST. amend. VI.

49. GA. CONST. art. I, § 1, para. 14.

50. *Muhammad*, 282 Ga. at 248, 647 S.E.2d at 562.

51. *Id.* (emphasis added) (quoting *Stinski*, 281 Ga. at 787, 642 S.E.2d at 7).

52. *Id.* (emphasis added) (quoting *Stinski*, 281 Ga. at 787, 642 S.E.2d at 7).

that the 2005 Act requires the defendant to “disclose *five days before trial* the identity of witnesses the defendant intends to call” during the penalty phase, as well as nonprivileged witness statements “*at or before the guilt / innocence verdict.*”⁵³

The court ruled that apart from the list of witnesses the defendant intends to call at the penalty phase of the trial, the defendant “has until the announcement of the jury’s verdict or the publication of the court’s judgment” to comply with the 2005 Act’s requirements.⁵⁴ Therefore, defense counsel is “free to investigate for mitigating evidence” without providing substantive discovery until the close of evidence in the merits phase of the trial.⁵⁵ The court also held that reciprocal discovery provisions requiring defense counsel to disclose the identity of witnesses that a defendant intends to call at the penalty phase five days prior to the commencement of the trial do not violate a defendant’s right to effective assistance of counsel.⁵⁶

Muhammad further alleged that the 2005 Act’s requirement that she disclose any mitigating evidence she intends to introduce at the penalty phase violated her privilege against self-incrimination guaranteed by the Fifth Amendment to the United States Constitution⁵⁷ and article I, section I, paragraph XVI of the Georgia constitution.⁵⁸ The court ruled that in order for statutorily mandated discovery of evidence to be protected by the self-incrimination clause, it must meet each of the following requirements: (1) the information must be incriminating; (2) the information must be personal to the defendant; (3) the information must be compelled; and (4) the information must be “testimonial or communicative in nature.”⁵⁹

The court held that requiring the defendant to produce the evidence enumerated in O.C.G.A. § 17-16-4(b)(3)(A)-(B)⁶⁰ at or before the merits phase is not compelled self-incrimination because the rule only changes

53. *Id.* (emphasis added) (quoting *Stinski*, 281 Ga. at 787, 642 S.E.2d at 7).

54. *Id.* at 249, 647 S.E.2d at 562.

55. *Id.*

56. *Id.*, 647 S.E.2d at 563 (citing *United States v. Nobles*, 422 U.S. 225, 251 (1975) (rejecting a Sixth Amendment challenge to the trial court’s order requiring disclosure by the defense of a report of a prosecutorial witness’s statements when the witness would be called by the defense at trial); *State v. Lucious*, 271 Ga. 361, 518 S.E.2d 677 (1999)). The provision also requires the defense to provide to the State written or recorded statements of the witness. O.C.G.A. § 17-16-4 (2008).

57. U.S. CONST. amend. V.

58. *Muhammad*, 282 Ga. at 250, 647 S.E.2d at 563; GA. CONST. art. I, § 1, para. 16.

59. *Muhammad*, 282 Ga. at 250-51, 647 S.E.2d at 563-64 (citing *Nobles*, 422 U.S. at 233; *Schmerber v. California*, 384 U.S. 757, 761 (1966)).

60. O.C.G.A. § 17-16-4(b)(3)(A)-(B) (2008).

the timing of the defendant's disclosure of evidence she would already introduce at trial.⁶¹ The court also held that statements of witnesses the defendant intends to call at trial are not personal to the defendant.⁶² Therefore, the privilege against self-incrimination does not extend to testimony or statements of third parties who will be called as witnesses at trial.⁶³

The court distinguished the defendant's list of witnesses from the statements of defense witnesses and held that the disclosure of the list of witnesses the defendant intends to call at the penalty phase of the trial is personal to the defendant because the defendant is required to create the list and provide it to the State.⁶⁴ The court recognized that there could be circumstances in which the disclosure of this list prior to the commencement of the trial could interfere with the defendant's merits-phase defense and violate the defendant's privilege against self-incrimination.⁶⁵ The court noted that such a requirement was "not merely accelerating the timing of [the] disclosure," because a defendant may not want to disclose a witness who would be helpful during the penalty phase, but would be harmful during the merits phase.⁶⁶ The court, therefore, held that a "trial court can exercise its discretion to 'specify the time, place, and manner of making the discovery' and to enter such orders as seem 'just under the circumstances' . . . when such concerns arise."⁶⁷ The court instructed that when the defendant brings the issue to the court's attention, the trial court may hold a hearing, and if the defendant demonstrates that pretrial disclosure of her witness list "would violate her constitutional rights, a protective order or a continuance pending the completion of the [merits] phase of the trial will provide a sufficient remedy."⁶⁸ Accordingly, the court affirmed the lower court's judgment.⁶⁹

In *Jones v. State*,⁷⁰ Jerry William Jones pleaded guilty to four counts of murder and eighteen related crimes, and the State filed its notice of intent to seek the death penalty at the sentencing trial.⁷¹ The supreme

61. *Muhammad*, 282 Ga. at 251, 647 S.E.2d at 564 (citing *Williams v. Florida*, 399 U.S. 78, 79 (1970)).

62. *Id.*

63. *Id.* at 251-52, 647 S.E.2d at 564 (citing *Nobles*, 422 U.S. at 233-34).

64. *Id.* at 252, 647 S.E.2d at 565.

65. *Id.* at 252-53, 647 S.E.2d at 565.

66. *Id.* at 253, 647 S.E.2d at 565 (citing *Williams*, 399 U.S. at 85).

67. *Id.* (quoting O.C.G.A. § 17-16-6 (2008)).

68. *Id.*

69. *Id.*

70. 282 Ga. 784, 653 S.E.2d 456 (2007).

71. *Id.* at 784, 653 S.E.2d at 457.

court granted interim review and directed the parties to address three issues: (1) whether the trial court erred in denying Jones's motion to suppress evidence found at his residence; (2) whether the trial court erred in denying Jones's motion to bar the imposition of the death penalty or a life sentence without the possibility of parole because the indictment did not allege the statutory aggravating circumstances; and (3) whether the trial court erred in denying Jones's motions regarding the amended discovery statute.⁷²

In addressing the first issue, Jones alleged that his rights against warrantless searches and seizures were violated when his probation officer and several law enforcement officers came to his home to arrest him pursuant to an arrest warrant and, finding that he was not home, conducted a forty-six minute search of his home without a search warrant.⁷³ The court held that the search was unlawful to the extent it exceeded a plain view search of his residence incident to the attempted arrest.⁷⁴

The court initially noted that pursuant to its own decisions as well as the decisions of the United States Supreme Court, the protections of the Fourth Amendment to the United States Constitution⁷⁵ apply to all citizens, including probationers.⁷⁶ The court also acknowledged that the Fourth Amendment rights of probationers may be lawfully restricted but only under the authority of "valid laws, legally authorized regulations, and sentencing orders."⁷⁷ However, in Jones's case, the court held that the State failed to show the existence of any authority allowing for the warrantless search of Jones's apartment.⁷⁸

According to the record, the State introduced the sentencing form from Jones's 2001 Gordon County conviction for possession of a firearm by a convicted felon that had a preprinted portion listing general and special conditions of probation, including a provision that the probationer must

72. *Id.*

73. *Id.*

74. *Id.*

75. U.S. CONST. amend IV.

76. *Jones*, 282 Ga. at 784-85, 653 S.E.2d at 457 (citing *Allen v. State*, 258 Ga. 424, 425, 369 S.E.2d 909, 910 (1988)).

77. *Id.* at 785-86, 653 S.E.2d at 457-58 (citing *Griffin v. Wisconsin*, 483 U.S. 868, 872-73 (1987) (holding that a warrantless search of a probationer's apartment based on "reasonable grounds" rather than probable cause was valid under the "special needs" exception to the warrant requirement when the limitation was authorized under a valid regulation governing probationers); *United States v. Knights*, 534 U.S. 112, 119-20 (2001) (holding that a warrantless search of a probationer's apartment for investigatory purposes was valid when the probationer's rights had been explicitly limited in a search condition contained in his sentencing order)).

78. *Id.* at 786, 653 S.E.2d at 458.

submit to warrantless searches upon request. The box next to this preprinted provision, however, was not checked. The State also introduced an order placing Jones on intensive probation for four to six months, which included a provision that Jones must submit to warrantless searches upon request; however, the search at issue occurred after the intensive supervision period had been completed.⁷⁹

The court concluded that the Gordon County court orders failed to put Jones on notice that he had a diminished expectation of privacy at the time of the search in question.⁸⁰ The court likewise concluded that other documents submitted by the State were insufficient to have put Jones on notice that he had a diminished expectation of privacy.⁸¹ The court adopted the reasoning of the United States Supreme Court⁸² and held that Jones's status as a probationer alone cannot serve as a substitute for a search warrant, and in the absence of a valid law, legally authorized regulation, or sentencing order giving Jones notice of his deprivation of rights, the warrantless search was invalid.⁸³

In his second claim, Jones argued that the court should rule that Georgia's statutory aggravating circumstances are elements of death eligible murder, which are required to be alleged in the indictment.⁸⁴ The court acknowledged that the United States Supreme Court held in *Ring v. Arizona*⁸⁵ "that a statutory aggravating circumstance in a death penalty case is 'the functional equivalent of an element of a greater offense' and, as such, must be proven to the jury beyond a reasonable doubt."⁸⁶ However, the court noted that "the Constitution of the United States does not require that statutory aggravating circumstances be included in Georgia indictments, because the indictment requirement of the Fifth Amendment has not been incorporated into the Fourteenth Amendment [to the United States Constitution],"⁸⁷ and thus the requirement "is not applicable to the states."⁸⁸ The court held that all that is necessary in Georgia is "notice sufficient to satisfy due process."⁸⁹

79. *Id.* at 786-87, 653 S.E.2d at 458.

80. *Id.* at 787, 653 S.E.2d at 458-59.

81. *Id.*, 653 S.E.2d at 459.

82. *See Griffin*, 483 U.S. at 880; *see also Knights*, 534 U.S. at 121.

83. *Jones*, 282 Ga. at 787-88, 653 S.E.2d at 459.

84. *Id.* at 791, 653 S.E.2d at 461.

85. 536 U.S. 584 (2002).

86. *Jones*, 282 Ga. at 790, 653 S.E.2d at 461 (quoting *Ring*, 536 U.S. at 609).

87. U.S. CONST. amend XIV.

88. *Jones*, 282 Ga. at 790, 653 S.E.2d at 461 (emphasis omitted).

89. *Id.*

Jones acknowledged that *Ring* was “binding only on the question of whether statutory aggravating circumstances are ‘elements’ with regard to federal constitutional law,” but he argued that *Ring* should be considered persuasive authority when deciding whether statutory aggravating circumstances are “elements” of death eligible murder under Georgia law.⁹⁰ The court agreed with Jones that an indictment is required in all capital cases in Georgia, but the court declined to address Jones’s argument that indictments are required under the common law and, thus, are an “inherent right[]” under the Georgia constitution.⁹¹ Relying on its own precedent, the court held that statutory aggravating circumstances are not elements of death eligible murder in Georgia; instead, they are sentencing factors and therefore do not need to be alleged in the indictment.⁹²

The court went on to deny Jones’s final claim, stating that regardless of whether he had standing to complain as a result of not opting into the discovery procedure, each of his arguments were previously rejected in other cases.⁹³ Accordingly, the court affirmed the lower court’s decision in part, reversed it in part, and remanded the case with direction.⁹⁴

In *Harper v. State*,⁹⁵ Richard Scott Harper was charged with murder and related crimes, and the State gave notice of its intent to seek the death penalty.⁹⁶ The supreme court granted Harper’s application for interim review and directed the parties to address two questions: (1) whether the trial court erred in denying Harper’s grand jury challenge when someone other than the person intended to be summoned served on the grand jury; and (2) whether the trial court erred in denying Harper’s motion to suppress evidence seized from his desk at work.⁹⁷

According to the record, “William A. Conner” was summoned to grand jury service. The summons, which did not include a date of birth, was sent to the address of William A. Conner, Sr. (Conner Senior), who ultimately served on the grand jury. The grand jury list generated by the jury commission, as well as the list of jurors attached to the trial court’s order summoning prospective jurors, listed “William A. Conner” with a birth date of April 12, 1977, which is the birth date of William A. Conner, Jr. (Conner Junior). Conner Junior had moved from the county

90. *Id.* at 791, 653 S.E.2d at 461.

91. *Id.* (citing GA. CONST. art. I, § 1, para. 29).

92. *Id.*, 653 S.E.2d at 461-62.

93. *Id.* (citing *Muhammad*, 282 Ga. 247, 647 S.E.2d 560; *Stinski*, 281 Ga. at 786-88, 642 S.E.2d at 6-8).

94. *Id.* at 792, 653 S.E.2d at 462.

95. 283 Ga. 102, 657 S.E.2d 213 (2008).

96. *Id.* at 102, 657 S.E.2d at 214.

97. *Id.*

ten years earlier but maintained a permanent address at his sister's house. Conner Junior had never lived at the address where the summons was mailed, which was also the address maintained in the jury commission's records and the order to summon jurors. The director of the jury management office testified that it was her belief that the wrong juror served on the grand jury, and the trial court's order was based on the assumption that the wrong person served on the grand jury.⁹⁸ However, the trial court ruled that "the juror who served was otherwise qualified to serve."⁹⁹

The supreme court rejected the State's argument that service on the grand jury by someone not on the grand jury list violated "merely directory aspects" of the jury selection statute.¹⁰⁰ The court noted that "the defect was not in complying with the statutory directives governing *how* the jury commission should select grand jurors. Instead, the alleged defect was that someone never selected by the jury commission served."¹⁰¹ The court reasoned that when the jury commission's role is circumvented by the service of someone who was never selected for service, there is an "essential and substantial" violation of the law.¹⁰² The court held that Harper made a sufficient showing of an "illegality" in the composition of the grand jury by showing that someone never selected for service by the jury commission served on the grand jury.¹⁰³ Because the trial court never made a finding that the wrong person served on the grand jury, the court vacated the judgment in part and remanded the case for a ruling on the issue.¹⁰⁴

Additionally, Harper alleged that the search of his office was conducted pursuant to an invalid search warrant, and therefore, the seized evidence should be suppressed.¹⁰⁵ The State conceded on the pleadings, and the court agreed, holding that the warrant was invalid because the information supporting a finding of probable cause was provided by a third party informant whose credibility was unverifi-

98. *Id.* at 103, 657 S.E.2d at 214-15.

99. *Id.*, 657 S.E.2d at 215 (citing O.C.G.A. § 15-12-60 (2008)).

100. *Id.* (citing *State v. Parlor*, 281 Ga. 820, 821, 642 S.E.2d 54, 55 (2007)); O.C.G.A. § 15-12-40 (2008).

101. 283 Ga. at 103-04, 657 S.E.2d at 215.

102. *Id.* at 104, 657 S.E.2d at 215 (quoting *Pollard v. State*, 148 Ga. 447, 453, 96 S.E. 997, 1000 (1918)).

103. *Id.*, 657 S.E.2d at 216 (internal quotation marks omitted) (quoting *Dawson v. State*, 166 Ga. App. 515, 517, 304 S.E.2d 570, 572 (1983)).

104. *Id.*

105. *Id.* at 105, 657 S.E.2d at 216.

able.¹⁰⁶ Accordingly, the court held that the trial court erred in finding the existence of probable cause to issue the warrant.¹⁰⁷

The court also rejected the trial court's alternative finding that a search warrant was not required to search Harper's desk at work because it was unlocked and in a workspace shared by others.¹⁰⁸ The court noted that the State presented no evidence that anyone with authority gave valid consent to search Harper's desk.¹⁰⁹ The court also noted that Harper's desk and file cabinet "were used exclusively by [him], that he regularly kept personal items in them, and that [his] employer did not have any regulation or policy discouraging employees from storing personal items in their desks and file cabinets."¹¹⁰ Therefore, the court held that the search violated Harper's reasonable expectation of privacy, making all evidence found within the desk inadmissible at trial.¹¹¹ Accordingly, the court reversed the lower court's judgment in part, vacated it in part, and remanded the case with direction.¹¹²

In *Vergara v. State*,¹¹³ Ignacio Vergara, along with his codefendant Brigido Soto, was indicted for murder and related crimes, and the State gave notice of its intention to seek the death penalty.¹¹⁴ The supreme court granted Vergara's application for interim review and directed the parties to address two issues: (1) whether the trial court erred in failing to suppress Vergara's March 28, 2002 custodial statement and the evidence obtained as a result thereof; and (2) whether the trial court erred in failing to suppress Vergara's statements to the police on March 26-27, 2002 and the evidence obtained as a result of those statements.¹¹⁵

According to the evidence, Georgia Bureau of Investigation (G.B.I.) agents went to Vergara's residence on March 26, 2002 in connection with the investigation of a double homicide that occurred on March 13, 2002. Detective Spindola informed Vergara that his home telephone number had been found on the cellular phone of one of the victims. Vergara then agreed to accompany the officers to the Law Enforcement Center (L.E.C.), where he was interviewed after being informed of his rights

106. *Id.*

107. *Id.* at 106, 657 S.E.2d at 217.

108. *Id.*

109. *Id.*

110. *Id.* at 106-07, 657 S.E.2d at 217.

111. *Id.* at 107, 657 S.E.2d at 217.

112. *Id.*, 657 S.E.2d at 218.

113. 283 Ga. 175, 657 S.E.2d 863 (2008).

114. *Id.* at 175-76, 657 S.E.2d at 865.

115. *Id.* at 176, 657 S.E.2d at 865.

under *Miranda v. Arizona*¹¹⁶ in Spanish and signing a waiver. During the videotaped interview, Vergara acknowledged his presence at the scene of the murders and implicated Soto as the perpetrator. Vergara provided officers with a notebook that contained Soto's telephone number, and he agreed to ride with the officers to retrace his and Soto's movements on the day of the murders. Vergara also helped police locate the cellular phone of one of the victims. Vergara and the officers later returned to the L.E.C., and Vergara telephoned Soto while the officers audiotaped the call. Vergara then again rode with the officers to point out Soto's residence.¹¹⁷

Following Soto's arrest and interview on March 26, 2002, Vergara was re-informed of his *Miranda* rights and re-interviewed at 12:45 a.m. on March 27, 2002. Vergara informed police that he knew the location of the handgun allegedly used in the murders and accompanied officers to its location. Police resumed their interview with Vergara at 1:55 a.m., after reminding him of his rights pursuant to *Miranda*. At 3:40 a.m., a warrant was obtained for Vergara's arrest. On March 28, 2002, police interviewed Vergara again.¹¹⁸

Vergara challenged the admission of his statements, and all evidence obtained as a result thereof, on the basis that they were not voluntarily obtained as required under Georgia law.¹¹⁹ The court rejected the State's argument that O.C.G.A. § 24-3-50¹²⁰ was inapplicable to Vergara's statements because they were not confessions, noting that the standard is the same for both incriminating statements and confessions under Georgia law.¹²¹ The court also rejected the State's argument that the nine-factor test for juvenile confessions in *Reinhardt v. State*¹²² should be applied.¹²³ Acknowledging that some of the factors might be relevant to an adult confession, the court concluded that the test itself only applies to juvenile confessions.¹²⁴ The court held that Vergara's statements would be admissible if, in "the totality of the

116. 384 U.S. 436 (1966).

117. *Vergara*, 283 Ga. at 176, 657 S.E.2d at 865.

118. *Id.*, 657 S.E.2d at 866.

119. *Id.* at 177, 657 S.E.2d at 866 (citing O.C.G.A. § 24-3-50 (1995) (providing that in order for a confession to be admissible, "it must have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury")).

120. O.C.G.A. § 24-3-50 (1995).

121. *Vergara*, 283 Ga. at 177, 657 S.E.2d at 866 (citing *Turner v. State*, 203 Ga. 770, 772, 48 S.E.2d 522, 523 (1948)).

122. 263 Ga. 113, 428 S.E.2d 333 (1993), *overruled by Vergara*, 283 Ga. at 178, 428 S.E.2d at 866.

123. *Vergara*, 283 Ga. at 177-78, 657 S.E.2d at 866.

124. *Id.*

circumstances, they were 'made voluntarily, without being induced by hope of benefit or coerced by threats.'¹²⁵

The court rejected Vergara's argument that his statements from March 26 and March 27 were involuntary, because Vergara was not a suspect in the case until after Soto's arrest, and therefore, he was not in custody at the time the statements were made.¹²⁶ The court then went on to address Vergara's March 28 statements that were made after his first appearance and appointment of counsel.¹²⁷ The court determined it was undisputed "that Spindola neither reread nor reminded Vergara of his *Miranda* rights."¹²⁸ Under the totality of the circumstances, the court could not "conclude that [Vergara] wished to waive his previously-invoked right to counsel and resume answering questions about the case."¹²⁹ The court, therefore, held that the trial court erred in ruling that Vergara's March 28 statement was admissible.¹³⁰ The court also held that the cocaine seized at Vergara's residence should be suppressed as fruit of the poisonous tree because its discovery resulted from Vergara's inadmissible statement, and the State failed to prove any attenuation that would have removed the initial taint.¹³¹ Accordingly, the court affirmed the lower court's judgment in part and reversed it in part.¹³²

B. Direct Appeal Cases

The Georgia Supreme Court reviewed five capital cases on direct appeal, two of which are included in this survey.¹³³

125. *Id.* at 178, 657 S.E.2d at 867 (quoting *Reynolds v. State*, 275 Ga. 548, 549, 569 S.E.2d 847, 849 (2002)).

126. *Id.* at 179, 657 S.E.2d at 867.

127. *Id.* at 181, 657 S.E.2d at 869.

128. *Id.* at 182, 657 S.E.2d at 869.

129. *Id.* (alteration in original) (quoting *McDougal v. State*, 277 Ga. 493, 500, 591 S.E.2d 788, 795 (2004)).

130. *Id.*

131. *Id.* at 184-85, 657 S.E.2d at 870 (citing *Nix v. Williams*, 467 U.S. 431, 442 (1984)); see also *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

132. *Vergara*, 283 Ga. at 185, 657 S.E.2d at 871.

133. Due to space restrictions, the following cases have been omitted: *Fulton County v. State*, 282 Ga. 570, 651 S.E.2d 679 (2007); *Britt v. State*, 282 Ga. 746, 653 S.E.2d 713 (2007) (involving the state funding scheme for capital cases in Georgia); and *Rogers v. State*, 282 Ga. 659, 653 S.E.2d 31 (2007) (involving an appeal from a judgment made pursuant to *Fleming v. Zant*, 259 Ga. 687, 386 S.E.2d 339 (1989), overruled in part by *Turpin v. Hill*, 269 Ga. 302, 303-04, 498 S.E.2d 52, 53-54 (1998), following the defendant's conviction for murder and death sentence when subsequent findings during habeas proceedings indicated that the defendant was mentally retarded and, therefore, ineligible for the death penalty).

In *Rivera v. State*,¹³⁴ Reinaldo Javier Rivera was convicted of malice murder and related charges, and a jury sentenced him to death.¹³⁵ The supreme court summarily denied a number of Rivera's claims without analysis because the issues were either resolved by prior decisions of the court or Rivera failed to object at trial, thereby waiving the issues.¹³⁶

The court affirmed Rivera's sentence but found error in the manner in which the jury made its findings regarding statutory aggravating circumstances.¹³⁷ The jury recommended a death sentence for the murder conviction after finding three statutory aggravating circumstances: (1) the murder was committed in the commission of the capital felony of rape, pursuant to O.C.G.A. § 17-10-30(b)(2);¹³⁸ (2) the murder was committed in the commission of an aggravated battery, pursuant to the same statutory section; and (3) "the murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim prior to the victim's death," pursuant to O.C.G.A. § 17-10-30(b)(7).¹³⁹ The court declared that the jury should have returned its verdict on the O.C.G.A. § 17-10-30(b)(7) aggravating circumstance in the conjunctive, stating the jury found in the disjunctive "torture, depravity of mind, or an aggravated battery to the victim," rather than in conjunctive language using "and."¹⁴⁰ The court reasoned that the conjunctive language of "and" was needed to ensure unanimity concerning the necessary elements of the statutory aggravating circumstance.¹⁴¹ The court, nonetheless, upheld the death sentence based on findings of other statutory aggravating circumstances.¹⁴² The court denied Rivera's remaining claims and affirmed the lower court's judgment.¹⁴³

In *Walker v. State*,¹⁴⁴ Artemus Rick Walker was convicted of murder and related offenses, and a jury sentenced him to death.¹⁴⁵ The court

134. 282 Ga. 355, 647 S.E.2d 70 (2007).

135. *Id.* at 355-56, 647 S.E.2d at 73.

136. *See id.* at 358-66, 647 S.E.2d at 74-80.

137. *Id.* at 366, 647 S.E.2d at 80.

138. O.C.G.A. § 17-10-30(b)(2) (2008).

139. *Rivera*, 282 Ga. at 366, 647 S.E.2d at 79-80; O.C.G.A. § 17-10-30(b)(7) (2008).

140. 282 Ga. at 366, 647 S.E.2d at 80 (quoting *Hill v. State*, 263 Ga. 37, 46, 427 S.E.2d 770, 778 (1993)).

141. *Id.* (citing *Hill*, 263 Ga. at 46, 427 S.E.2d at 778).

142. *Id.* (citing *Jenkins v. State*, 269 Ga. 282, 294, 498 S.E.2d 502, 514 (1998)).

143. *Id.* at 367, 647 S.E.2d at 80.

144. 282 Ga. 774, 653 S.E.2d 439 (2007).

145. *Id.* at 774, 653 S.E.2d at 442.

summarily denied a number of Walker's claims without analysis because defense counsel failed to preserve the issues by not objecting at trial.¹⁴⁶

In the first preserved claim, Walker argued that the State presented improper testimony about the victim during the merits phase of the trial.¹⁴⁷ The court acknowledged that background information about the victim that is irrelevant to merits-phase issues is improper, especially when it is "likely to engender the jury's sympathies."¹⁴⁸ The testimony at issue was introduced by the victim's wife, who testified about the victim's church participation, including the fact that he was a deacon.¹⁴⁹ The court noted that while the trial court overruled Walker's initial objection, it sustained Walker's subsequent objection to the same testimony.¹⁵⁰ The court, therefore, held that the trial court's initial error was harmless beyond a reasonable doubt.¹⁵¹

The court identified additional error in Walker's case when it conducted its required review on whether the statutory aggravating circumstances found by the jury were supported by the evidence.¹⁵² The court declared that the second and third statutory aggravating circumstances found by the jury in its sentencing verdict varied so greatly from the language of the statute that they could not be considered valid statutory aggravating circumstances supported by the evidence.¹⁵³ Nonetheless, the court upheld Walker's death sentence because it was supported by at least one other statutory aggravating circumstance.¹⁵⁴ The court denied Walker's remaining claims and affirmed the lower court's judgment.¹⁵⁵

146. *See id.* at 775-80, 653 S.E.2d at 443-46.

147. *Id.* at 777, 653 S.E.2d at 444.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 781, 653 S.E.2d at 447.

153. *Id.*

154. *Id.*

155. *Id.* at 782, 653 S.E.2d at 448.