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Criminal Law

by **Franklin J. Hogue**^{*}
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I. INTRODUCTION

The significance of the cases reported in this article represents the perpetual tension between the prosecution and defense of people accused of crimes. This tension, which creates the necessary balance between the State's interests and the accused's, makes for interesting debate by the Georgia Supreme Court justices and for important decisions that guide those attorneys who practice criminal law.

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II. PRETRIAL ISSUES

A. *Discovery*

In this reporting period, the Criminal Justice Act¹ came under yet another attack in *Muhammad v. State*,² a death penalty case. Muhammad challenged the constitutionality of the amended Act on several grounds that had been raised and decided only a few months earlier in *Stinski v. State*,³ in which the Act was upheld as constitutional.⁴ The principal change to the Act now requires capital defendants who opt into it to provide to the State, at or before the announcement of a verdict in the guilt/innocence phase of the trial, books, papers, documents, photographs, films, recordings, tangible objects, and audio and visual recordings, and to allow inspection and photographing of buildings if the defendant intends to use any of these items as evidence in the sentencing phase.⁵ A defendant must also disclose, at or before the guilt/innocence verdict, reports regarding any mental health examinations or other scientific tests the defendant intends to introduce into evidence in the sentencing phase.⁶ Finally, the defendant must disclose the identities of witnesses that the defendant intends to call at sentencing five days before trial and must disclose at or before the guilt/innocence verdict any nonprivileged statements of witnesses that are in the defendant's possession, custody, or control.⁷

The assertions made by the defendant in *Muhammad* mirrored several arguments that the Georgia Supreme Court had previously decided in *Stinski*: (1) Even though the defendant had "opted-in" to the reciprocal provisions of the Act prior to its amendments and then the amendments laid new obligations on the defendant, this was not an unconstitutional ex post facto law or bill of attainder; (2) the amendments do not violate due process of law because, contrary to the defendant's argument, the Act does impose reciprocal discovery requirements on the State; (3) the amendments do not violate the defendant's right to present mitigating evidence; and (4) the imposition of additional discovery duties on the

1. 2005 Ga. Laws 20-30, 474-75 (codified as amended at O.C.G.A. §§ 17-16-1 to -23 (2008)). See particularly an uncodified section of the amendment that made the Act applicable to "all trials which commence on or after July 1, 2005." 2005 Ga. Laws 29.

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

3. 281 Ga. 783, 642 S.E.2d 1 (2007).

4. *Id.* at 786-87, 642 S.E.2d at 6.

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

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

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

defendant by the Act arises regardless of whether the defendant waived her right not to participate in the amended Act.⁸

What new arguments, then, did Muhammad make? First, Muhammad argued that the Act violated her right to effective assistance of counsel under federal and state constitutions⁹ because “defense counsel cannot effectively perform their constitutionally-mandated duty of investigating and preparing mitigating evidence for use in the sentencing phase while simultaneously being concerned with the possibility that such efforts will result in the discovery of evidence that is both harmful to the defendant and discoverable by the State.”¹⁰ The court noted that the new requirements imposed upon a defendant, with one notable exception, need not be met until “at or before the announcement of a guilt/innocence verdict.”¹¹ The defendant must comply with the disclosure requirements of the Act with respect to evidence covered by the “at or before verdict” language of the Act¹² before “the announcement of the jury’s verdict or the publication of the court’s judgment in a bench trial.”¹³ For example, the defendant may wait until the light comes on outside the jury room, the customary signal that a verdict has been reached, used in most courthouses where we have tried cases, then counsel for the defendant may say to the prosecuting attorney, “Say, we have a whole bunch of mitigation evidence over here behind counsel table that you may want to inspect before the sentencing trial begins, assuming we are about to get a guilty verdict and then begin the sentencing trial.”¹⁴

The one exception to the “at or before verdict” language of the amended Act is the defendant’s witness list for the sentencing phase, which must be disclosed five days before trial.¹⁵ After noting that nothing in the Act requires that the defendant produce to the State the identities of witnesses the defendant does not intend to call, the court

8. *Muhammad*, 282 Ga. at 248, 647 S.E.2d at 562 (citing *Stinski*, 281 Ga. at 788, 642 S.E.2d at 7-8).

9. See U.S. CONST. amend. VI; Ga. Const. art. I, § 1, para. 14.

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

11. *Id.* at 248-49, 647 S.E.2d at 562 (emphasis omitted) (quoting *Stinski*, 281 Ga. at 787, 642 S.E.2d at 7).

12. Such evidence includes books, papers, documents, photographs, films, recordings, tangible objects, audio and visual recordings, notice of buildings that may need to be photographed by the State, and mental health examinations or other scientific tests. O.C.G.A. § 17-16-4(b)(3)(A)-(B).

13. *Muhammad*, 282 Ga. at 249, 647 S.E.2d at 562.

14. See *id.*

15. O.C.G.A. § 17-16-4(b)(3)(C). Note, however, that in this subsection any nonprivileged statements made by these witnesses must be turned over at or before the guilt/innocence verdict. *Id.*

addressed the more difficult question: What about the mixed witness, the one who can offer evidence in mitigation but knows some damaging information as well?¹⁶ The court's answer: The mixed witness "presents the type of difficult tactical choice that trial attorneys routinely face. Such choices do not deny a defendant her right to effective assistance of counsel."¹⁷ In other words, defense counsel must weigh the good against the bad, make a decision, and go with it.¹⁸

Muhammad's second new attack on the amended Act was her contention that requiring her to disclose mitigating evidence violated her privilege against self-incrimination, guaranteed by both federal and state constitutions.¹⁹ The court listed "four requirements for triggering the Fifth Amendment privilege. The information sought must be (1) incriminating; (2) personal to the defendant; (3) compelled; and (4) testimonial or communicative in nature."²⁰ The court then held that production of the items listed in Official Code of Georgia Annotated (O.C.G.A.) § 17-16-4(b)(3)(A)-(B) does not constitute "compelled self-incrimination."²¹ With respect to statements of witnesses that the defendant intends to call, the court ruled that these are "not personal to the defendant" and, thus, are not protected by the Fifth Amendment.²²

By contrast, however, the defendant's witness list, which must be produced five days before trial,²³ is personal to the defendant.²⁴ It is also testimonial in nature.²⁵ While in most instances a defendant's witness list will not be incriminating, because a defendant may simply omit the incriminating witnesses, the court acknowledged it could be incriminating under some circumstances.²⁶ Thus, the court concluded that if a defendant invokes his or her privilege against self-incrimination with respect to a witness list for the sentencing phase of trial, then the trial court can conduct an inquiry to determine whether compelled production would be incriminating.²⁷ If so, the court may fashion a just and sufficient remedy, which could include granting a continuance after

16. *Muhammad*, 282 Ga. at 249, 647 S.E.2d at 562-63.

17. *Id.*, 647 S.E.2d at 563.

18. *See id.*

19. *Id.* at 250, 647 S.E.2d at 563; U.S. CONST. amend. V; GA. CONST. art. I, § 1, para. 16.

20. *Muhammad*, 282 Ga. at 250-51, 647 S.E.2d at 564.

21. *Id.* at 251, 647 S.E.2d at 564.

22. *Id.* at 251-52, 647 S.E.2d at 564-65.

23. O.C.G.A. § 17-16-4(b)(1)(C).

24. *Muhammad*, 282 Ga. at 252, 647 S.E.2d at 565.

25. *Id.*

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

27. *Id.* at 253, 647 S.E.2d at 565.

the guilt/innocence phase has ended to allow the State to investigate the defendant's sentencing phase witnesses.²⁸

So, what is the lesson of *Stinski* and *Muhammad*? For capital defense lawyers, it is this: If you possess those items listed in the statute that you intend to use in your mitigation case, hold them until the close of evidence, then tell the State about them. If your witness list includes a person whose testimony would offer exculpatory evidence as to guilt but may have inculpatory evidence of the defendant's participation in the crime—for example, if the State's theory is that the defendant was the triggerman, but the defense mitigation witness says that the defendant was merely there to rob the victim but not to shoot him—then you should ask for a hearing to protect the defendant from having to reveal the incriminating witness's identity five days before trial.²⁹

B. Conflict of Interest

In *Britt v. State*,³⁰ Donald Sanders was accused of murder, for which the State sought the death penalty. Sanders's lawyers, Walter M. Britt and Douglas A. Ramseur, were concerned over the financial crisis in the relatively new statewide public defender system and how the lack of money would impinge upon Sanders's defense. Accordingly, the attorneys served subpoenas on the executive director of the Georgia Public Defender Standards Council (Council) and others, seeking documents that would reveal the expenditure of funds in capital cases, including the highly publicized Brian Nichols case in Fulton County. Sanders's lawyers also challenged the constitutionality of the funding scheme for capital cases mandated by O.C.G.A. § 17-12-120.³¹ Britt, a private attorney, represented Sanders pursuant to a contract with the Georgia Capital Defender (Capital Defender); Ramseur was an employee of the Capital Defender. The Council moved to quash the subpoenas, but the trial judge denied their motion.³² In the companion appeal, the supreme court reversed the trial court, holding that “the Council correctly argues that the trial court erred in denying its motion to quash” because “the documents requested here have no bearing on Sanders' guilt or innocence and are entirely irrelevant to Sanders' criminal case.”³³

28. *Id.*

29. *See id.* at 252-53, 647 S.E.2d at 565.

30. 282 Ga. 746, 653 S.E.2d 713 (2007).

31. *Id.* at 746, 653 S.E.2d at 715; O.C.G.A. §§ 17-12-120 to -128 (2008), *repealed by* 2008 Ga. Laws 846.

32. *Britt*, 282 Ga. at 746-47, 653 S.E.2d at 715.

33. *Id.* at 749, 653 S.E.2d at 717.

In the companion cases brought individually by Britt and Ramseur against the State, the attorneys appealed a finding by the trial judge that they were in contempt of court for refusing to proceed with a motions hearing when ordered to do so. The two lawyers had filed 106 motions, which were called for hearing on February 6, 2007. They refused to go forward with the hearings, claiming that a conflict of interest prevented them from proceeding.³⁴ The conflict, they argued, consisted of their having been “placed in an adversarial position with respect to their employers (the Council and the Capital Defender), and that this conflict of interest could adversely affect their representation of Sanders.”³⁵

The supreme court, in a 5-2 majority, affirmed the trial court’s finding of contempt, agreeing with the trial court that “the attorneys attempted to use a collateral conflict of interest that was (1) of their own making; (2) that had nothing to do with the underlying issues of the case; and (3) that involved documents requested on matters outside the scope of permissible discovery.”³⁶ The court concluded that “to the extent that Sanders’ attorneys believed that the trial court erred by ordering them to proceed despite their conflict of interest, their remedy was to appeal, not to disobey the trial court’s direct order to continue with the motions hearing.”³⁷ Thus, Britt’s and Ramseur’s sentences of twenty-four hours in jail and the \$500 fines were also upheld.³⁸

Presiding Justice Hunstein and Justice Benham dissented in part, noting that four days prior to the motions hearing at which Britt and Ramseur had refused to proceed, the trial court had found, correctly, that the two lawyers did indeed have a conflict of interest.³⁹ The trial court even agreed that a third attorney needed to be appointed to advise Sanders concerning the conflict.⁴⁰ The dissent noted that “[u]ndivided loyalty is an essential element of the right to counsel.”⁴¹ This is

34. *Id.*

35. *Id.* at 747, 653 S.E.2d at 715.

36. *Id.* at 750, 653 S.E.2d at 717.

37. *Id.*, 653 S.E.2d at 718.

38. *Id.* at 747, 653 S.E.2d at 716.

39. *Id.* at 751, 653 S.E.2d at 718 (Hunstein, P.J., dissenting).

40. *Id.*

41. *Id.* at 752, 653 S.E.2d at 719 (quoting *Howerton v. Danenberg*, 279 Ga. 861, 862, 621 S.E.2d 738, 740 (2005)). Danenberg, a former attorney who was accused of murder and faced the death penalty, was represented by counsel who, unbeknownst to Danenberg, was at the same time representing the prosecuting district attorney in a federal civil rights lawsuit involving allegations of racial discrimination in jury compositions. *Howerton*, 279 Ga. at 861, 863, 621 S.E.2d at 739-40. Danenberg pled guilty to murder, accepted a sentence of life in prison, then discovered the conflict years later and succeeded in a habeas case. *Id.* at 861, 863-64, 621 S.E.2d at 739-41. After twenty years in prison, Danenberg

especially important in a death penalty case, when “even a ‘slight conflict of interest [is] not permitted,’”⁴² even if “the conflict may be irrelevant to a death penalty defendant’s guilt or innocence.”⁴³ The dissent also noted the majority’s reasoning—that all but one or two of the pending motions had nothing to do with a conflict—was insufficient to secure a defendant’s constitutional right to effective assistance of counsel.⁴⁴ Presiding Justice Hunstein, emphasizing that a lawyer cannot simply “compartmentalize his loyalties and proceed with representation of his client” even when the conflict concerns the payment of attorney fees,⁴⁵ concluded by saying,

I would recognize that counsel here acted in compliance with Sanders’ Sixth Amendment right to effective assistance of counsel when they declined to ignore a court-recognized conflict of interest and that they thus properly refused the trial court’s order to proceed with divided loyalties at the motions hearing in this death penalty case.⁴⁶

III. DEFENSE CASE—DEFENDANT’S STATEMENT

The Georgia Supreme Court granted certiorari in *State v. Aiken*⁴⁷ to determine whether the Georgia Court of Appeals correctly affirmed the trial court’s exclusion of Aiken’s statement and whether the court of appeals adopted the correct legal test for determining the admissibility of statements by public employees.⁴⁸ Aiken was a probation officer accused of both sexual assault against a person in custody and violation of oath of office by a public employee. At a hearing on the motion to exclude his statement, Aiken introduced a document he had signed in which he acknowledged that he had read the Standard Operating Procedures of the Georgia Department of Corrections, his employer, and that he could be fired for failing to comply with those procedures.⁴⁹ One procedure required that he “cooperate fully with any official investigation carried out by any law enforcement or administrative agency” and that, “[i]n cooperating with an official investigation,” he

faces trial in the fall of 2008; he is being represented by the Authors.

42. *Britt*, 282 Ga. at 752, 653 S.E.2d at 719 (Hunstein, P.J., dissenting) (alteration in original) (quoting *Sallie v. State*, 269 Ga. 446, 448, 499 S.E.2d 897, 899 (1998)).

43. *Id.* (citing *Fleming v. State*, 246 Ga. 90, 93, 270 S.E.2d 185, 188 (1980)).

44. *Id.* at 753, 653 S.E.2d at 719.

45. *Id.*

46. *Id.* at 753-54, 653 S.E.2d at 720.

47. 282 Ga. 132, 646 S.E.2d 222 (2007).

48. *Id.* at 132-33, 646 S.E.2d at 223-24.

49. *Id.* at 132, 136, 646 S.E.2d at 223-24, 226.

would ‘respond truthfully to all questions asked.’⁵⁰ Aiken’s supervisors told him to speak with the investigator, who had Aiken sign a form before the interview.⁵¹ The form warned Aiken that if he “‘interfere[d] with an on-going investigation in any manner,’” then he would be “‘subject to disciplinary action, including dismissal from employment.’”⁵² No *Miranda*⁵³ warnings were given, and Aiken admitted sexual misconduct.⁵⁴

While the supreme court agreed with both the trial court and the court of appeals that Aiken had been coerced into incriminating himself and, thus, that his statement could not be used against him,⁵⁵ the court concluded that it was unnecessary to adopt the two-part test that the court of appeals used for assessing coercion of a public employee’s statement.⁵⁶ The controlling case, *Garrity v. New Jersey*,⁵⁷ held that statements obtained under threat of removal from public employment are coerced and, thus, inadmissible in any subsequent proceeding.⁵⁸ The court of appeals had adopted the test set forth in *United States v. Friedrich*⁵⁹ rather than the test in *United States v. Indorato*,⁶⁰ both of which are progeny of *Garrity*.⁶¹

The two-part *Friedrich* test “examines whether the employee subjectively believed that he would be fired if he did not answer questions and whether that subjective belief was objectively reasonable.”⁶² Further, “[i]n making the determination of objective reasonableness, the courts examine the totality of the circumstances surrounding the statements. If the court finds that the employee’s subjective belief was objectively reasonable, the employee’s answers are considered to be coerced and may not be used against him in a criminal trial.”⁶³ Courts following *Indorato*, however, have refused to extend the coerced testimony doctrine to cases involving implied threats of job loss.⁶⁴

50. *Id.* at 136, 646 S.E.2d at 226 (alteration in original) (quoting the Standard Operating Procedures of the Georgia Department of Corrections).

51. *Id.*

52. *Id.*

53. *Miranda v. Arizona*, 384 U.S. 436 (1966).

54. *State v. Aiken*, 281 Ga. App. 415, 415, 636 S.E.2d 156, 157 (2006).

55. *Aiken*, 282 Ga. at 137-38, 646 S.E.2d at 227.

56. *Id.* at 135, 646 S.E.2d at 225.

57. 385 U.S. 493 (1967).

58. *Id.* at 500.

59. 842 F.2d 382 (D.C. Cir. 1988).

60. 628 F.2d 711 (1st Cir. 1980).

61. *Aiken*, 282 Ga. at 133, 646 S.E.2d at 224.

62. *Id.* at 134, 646 S.E.2d at 225.

63. *Id.*

64. *Id.* at 134-35, 646 S.E.2d at 225.

The supreme court concluded that

it is unnecessary to adopt the two-part test of *Friedrick* or the more narrow interpretation of *Garrity* espoused by other courts. Instead, because the Supreme Court in *Garrity* employed the totality-of-the-circumstances test for evaluating whether the defendant's statement was coerced, and because this State's courts have vast experience applying this test, we hereby adopt that test for determining whether the statements that a public employee makes during an investigation into his activities are voluntary.⁶⁵

The court then discussed what factors can be considered for the totality-of-the-circumstances test, including whether the threat of job loss was overt or implicit, whether the employee subjectively believed he would be fired if he remained silent, and whether this belief was objectively reasonable.⁶⁶ The court concluded that the totality-of-the-circumstances test is "in keeping with the spirit of *Garrity* and with the discretion our courts have historically enjoyed in determining whether a defendant's statement is voluntary."⁶⁷

IV. THE JURY

A. *Instructions: Creating Confusion*

A defense of justification arises when a defendant claims that his or her conduct was justified under the circumstances.⁶⁸ Several circumstances can justify what would otherwise be criminal conduct, but perhaps the most common justification defense is self-defense.⁶⁹ In most cases with which we are familiar—having raised this defense many times ourselves—the charge to the jury tracks the language of O.C.G.A. § 16-3-21.⁷⁰

65. *Id.* at 135, 646 S.E.2d at 225 (footnote omitted).

66. *Id.* at 135-36, 646 S.E.2d at 225-26.

67. *Id.* at 136, 646 S.E.2d at 226.

68. O.C.G.A. § 16-3-20 (2007).

69. *See* O.C.G.A. § 16-3-21 (2007).

70. *Id.* The statute states, in relevant part,

A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that such threat or force is necessary to defend himself or herself or a third person against such other's imminent use of unlawful force; however, . . . a person is justified in using force which is intended or likely to cause death or great bodily harm only if he or she reasonably believes that such force is necessary to prevent death or great bodily injury to himself or herself or a third person or to prevent the commission of a forcible felony.

Id. § 16-3-21(a).

A defense of justification is an affirmative defense.⁷¹ The burden is on the State to prove beyond a reasonable doubt that the defendant was not justified.⁷² In *Preston v. State*,⁷³ a murder case, the trial court charged the jury on the State's burden to disprove justification but followed the standard charge with an additional instruction that

[w]here the defense of justification is offered, it is the duty of the jury to consider it along with all the testimony in this case, and if the evidence, taken as a whole, raises reasonable doubt in the mind of the jury of the defendant's guilt, then you should acquit him.⁷⁴

Preston argued on appeal that this instruction shifted the burden of proof to him, "because it states that the evidence of justification he offered must itself raise reasonable doubt in order for the jury to acquit."⁷⁵

The Georgia Supreme Court disagreed with Preston, holding that the charge expressly directs the jury to consider the evidence "as a whole," which means that it does not limit the jury to considering only the defendant's evidence of justification to determine whether it alone raises a reasonable doubt.⁷⁶ Moreover, the charge is a correct statement of the law.⁷⁷ Nevertheless, the supreme court took the opportunity, while affirming Preston's conviction, "to suggest to bench and bar that the charge not be given in the future."⁷⁸ This is because "the charge could have the possibility of being confusing in a close case."⁷⁹ Though the charge is true in two respects—(1) "the jury must consider evidence of an affirmative defense" and (2) "the jury should acquit the defendant if the totality of the evidence raises a reasonable doubt of guilt"—it "serves no valuable purpose since those basic ideas are covered in other standard instructions."⁸⁰ In addition, the charge is "so general, it could be seen to dilute the message of other more specific charges concerning affirmative defenses."⁸¹

71. O.C.G.A. § 16-3-28 (2007).

72. *Bishop v. State*, 271 Ga. 291, 291, 519 S.E.2d 206, 207-08 (1999).

73. 282 Ga. 210, 647 S.E.2d 260 (2007).

74. *Id.* at 212, 647 S.E.2d at 262 (alteration in original) (internal quotation marks omitted).

75. *Id.*, 647 S.E.2d at 263.

76. *Id.*

77. *Id.* at 212-13, 647 S.E.2d at 263 (citing *Fox v. State*, 238 Ga. 387, 388, 233 S.E.2d 341, 342 (1977)).

78. *Id.* at 213, 647 S.E.2d at 263.

79. *Id.*

80. *Id.*

81. *Id.*

Justice Thompson did not concur with the division of Justice Benham's majority opinion concerning the jury charge.⁸² Justice Carley wrote a special concurrence, in which Justice Hines joined, stating that he "strongly disagree[d] with the criticism of the instruction."⁸³ Justice Carley further noted that

[d]iscouraging the use of a particular jury instruction is not a matter which can be taken lightly or with less than full and careful consideration. Indeed, such a statement effectively informs the bench and bar of the potential for this Court to take the further step of holding that the giving of the charge is error.⁸⁴

It seems that the case in which the court would take that further step would be the one in which the charge is given over objection and is a "close case."⁸⁵ The concurring justices have a good point about the weight of the court's suggestion regarding this charge because an apparently open-and-shut case to a trial court—which *Preston* itself appeared to be and which explains why the jury instruction in that case did not require reversal—may be a close case on appeal and, thus, require reversal.⁸⁶ Given the possibility of diluting a defendant's affirmative defense and, thus, of being reversed, we speculate that most trial judges will take the court's suggestion so seriously that they will not give this charge, even when the case is not so close. In our view, no harm would be done if this charge is never again delivered to any jury.

B. *Communication with the Court*

In *Lowery v. State*,⁸⁷ the supreme court again affirmed a murder conviction while criticizing the way matters were communicated to a jury, but this time the court announced a new rule.⁸⁸ Soon after deliberations began, the foreman asked a bailiff, "Can we get the tape that they showed us in here?"⁸⁹ The bailiff, without telling the trial court about it, told the foreman, "Well, the judge in the instructions said all your evidence was coming up when we originally brought it."⁹⁰ Having heard this exchange, trial counsel put it on the record and the trial judge instructed the bailiff to have the jury put all further

82. *Id.* at 214, 647 S.E.2d at 264.

83. *Id.* at 215, 647 S.E.2d at 264 (Carley, J., concurring).

84. *Id.* at 214, 647 S.E.2d at 264.

85. *See id.* at 213, 647 S.E.2d at 263 (majority opinion).

86. *See id.* at 214, 647 S.E.2d at 264 (Carley, J., concurring).

87. 282 Ga. 68, 646 S.E.2d 67 (2007).

88. *Id.* at 76, 646 S.E.2d at 75.

89. *Id.* at 73 n.4, 646 S.E.2d at 73 n.4.

90. *Id.*

questions in writing to be delivered to the judge and the lawyers. Some time later, the jury complied with these instructions by sending a note to the judge to ask for a smoke break. The court shared this note with counsel, who endorsed the court's response.⁹¹

Deliberations continued until the jury foreman finally sent a note to the court that said, "We have a couple of people that says no way to change mind. What do we do?"⁹² But instead of revealing the contents of the note to the defendant and counsel and discussing what response the court should make, the judge called the jury into the box and, with counsel and defendant present, engaged the foreman in a series of questions about the status of deliberations.⁹³ The trial court then gave the jury the *Allen*⁹⁴ charge. After the jury returned to the jury room to continue deliberations, the judge informed counsel of the contents of the note. Trial counsel objected and then argued on appeal that the defendant's constitutional right to be present at all stages of the proceedings against him had been violated and that the trial court had abused its discretion, violating the defendant's right to assistance of counsel by failing to consult with defense counsel before responding to the jury's note.⁹⁵

Because the defendant and counsel were present when the court responded to the jury's note but had not seen the note or known what response the court intended to give, the question for the supreme court was "whether the defendant's right to be present or his right to effective assistance of counsel includes the right to know the contents of the jury communication and to make suggestions regarding the trial court's proposed response."⁹⁶ The court concluded that a defendant's right to be present, which "attaches 'at any stage of a criminal proceeding that is critical to its outcome if the defendant's presence would contribute to the fairness of the procedure,'" is not violated if the defendant is involuntarily absent during a charge conference or discussion about how

91. *Id.*

92. *Id.* at 72, 646 S.E.2d at 73.

93. *Id.* at 72-73, 646 S.E.2d at 73. The court asked whether a verdict had been reached on any count ("no"); whether they had taken a vote ("yes, sir"); whether they had taken more than one vote ("possibly two, yes, sir"); the numerical division of the last vote ("10-2"); and whether it was the same as the first vote ("yes").

Id. at 73, 646 S.E.2d at 73.

94. *Allen v. United States*, 164 U.S. 492 (1896).

95. *Lowery*, 282 Ga. at 73, 646 S.E.2d at 73.

96. *Id.*

to respond to a jury question during deliberations because these are not critical stages.⁹⁷

A “defendant’s constitutional right to counsel attaches after the onset of formal prosecutorial proceedings and continues through all critical stages of the proceeding brought against him.”⁹⁸ The court ruled that “the failure of the trial court to inform counsel of the contents of the note and to seek comment on or input in the formulation of the court’s response would constitute a violation of the right to counsel.”⁹⁹ Unfortunately for Lowery, however, even an error of constitutional magnitude, such as this one, was not “harmless beyond a reasonable doubt.”¹⁰⁰ With no other reversible error present, Lowery’s conviction was affirmed.¹⁰¹ The court concluded its analysis by announcing a new rule for trial courts:

In an exercise of this Court’s inherent power to maintain a court system capable of providing for the administration of justice in an orderly and efficient manner, we take this opportunity to require trial courts to have jurors’ communications submitted to the court in writing; to mark the written communication as a court exhibit in the presence of counsel; to afford counsel a full opportunity to suggest an appropriate response; and to make counsel aware of the substance of the trial court’s intended response in order that counsel may seek whatever modifications counsel deems appropriate before the jury is exposed to the instruction.¹⁰²

V. SENTENCING

A. *Cruel and Unusual Punishment*

When Genarlow Wilson was seventeen years old, he attended a party at which a fifteen-year-old girl willingly performed oral sex on him. At the time of Wilson’s trial in February 2005, this crime carried a sentence of ten to thirty years in prison and required sex offender registration for life. Wilson was convicted, and the trial court sentenced him to eleven years, ten to serve in prison and one year to follow on probation. On

97. *Id.* at 74, 646 S.E.2d at 74 (quoting *Huff v. State*, 274 Ga. 110, 111, 549 S.E.2d 370, 372 (2001)).

98. *Id.* at 74-75, 646 S.E.2d at 74 (citation omitted).

99. *Id.* at 75, 646 S.E.2d at 74-75.

100. *Id.*, 646 S.E.2d at 75 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967); *Horne v. State*, 281 Ga. 799, 808, 642 S.E.2d 659, 667 (2007)).

101. *Id.* at 76, 646 S.E.2d at 75.

102. *Id.* (citation omitted).

April 28, 2006, the Georgia Court of Appeals affirmed Wilson's conviction and sentence.¹⁰³

A year later on April 16, 2007—after continued appellate efforts (all of which had failed) and after the applicable statute¹⁰⁴ was amended, effective July 1, 2006, by adding a subsection making conduct such as Wilson's a misdemeanor with no sex offender registration requirements¹⁰⁵—Wilson filed a petition for writ of habeas corpus, contending that his sentence constituted cruel and unusual punishment. On June 11, 2007, the trial court granted habeas relief to Wilson, finding that his sentence was indeed cruel and unusual, and as a remedy, the trial court imposed the new statutory penalty on Wilson for the misdemeanor crime, sentencing him to twelve months with credit for time served. Because Wilson had served almost two-and-a-half years in prison, he had served almost two-and-a-half times the maximum sentence. The warden, however, filed a notice of appeal that very same day. An appeal bond was denied, so Wilson remained in prison pending the appeal to the Georgia Supreme Court.¹⁰⁶

On October 26, 2007, the supreme court affirmed the trial court's grant of habeas relief.¹⁰⁷ The court reasoned as follows: "Under the Eighth Amendment to the United States Constitution and under Art. I, Sec. I, Par. XVII of the Georgia Constitution, a sentence is cruel and unusual if it 'is grossly out of proportion to the severity of the crime.'"¹⁰⁸ The concept of "cruel and unusual punishment" is not static, but "changes in recognition of the evolving standards of decency that mark the progress of a maturing society."¹⁰⁹ The "clearest and best evidence of a society's evolving standard of decency and of how contemporary society views a particular punishment" are "[l]egislative enactments."¹¹⁰ Because the legislature changed the law after Wilson's conduct occurred and after he was sent to prison, "these changes," the court wrote, "represent a seismic shift in the legislature's view of the gravity of oral sex between two willing teenage participants."¹¹¹ Since the amended statutes "reflect a decision by the people of this State that the severe felony punishment and sex offender registration imposed on

103. *Humphrey v. Wilson*, 282 Ga. 520, 520-21, 652 S.E.2d 501, 502-03 (2007).

104. O.C.G.A. § 16-6-4 (2007).

105. 2006 Ga. Laws 379 (codified at O.C.G.A. § 16-6-4(d)(2)).

106. *Wilson*, 282 Ga. at 521-23, 652 S.E.2d at 503-04.

107. *Id.* at 520, 652 S.E.2d at 501.

108. *Id.* at 524-25, 652 S.E.2d at 505 (quoting *Fleming v. Zant*, 259 Ga. 687, 689, 386 S.E.2d 339, 341 (1989)).

109. *Id.* at 525, 652 S.E.2d at 505 (quoting *Fleming*, 259 Ga. at 689, 386 S.E.2d at 341).

110. *Id.*

111. *Id.* at 528, 652 S.E.2d at 507.

Wilson make no measurable contribution to acceptable goals of punishment,” Wilson’s sentence could not stand.¹¹²

Justices Carley, Hines, and Melton concurred in part and dissented in part.¹¹³ At the heart of it, these justices concluded that because the legislature did not make the amendment retroactive to Wilson’s case, which it could have done, the only legal question for the court was whether the legislature’s decision was itself cruel and unusual, not whether Wilson’s original sentence was cruel and unusual.¹¹⁴ The court had already taken up that very question in *Widner v. State*,¹¹⁵ ruling that the refusal to make the amendment retroactive did not make the punishment cruel and unusual.¹¹⁶ The dissenters characterized the majority’s decision in *Wilson* as “rare because of its unprecedented disregard for the General Assembly’s constitutional authority to make express provision against the giving of any retroactive effect to its legislative lessening of the punishment for criminal offenses.”¹¹⁷

More than that, the dissent saw no limit to the application of the majority’s decision to “any and all defendants who were ever convicted of aggravated child molestation and sentenced for a felony under circumstances similar to Wilson,”¹¹⁸ as well as to “[a]ny defendant who was ever convicted in this state for the commission of any crime for which the sentence was subsequently reduced.”¹¹⁹ Justice Carley went on to predict “a flood of habeas corpus petitions filed by prisoners who seek to be freed from imprisonment because of a subsequent reduction in the applicable sentences for the crimes for which they were convicted.”¹²⁰ Finally, the dissent argued that due to the court’s previous decision in *Wilson*, the majority’s opinion violated the principle of separation of powers, failing to “give due regard to the authority of the legislative branch of government” and was contrary to the principle of stare decisis.¹²¹

112. *Id.*

113. *Id.* at 533, 652 S.E.2d at 511.

114. *Id.* at 538-39, 652 S.E.2d at 514 (Carley, J., concurring in part and dissenting in part).

115. 280 Ga. 675, 631 S.E.2d 675 (2006).

116. *Id.* at 677, 631 S.E.2d at 678.

117. *Wilson*, 282 Ga. at 540, 652 S.E.2d at 515 (Carley, J., concurring in part and dissenting in part).

118. *Id.* at 540-41, 652 S.E.2d at 515-16.

119. *Id.* at 541, 652 S.E.2d at 516.

120. *Id.*

121. *Id.* at 541-42, 652 S.E.2d at 516.

B. Sex Offender Registry

Anthony Mann was convicted of a sex offense that required him to register as a sex offender pursuant to O.C.G.A. § 42-1-12.¹²² In 2004 he challenged the statutory provision that required him to move out of his parents' home because it was located within one thousand feet of a place where minors congregated. Mann lost and had to move. Later, he married and bought a house with his wife. Then Mann became half owner and operator of a barbecue restaurant. Neither the home nor the business, when purchased, were within one thousand feet of any prohibited place where children congregated, such as a child care facility, church, or school.¹²³

Sometime later, child care facilities opened within one thousand feet of both his home and his business. Mann's probation officer then demanded that he "quit the premises of his business" and move out of his house or face arrest.¹²⁴ The Georgia statute, Mann argued, left him and people like him continually at risk of being ejected from home and business because the statute contained no "move-to-the-offender" exception.¹²⁵ Additionally, because a sex offender who is obligated to register will have his identity and address disseminated to the public,¹²⁶ any third party could pick a sex offender, open a child care facility within one thousand feet of his home or business, and force him to move.¹²⁷ The supreme court agreed with Mann that O.C.G.A. § 42-1-15(a) constitutes an unconstitutional regulatory taking of property, but only of his home, not his business.¹²⁸ Therefore, the court held that the statute is "unconstitutional to the extent that it permits the regulatory taking of appellant's property without just and adequate compensation."¹²⁹ Mann could remain in his home but could not continue overseeing the day-to-day sale of barbecue sandwiches at his restaurant.¹³⁰

122. O.C.G.A. § 42-1-12 (1997 & Supp. 2008).

123. *Mann v. Ga. Dep't of Corr.*, 282 Ga. 754, 754-55, 653 S.E.2d 740, 741-42 (2007).

124. *Id.* at 755, 653 S.E.2d at 742.

125. *Id.*

126. O.C.G.A. § 42-1-12(i).

127. *Mann*, 282 Ga. at 756, 653 S.E.2d at 742-43.

128. *Id.* at 760-61, 653 S.E.2d at 745-46.

129. *Id.*, 653 S.E.2d at 745.

130. *Id.* at 762, 653 S.E.2d at 746.

VI. APPELLATE ISSUES

A. *State's Right to Appeal*

In last year's survey, we reported—with some criticism—the Georgia Supreme Court's opinion in *Zigan v. State*.¹³¹ In *Zigan* the supreme court held that the State, in addition to the trial court, had to acquiesce in the defendant's decision to waive her right to a jury trial before the defendant could have a bench trial.¹³² The court's ruling in *Zigan* effectively provided the State with a veto power over a defendant's decision to waive a jury trial, extending the power beyond the trial judge, who traditionally safeguarded a defendant's right to a jury trial.¹³³ In *State v. Evans*,¹³⁴ a murder case, the trial judge granted Evans's request for a bench trial over the State's objection. Evans was tried with his co-defendant, Sovensky Maddox. While Maddox was tried before a jury, Evans put his fate in the hands of the trial judge, who pronounced him not guilty on all counts. The State brought the appeal from Evans's acquittal, arguing that the court violated the rule announced in *Zigan*.¹³⁵

Citing O.C.G.A. § 5-7-1(a),¹³⁶ the supreme court noted that the State has no right to appeal an acquittal.¹³⁷ More than that, the legislature enumerated the rulings from which the State can appeal in a criminal case, and appealing the denial of the State's objection to a defendant's waiver of his right to a jury trial in favor of a bench trial is not named by the legislature as one of those rulings.¹³⁸ So while it is the law since *Zigan* that a trial court cannot conduct a bench trial over the State's objection, *Evans* says that if the judge does it anyway, there is nothing the State can do about it.¹³⁹

B. *Ineffective Assistance of Counsel*

Brothers, Mack and Larry Garland, were tried and convicted for armed robbery and other related crimes. Both had court-appointed

131. 281 Ga. 415, 638 S.E.2d 322 (2006); see Franklin J. Hogue & Laura D. Hogue, *Criminal Law*, 59 MERCER L. REV. 89, 101 (2007).

132. *Zigan*, 281 Ga. at 417, 638 S.E.2d at 324.

133. *Id.* at 417-18, 638 S.E.2d at 324 (Sears, C.J., dissenting).

134. 282 Ga. 63, 646 S.E.2d 77 (2007).

135. *Id.* at 64-65, 646 S.E.2d at 78-79.

136. O.C.G.A. § 5-7-1(a) (1995 & Supp. 2008).

137. *Evans*, 282 Ga. at 63-64, 646 S.E.2d at 78.

138. *Id.* at 64, 646 S.E.2d at 78 (citing O.C.G.A. § 5-7-1(a)).

139. *Id.* at 65, 646 S.E.2d at 79.

counsel. Upon conviction, both men asked the court to appoint new counsel to file a motion for a new trial and, if unsuccessful, for an appeal on the basis of ineffective assistance of trial counsel. Since it was the policy of the Georgia Public Defender Standards Council (Council) not to authorize the appointment of new counsel for appeals, the trial court denied the Garlands' requests. The court of appeals held that the trial court did not err in its deference to Council policy.¹⁴⁰ The supreme court granted certiorari, held that it was error for the trial court to defer, and accordingly, reversed both the trial court and the court of appeals.¹⁴¹

After acknowledging that the United States Supreme Court has long held that a defendant is entitled by the Sixth Amendment¹⁴² to effective assistance of counsel,¹⁴³ the Georgia Supreme Court noted that well-established Georgia law requires a defendant to "raise any issue of ineffective assistance of trial counsel at the earliest practicable moment to avoid it being deemed waived."¹⁴⁴ The "earliest practicable moment" requirement means that an ineffective assistance claim must be raised before appeal.¹⁴⁵ Because an appellant's trial counsel cannot argue on appeal that she provided ineffective assistance at trial¹⁴⁶ and because an appellant who enjoys the right to be represented on appeal cannot also represent herself for the purpose of raising an ineffective assistance claim,¹⁴⁷ the supreme court reasoned that trial counsel cannot remain as appellate counsel if the defendant indicates that she wishes to raise a claim of ineffective assistance of trial counsel.¹⁴⁸

The supreme court also reasoned that anything less, such as requiring the defendant to make a threshold showing of merit to the claim of ineffective assistance prior to receiving new counsel, would cause "an invidious distinction between rich and poor" because defendants with sufficient money need not make any such showing of merit.¹⁴⁹ The defendant with money may simply fire his trial lawyer, hire appellant

140. *Garland v. State*, 283 Ga. 201, 201-02, 657 S.E.2d 842, 843 (2008).

141. *Id.* at 202, 657 S.E.2d at 843.

142. U.S. CONST. amend. VI.

143. 283 Ga. at 202, 657 S.E.2d at 843 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

144. *Id.*, 657 S.E.2d at 844 (citing *Trauth v. State*, 283 Ga. 141, 143, 657 S.E.2d 225, 227 (2008)).

145. *Id.* (citing *Glover v. State*, 266 Ga. 183, 184, 465 S.E.2d 659, 660 (1996)).

146. *Id.* at 203, 657 S.E.2d at 844 (citing *White v. Kelso*, 261 Ga. 32, 401 S.E.2d 733 (1991)).

147. *Id.* (citing *Johnson v. State*, 266 Ga. 775, 778, 470 S.E.2d 637, 641 (1996)).

148. *See id.* at 205, 657 S.E.2d at 845-46.

149. *Id.* at 203-04, 657 S.E.2d at 844-45.

□

counsel, and raise ineffective assistance on appeal.¹⁵⁰ Because a poor defendant could not do this, the fundamental guarantee of equal protection of laws, without respect to money, would be lost.¹⁵¹

VII. CONCLUSION

The defense achieved some important victories this reporting period: restoring freedom to a young man whose punishment was “cruel and unusual,” minimizing the oppressive restrictions on those who are declared to be “sex offenders,” and assuring indigent defendants the right to counsel at a motion for new trial. The State was able to hang on to its right to appeal in certain circumstances as well as the legislative mandate for timely reciprocal discovery in death penalty cases, although in practical application those rights may have been significantly diluted. Finally, the trial courts received specific direction concerning jury instructions and the proper manner of communicating with jurors.

150. *See id.*

151. *Id.*