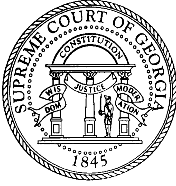

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SUMMARIES OF OPINIONS

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BASS V. THE STATE (S08G0592)

In a 6-to-1 vote, the Supreme Court of Georgia has reversed the convictions of a **Randolph County** man found guilty in 1999 of burning down a neighbor's home, slashing the tires of several people's cars, and illegally chopping down neighborhood trees. Ronald Bass was convicted of numerous counts of arson, criminal damage to property, robbery and criminal trespass, and sentenced to 40 years in prison. His neighbors had signed a petition against him complaining about the dogs he kept outside in pens.

At issue in this case is whether it was OK for a key prosecution witness in his criminal trial to also serve as bailiff in the same trial. The Georgia Court of Appeals upheld the lower court's ruling which rejected Bass's claim that his attorney was deficient for failing to object when the trial court let the sheriff, who first testified as a witness on behalf of the State, to then serve as bailiff.

But in today's decision, written by **Presiding Justice Carol Hunstein**, the majority concludes the Court of Appeals and lower court were wrong. Allowing the sheriff to serve as both witness and bailiff was "in flagrant violation" of Bass's right to a fair trial, the high court concludes.

"Our adversary system of criminal justice demands that the respective roles of prosecution and defense and the neutral role of the court be kept separate and distinct in a criminal trial," the opinion says. "When a key witness against a defendant doubles as the officer of the court specifically charged with the care and protection of the jurors, associating with them on both a personal and an official basis while simultaneously testifying for the prosecution, the

adversary system of justice is perverted." Any competent attorney would have objected, the majority states, and had Bass's attorney done so, "there is a reasonable probability that the outcome of the trial would have been different."

In a 9-page dissent, **Justice George Carley** argues that the sheriff's contact with jurors was "brief, incidental, and legally insignificant." He cites a number of state and federal court decisions, including one in 1997, *Bishop v. State*, in which the Georgia Supreme Court ruled that "contact between the jury and a witness for the State who is also an officer of the court is not grounds for an automatic reversal."

"The factors to be considered are both the importance of the bailiff's testimony and the type and duration of his association with the jury," the dissent says. In this case, the sheriff did not begin performing as bailiff until the third day of a four-day trial. The jury only deliberated a little more than an hour before reaching a verdict, during which time the sheriff did not converse with any juror or enter the jury room.

Attorney for Appellant (Bass): Brian Steel
Attorney for Appellee (State): Charles Ferguson, District Attorney

WHITFIELD V. WHITFIELD (S09F0104)

The Georgia Supreme Court has granted a motion to dismiss the appeal brought by Sheree Whitfield, a regular on the reality TV show, "Real Housewives of Atlanta," in her divorce from Bob Whitfield, a former Atlanta Falcons football player. She had appealed to the Supreme Court after a **Fulton County** court refused to grant her alimony. The couple has two young children. On the day the parties argued their case before the Supreme Court, her lawyer filed a motion to dismiss the appeal, stating they had recently learned that the athlete had "squandered his assets." Meanwhile his attorney filed a motion asking the Supreme Court to sanction her for bringing the appeal.

Today's two-sentence order grants the motion to dismiss while denying the motion for sanctions.

Attorneys for Appellant (Sheree): Michael Weinstock, John Wilson, David Weinberg
Attorney for Appellee (Bob): Christopher Olmstead

IN THE MATTER OF: K.R.S., A CHILD (S08A2005)

For the second time this month, the Georgia Supreme Court has upheld as constitutional "The Georgia Street Gang Terrorism and Prevention Act." Lawyers for a juvenile had filed a pre-trial appeal in **Bulloch County**, challenging the law as "unconstitutionally vague and overbroad."

The youth, "K.R.S." was charged in juvenile court with simple battery, battery and influencing a witness for allegedly cutting a person's hand, hitting another in the head, and slapping a third in the face. (Due to his minor status, the youth is identified by initials only.) As a result of those charges, K.R.S. was also charged with two counts of street gang activity, which is a felony. Prior to a formal hearing on the charges, his lawyers filed a pre-trial motion to dismiss the street gang counts. Specifically, they claim the act fails to define "criminal gang activity," or what it means to be illegally "associated with" a "criminal street gang," thereby violating due process rights by failing to provide clear warning to the average citizen of what conduct is criminally prohibited.

"We disagree," **Justice Hugh Thompson** writes for the Supreme Court in today's unanimous decision. The law clearly defines a street gang as an association of three or more persons engaged in criminal gang activity, and it lists 10 offenses that constitute "criminal gang activity," the opinion points out. "We find the description of these enumerated crimes…provide[s] sufficient notice to the ordinary citizen and clear guidance to law enforcement authorities as to what conduct is forbidden under the statute."
Attorneys for Appellant (K.R.S.): Stuart Patray, W. Keith Barber
Attorneys for Appellee (State): Richard Mallard, District Attorney, Kathy Bradley

MANLEY V. THE STATE (S08A1921)
In a 6-to-1 decision, the Georgia Supreme Court has upheld the conviction of Charles Travis Manley for the murder of a young Laotian woman whose skull and remains were eventually found in a remote part of **Harris County**.

Vieng Phoxivay was 19 years old when she disappeared in 1987 after visiting her fiancé in his trailer park on her way to work. Vieng's father had assisted U.S. military forces during the Vietnam War, and the First Baptist Church of Newnan had sponsored the family so they could move to the United States. According to the evidence presented at trial, after leaving her boyfriend's home in October 1987, Vieng got a flat tire, and Manley stopped to help. She was never seen alive again.

Two years later, while working in the woods, a timber cruiser discovered Vieng's skull. From other remains, investigators concluded the girl had been tied to a tree, raped and killed.

In 2007, Manley was convicted of her murder and sentenced to life in prison. He has appealed on a number of grounds, including that the trial court erred by refusing to allow his attorney to introduce expert testimony questioning eyewitness identification that is more than a decade old. Two of the witnesses initially did not identify Manley in a photo lineup, yet years later, after the cold case was revived, both witnesses did positively identify Manley.

In today's decision, written by **Justice Harold Melton**, the majority upholds Manley's conviction, finding the trial court made no errors requiring reversal. "This is not a case in which the State lacked substantial corroboration of eyewitness testimony by any other evidence," the opinion says. Three witnesses identified Manley's car as the one they had seen before the murder. Shortly after the murder, Manley repainted his car, reducing its value. There was also evidence that Manley had been accused of three other sexual attacks at knife-point or gunpoint, "two of which were aimed at young women like the victim in this case."

But in her dissent, **Presiding Justice Carol Hunstein** argues that Manley's conviction should be reversed, based on improper statements made by the prosecutor during his closing argument and because the trial court was wrong to deny Manley's request to call an expert witness on eyewitness identification. "Because the identifications were a crucial component of the State's case, it follows that the exclusion of the expert testimony was so prejudicial as to require reversal," the dissent says.
Attorney for Appellant (Manley): Brian Steel
Attorneys for Appellee (State): Peter Skandalakis, District Attorney, Raymond Mayer, Asst. D.A., Thurbert Baker, Attorney General, Mary Beth Westmoreland, Dep. A.G., Paula Smith, Sr. Asst. A.G., Chris Johnson, Asst. A.G.

<u>IN RE: D.H., A CHILD</u> (S08A1853)

The Georgia Supreme Court has upheld a ruling by a **Gwinnett County** juvenile court that found a teenager delinquent after police retrieved less than an ounce of marijuana from the pocket of his companion. Attorneys for "D.H.," whose initials are used because he's a minor, have appealed the ruling on several grounds, including that the evidence was insufficient to find him guilty of anything and that the trial court erred in finding he had possession of the drug. All he possessed were rolling cigarette papers; it was the other boy who was carrying the marijuana in his pants pocket.

But in today's unanimous opinion, written by **Justice George Carley**, the Supreme Court finds that although D.H. did not have "actual possession" of the marijuana, he did have "constructive possession" of it. He had the rolling papers needed to smoke the marijuana, and both he and the other boy admitted they'd just purchased the drug and were headed to a construction site to smoke it. The evidence was sufficient to prove "that D.H. possessed less than an ounce of marijuana and, thus, committed a delinquent act."

The high court also finds that the state law outlawing the possession of an ounce or less of marijuana is not unconstitutional, as D.H.'s lawyers contended. The use of the phrase, "shall be guilty of a misdemeanor," does not create a mandatory presumption of guilt but merely the General Assembly's intent to make the possession of a small amount a misdemeanor. "Such absurd consequences obviously were not contemplated by the legislature, and we will not construe the words of the statute in such an unreasonable way," the opinion says.

Attorneys for Appellant (D.H.): Christopher McClurg, Nathan Hayes, Jesse Kent
Attorney for Appellee (State): Daniel Porter, District Attorney

<u>IN THE MATTER OF LESTER C. SOLOMON</u> (S08Y1972)

In a split 4-to-3 decision, the Georgia Supreme Court has ordered the six-month suspension of attorney Lester Solomon. The State Bar of Georgia filed a formal complaint against Solomon based on his failure to separate his funds from those of a disabled man whose finances he began managing before becoming a lawyer. Under State Bar rules, Solomon should have created an attorney trust account for the funds of the man whose property and bills he'd agreed to manage. A special master found that Solomon, a former minister, was relatively inexperienced in the practice of law and his violation was unintentional. Joining in the majority are **Chief Justice Leah Ward Sears** and **Justices Robert Benham, George Carley** and **Harris Hines**.

But in the dissent, **Justice Harold Melton** writes that based on the commingling of the funds as well as the fact that Solomon tried to evict the man from his home, "I do not believe that a six-month suspension is adequate punishment for Solomon's actions." He is joined by **Presiding Justice Carol Hunstein** and **Justice Hugh Thompson**.

Attorneys for Appellant (Bar): William Smith, III, General Counsel, Jonathan Hewett
Attorney for Appellee (Solomon): Frederick Green

<u>DENSON V. FRAZIER, WARDEN</u> (S09A0079)

The Georgia Supreme Court has unanimously reversed the conviction of a **Fulton County** assistant principal for the brutal assault of his wife and stepdaughter. Rodney Denson

pleaded guilty in 2005 to aggravated assault and cruelty to children and was sentenced to 22 years in prison. Denson, a middle school assistant principal, shot his then estranged wife, elementary school teacher Elletta Lynette Bailey, six times in her Fairburn home. After shooting her, he threatened to shoot his 16-year-old stepdaughter, who fell to the floor and pleaded for her life.

In 2007, Denson filed a petition for a writ of habeas corpus – a civil proceeding that allows prisoners to challenge their conviction before a judge in the county where they're serving time. The habeas court denied his petition.

But in today's opinion, written by **Chief Justice Leah Ward Sears**, the Supreme Court has reversed the conviction because, according to the transcript, Denson was never advised that by pleading guilty, he was automatically waiving his constitutional right protecting him from having to testify against himself. The State has provided no evidence, the high court has found, "that Denson knowingly, intelligently and voluntarily waived his right against self-incrimination, and our own thorough review of the record has uncovered none. Accordingly, we must reverse the habeas court's judgment denying Denson's petition."

Attorney for Appellant (Denson): Sarah Gerwig-Moore
Attorneys for Appellee (Frazier): Thurbert Baker, Attorney General, Elizabeth Anne Harris, Asst. A.G.

<u>AMERSON V. VANDIVER</u> (S08A1707)

The Georgia Supreme Court has reversed a lower court's decision in a **Greene County** case involving the termination of a father's parental rights. John Vandiver and Pamela Anderson divorced in 2004. As part of the final divorce decree, Vandiver volunteered to terminate his parental rights, releasing him from any obligation to pay child support. But in March 2008, he tried to undo the agreement by filing a motion stating that the juvenile court, not the superior court, was the court authorized to decide issues involving parental rights. The superior court judge agreed, set aside that portion of the divorce decree terminating Vandiver's parental rights, and transferred the case to juvenile court for a final decision on the matter.

But in today's decision, written by **Justice George Carley**, the Supreme Court has reversed the trial court's decision. Although it is true the juvenile court "is the sole court for initiating action involving any proceeding for the termination of parental rights," Vandiver waited too long to file his complaint, the high court has found. "Accordingly, the trial court erred in setting aside that portion of the final divorce decree which terminated Mr. Vandiver's parental rights."

In her concurrence, **Presiding Justice Carol Hunstein** stresses that although she agrees that four years was too long, certain issues involving children that are negotiated in a divorce, "must be taken to the juvenile court, not the superior court." Joined by **Chief Justice Leah Ward Sears**, the concurrence states that, "there are compelling public policy reasons to keep these child-sensitive issues in the juvenile courts, where the best interests of the child are paramount."

Attorney for Appellant (Amerson): Brenda Trammell
Attorney for Appellee (Vandiver): Martin Fierman

IN OTHER MURDER CASES, the Supreme Court of Georgia has upheld convictions and life prison sentences for:

* Angelo Armstrong (Coweta Co.)	**ARMSTRONG V. THE STATE (S08A1591)**
* Michael Cox (Coweta Co.)	**COX V. THE STATE (S08A1590)**
* Benjamin Hargett (Coweta Co.)	**HARGETT V. THE STATE (S08A1589)**
* Robert L. Bostic (Chatham Co.)	**BOSTIC V. THE STATE (S09A0175)**
* David Lamar Brown (Coffee Co.)	**BROWN V. THE STATE (S08A1849)**
* Thomas Ray Freeman (Gordon Co.)	**FREEMAN V. THE STATE (S08A1802)**
* Kevin Lamar Hooper (Floyd Co.)	**HOOPER V. THE STATE (S08A1654)**
* Raevelle Ronchon Jackson (DeKalb Co.)	**JACKSON V. THE STATE (S08A1773)**
* Wayne Matthews (DeKalb Co.)	**MATTHEWS V. THE STATE (S08A1577)**
* Reginald Quinton Williams (Fulton Co.)	**WILLIAMS V. THE STATE (S08A1654)**

IN OTHER CASES RELATED TO THE DISCIPLINE OF LAWYERS, the Supreme Court has ordered that the following attorney be **disbarred**:

* Earl Dean Clark, Jr. **IN THE MATTER OF EARL DEAN CLARK, JR. (S08Y2120-23)**

The Court has accepted the **voluntary surrender of license** – tantamount to disbarment – from attorney:

* James A. Elkins **IN THE MATTER OF JAMES A. ELKINS (S09Y0387)**

The Court has ordered the **six-month suspension** of attorney:

* Bradley J. Taylor **IN THE MATTER OF BRADLEY J. TAYLOR (S09Y0090)**

The Court has accepted the **voluntary discipline and public reprimand** of attorney:

* Mara Sacks Dewrell **IN THE MATTER OF MARA SACKS DEWRELL (S09Y1043)**