



Supreme Court of Georgia

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SUMMARIES OF OPINIONS

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GEORGIA PUBLIC DEFENDER STANDARDS COUNCIL V. THE STATE ET AL. **(S09A0379)**

The Supreme Court of Georgia has unanimously upheld a **Burke County** judge's order holding the Georgia Public Defender Standards Council in contempt for refusing to pay the cost of representing a man sentenced to death. In the opinion written by **Justice George Carley**, the high court has ruled that the state council, not the county, is responsible under Georgia law for bearing the cost of defending certain indigent death penalty cases.

The case stems from the 1995 indictment of Willie Palmer, who was charged with murder, convicted and sentenced to death. The state Supreme Court upheld his convictions, and Palmer then filed a petition for writ of habeas corpus – a civil proceeding available to already convicted prisoners allowing them to challenge their case in the county where they're in prison. In March 2005, the habeas court ordered a new trial, and the Supreme Court upheld that ruling.

The same year, the Georgia Indigent Defense Act took effect, replacing the piecemeal system for providing indigent defense with a state-funded system to pay lawyers who represent poor people sentenced to death. Michael Mears, then director of the newly created Georgia Public Defender Standards Council, assured the trial court that it would secure counsel for Palmer and cover attorneys' fees and expenses. In 2007, Palmer was again convicted and sentenced to death, but when the attorneys submitted their bill for \$68,946.61 to the Council, the state agency refused to pay, on the grounds that the case dated back to 1995 when the Notice of Death Penalty was first filed, and it was therefore Burke County's responsibility to pay. In 2007,

the trial court ordered the Council to pay attorneys' fees and expenses. After the Council failed to comply, the trial court held it in contempt.

"[B]oth the statutory language of the Act and its underlying policy compel the conclusion that, in this case, the Council is responsible for payment of indigent defense costs..." today's opinion says. Nothing in the law "required that the Council fund representation only for defendants who are indicted or sent a death penalty notice after a certain date." Furthermore, the opinion says, death penalty cases in which a previous conviction or sentence is overturned, such as Palmer's, "stand on an entirely different footing than those which have not yet resulted in any conviction."

"The case becomes essentially indistinguishable from a newly pending case," the opinion says.

Attorneys for Appellant (Council): Judson Turner, Mark Johnson, Taylor Haley

Attorney for Appellees (State): John Long

FERDINAND V. CITY OF ATLANTA (S08A2102)

The Georgia Supreme Court has unanimously reversed a ruling by **Fulton County** Superior Court Judge Craig Schwall. The case involves the state Supreme Court's recent decision that the use of school tax revenues for non-educational purposes violates the Georgia Constitution.

"Finding that the trial court committed procedural errors, we reverse and remand with direction," says today's opinion, written by **Justice Harris Hines**.

The dispute arose after Arthur Ferdinand, Fulton County Tax Commissioner, informed the City that he could no longer turn over school tax funds to Tax Allocation Districts, but instead would have to turn them over to the school districts, as a result of last year's state Supreme Court decision in *Woodham v. City of Atlanta*. Prior to the *Woodham* decision, the City had issued bonds for five tax allocation districts, or "TADs." On Feb. 22, the City sued Ferdinand by filing a Petition for Writ of Mandamus – a legal proceeding designed to force a public official to do his job. The City also filed a motion for a temporary restraining order, asking the court to order Ferdinand not to pay to the Atlanta Public Schools tax funds it said had already been pledged for payment of principal and interest on the bonds. At a hearing on the temporary restraining order, the judge granted not only a permanent injunction but also a writ of mandamus requiring Ferdinand to give the City the funds.

"Ferdinand raises several procedural issues," today's opinion points out. "Primarily, he complains that the trial court converted what was a hearing on an interlocutory injunction into a final hearing on a permanent injunction and a hearing on the writ of mandamus, and that the court did not follow statutory requirements as to notice and time periods. We agree."

The opinion refers to a transcript of the hearing, quoting Judge Schwall after Ferdinand's attorney objected that the judge was deciding an issue not before his court. "I don't need any briefing," Schwall said. "My mind's totally made up." After the judge said he would have the City draw up for him the order issuing the injunction and writ of mandamus, Ferdinand's lawyer asked, "Your Honor, just so I'm clear, you're deciding the whole case?" To that, Schwall responded, "I'm deciding everything, because you know what? I know what I needed to do and I did it."

In today's opinion, the high court is returning the case to the trial court for it to follow the procedures required under the law.

Attorney for Appellant (Ferdinand): Samuel Woodhouse

Attorneys for Appellee (City): Elizabeth Chandler, City Attorney, Lemuel Ward, Sr. Asst. C.A., Peter Andrews, Sr. Asst. C.A., Jeffrey Haymore, Assoc. C.A.

IN THE INTEREST OF K.R. AND T.R., CHILDREN (S08G1611)

The Georgia Supreme Court has decided that a **Walton County** woman whose parental rights were terminated has the right to appeal. In today's unanimous ruling, written by **Justice Harris Hines**, the high court has thrown out a decision by the Georgia Court of Appeals which dismissed the woman's appeal and is sending the case back to that court for reconsideration.

In December 2007, the Department of Human Resources filed a petition to terminate Amanda Njie's rights to her children, K.R. and T.R. who are identified by their initials to protect their anonymity. In March 2008, the juvenile court entered an order terminating the mother's rights. A week later, Njie's attorney filed a notice of direct appeal with the Georgia Court of Appeals. But in May 2008, the Court of Appeals dismissed it, finding that the law had recently been amended and instead of filing a "direct" appeal, the attorney should have filed an application for a "discretionary" appeal.

Before the law was changed in 2007, parents whose rights were terminated had the right to automatically appeal that decision as a direct appeal. After the law was amended, however, their right to appeal was up to the court's discretion, and parents had to apply to appeal. In dismissing Njie's appeal, the Court of Appeals stated that an application for discretionary appeal is required "where an appeal is sought from an order terminating parental rights entered after January 1, 2008."

"But the Court of Appeals' analysis is flawed," today's opinion says. The Act clearly states that the change will apply to all child custody proceedings "*filed* on or after January 1, 2008." The date for triggering the change in the appeals process is the time the legal action is filed, not the date the order is issued, the high court finds. Here the petition to terminate rights was filed in December 2007. "Accordingly, the order of dismissal is vacated, and the case is remanded to the Court of Appeals for action consistent with this opinion."

Attorney for Appellant (Njie): Lori Duff

Attorneys for Appellee (State): Thurbert Baker, Attorney General, Dennis Dunn, Dep. A.G., Shalen Nelson, Sr. Asst. A.G., Elizabeth Williamson, Asst. A.G.

PAYNE V. THE STATE (S08G1267)

In a 4-to-3 vote, the Georgia Supreme Court has upheld the convictions of a **Douglas County** man for having sex with his 11-year-old stepdaughter. In an opinion written by **Justice Hugh Thompson**, the majority agrees with the Georgia Court of Appeals in affirming the lower court's decision to allow in "similar transaction evidence," or evidence of an allegedly similar crime committed by the defendant.

In 2000, the 11-year-old stepdaughter of William Christopher Payne told an officer at her elementary school that her "dad" had been having sex with her. The officer transported the child to the Douglas County Sheriff's office where she was interviewed on videotape, which was later played to the jury. On tape, the child said Payne had forced her to have oral sex and sexual

intercourse since she was about 8. He would hold her down and threaten to hurt her, and she said she was afraid he would kill her.

At trial, a nurse testified that in 1994, after she had ended her relationship with Payne when she was 32, he came to her home in Alabama, disconnected the phone line, broke in and armed with a knife, forced her to have oral sex and sexual intercourse. The trial court allowed in the similar transaction evidence of the Alabama crime to establish Payne's "bent of mind and course of conduct." The jury found Payne guilty of aggravated child molestation, child molestation and cruelty to a child, and he was sentenced to 20 years in prison plus 10 on probation. On appeal, his attorneys argued the Appeals Court was wrong and the trial court erred by allowing in details of an unrelated rape of an adult woman when this case involves his alleged abuse of a child. The prior transaction is not admissible unless the facts are strikingly similar. Here they are not, Payne's attorney argued.

But in today's opinion, the majority disagrees. In this case, the sexual crimes are similar, the high court finds: Both the little girl and the adult woman had a relationship with Payne, as opposed to being strangers; both crimes were committed in a home where he lived or had lived; and both victims were physically restrained and threatened with violence. "No Georgia case holds that the difference in age of the victims" alone determines similarity, the opinion says. "Our precedent consistently holds that it is the totality of the similar facts surrounding the crimes which are properly considered in a similar transaction." Joining in the majority are **Justices Robert Benham, Harris Hines and Harold Melton.**

But the dissent disagrees, finding that the two crimes were not similar enough to allow in evidence of the adult rape. "In this case, the prejudicial effect of the prior transaction evidence cannot be overstated," says the dissent, written by **Presiding Justice Carol Hunstein.** At trial, the truth of the child's allegations was "hotly contested," the dissenting opinion says. "In short, the evidence was in sharp conflict, and the evidence of [the] prior conviction may have been the deciding factor in the jury's verdict." **Chief Justice Leah Ward Sears and Justice George Carley** join in the dissent.

Attorney for Appellant (Payne): Brian Steel

Attorneys for Appellee (State): David McDade, District Attorney, James Dooley, Asst. D.A., James Barker

O'NEILL V. THE STATE (S08G0708)

In another split 4-to-3 decision, the Georgia Supreme Court has reversed the Court of Appeals, which had upheld the drug conviction of a **Henry County** man found passed out on a bed near some methamphetamine. In an opinion written by **Presiding Justice Carol Hunstein,** the majority finds that statements made against the man were inadmissible, and the evidence failed to exclude the possibility that his unconscious state was due to a night of legally consuming alcohol.

After receiving a tip, Henry County police knocked on the door of a motel room where inside they found Brian O'Neill and two other men. While O'Neill was unconscious on the bed and could not be aroused by police, the other two were awake. After one consented to a search of the room, police found significant quantities of methamphetamine and other drugs in containers. Next to O'Neill on the bed, they found more than 2 grams of meth in a jewelry box and two glass pipes commonly used to smoke meth. All three were charged with violations of the Georgia

Controlled Substances Act. Although no drugs were found on O’Neill, he was charged with unlawful possession of the meth in the ring box because it was found beside him and because one of the men told officers that O’Neill had passed out from “drinking or smoking” all night due to marital problems. In a bench trial before a judge with no jury, O’Neill was found guilty. The Georgia Court of Appeals upheld the conviction on the basis that O’Neill had “equal access to or was in joint constructive possession of the drugs.”

“Because the Court of Appeals improperly relied on a statement by O’Neill’s co-conspirator that was not admissible against O’Neill...and the admissible evidence in the record failed to exclude every other reasonable hypothesis except the guilt of the accused..., we reverse,” the majority opinion says. Furthermore, O’Neill’s mere proximity to the drug cannot sustain a drug possession conviction, the majority states. “It is well established that a finding of constructive possession must be based upon some connection between the defendant and the contraband other than mere spatial proximity.” Joining in the majority are **Chief Justice Leah Ward Sears, Justice Robert Benham and Justice Harold Melton.**

But the dissent finds that the majority’s reasoning in the case is “fatally flawed.” With its opinion, the Supreme Court has overstepped its bounds by retrying the case, then wrongly acquitting O’Neill of drug charges, says the dissent, written by **Justice Harris Hines** and joined by **Justices George Carley and Hugh Thompson.** “Simply, the majority has parsed the evidence and substituted its judgment for that of the trial court,” the dissent says. “It has exceeded the bounds of appellate review, resulting in Mr. O’Neill’s unfounded freedom.” There was plenty of evidence to convict O’Neill, the dissent states. “The circumstantial evidence authorized the finding that O’Neill had equal access to the methamphetamine, and therefore, was in joint possession of it.”

Attorney for Appellant (O’Neill): Gary Bowman, Public Defender

Attorneys for Appellee (State): Tommy Floyd, District Attorney, David Slemons, Asst. D.A.

TIDWELL V. THE STATE (S08A1783)

The Georgia Supreme Court has reversed drug charges against a **Forsyth County** man, based on a law enforcement officer’s failure to get a warrant before searching the man’s locker.

In February 2007, investigators with the Forsyth County Sheriff’s Office went to the Lanier Livestock Auction hoping to find William Blackwell so they could serve him with an outstanding warrant. One of the investigators asked employee Darryl Moore, who lived in a room at the facility, if he could search his room. Moore said yes. When they didn’t find Blackwell, the investigator then asked for permission to search the rest of the facility, and Moore again agreed. During the search, the investigator came across a sectioned off area with a front entrance and a three-to-four foot wall. Looking over the top, the investigator saw a foam sleeping pad in the stall, a filing cabinet and a wooden locker. Moore said that Jerry Tidwell, a foreman at the Livestock Auction, lived there four days a week. The wooden locker was unlocked, and after the investigator asked Moore if he could look inside, Moore again gave permission. Inside the investigator saw a digital scale, a glass smoking pipe, a lighter, sandwich bags and a small bag of marijuana. He also saw a bag of white powder, which turned out to be meth, sticking out the side of a duffel bag. After the investigator asked several times whose duffel bag it was, Tidwell said the bag was his, “but not the dope.” Following his arrest, Tidwell filed a motion to suppress the

evidence seized during the auction search. The motion was denied, and a jury found Tidwell guilty of possession of methamphetamine with intent to distribute, along with other drug charges.

“Because we find that the trial court erred in denying Tidwell’s motion to suppress, we reverse,” says today’s unanimous decision, written by **Justice Harold Melton**. The high court finds that Tidwell “had a reasonable expectation of privacy in the locker” and Moore “did not have the authority to authorize the police to search the locker.” To authorize a search, a third party must have some common authority over the premises, the opinion states. “The evidence does not support the conclusion that Moore had common authority over Tidwell’s locker.” Tidwell also challenged the constitutionality of the law prohibiting possession of drug-related objects, but the Supreme Court did not address that issue.

Attorney for Appellant (Tidwell): Rafe Banks III

Attorney for Appellee (State): Penny Penn, District Attorney

OTHER CASES APPEALED FROM THE GEORGIA COURT OF APPEALS

CLEVELAND V. THE STATE (S08G1371)

In a 6-to-1 vote, the Georgia Supreme Court has upheld methamphetamine drug charges against a **Harris County** man, affirming a decision by the Georgia Court of Appeals.

In the summer of 2004, a sheriff’s deputy stopped Sean David Cleveland, who was driving a van with no tag and wearing no seatbelt. After a standard license check revealed that Cleveland’s license had been suspended and the van was uninsured, he was arrested, and the deputy called a wrecker to impound the vehicle. Before releasing the van, the officer found inside a cigarette pouch containing six bags of methamphetamine and other items the State says are commonly used to manufacture meth. The sheriff’s office obtained a search warrant for Cleveland’s home where officers later retrieved other items used to produce the drug. They also photographed security cameras located around the residence. Prior to trial, Cleveland was offered a plea bargain: In exchange for pleading guilty, he would not have to serve any time in prison. He rejected the offer. The jury convicted Cleveland of possession of meth and related trafficking charges, and he was sentenced to 10 years in prison followed by 10 on probation. After trial, his new attorney moved for a new trial. At a hearing on the motion, his former attorney testified that he had not realized evidence of the items found at the home would be introduced at trial. The trial court denied the motion, and Cleveland’s attorney then appealed to the Georgia Court of Appeals. That court found that while the trial attorney acted unreasonably for failing to examine the State’s file prior to trial, it is unlikely that Cleveland would have accepted the plea bargain knowing that in addition to the evidence found in his car, that found in his house would also be introduced at trial.

In today’s majority opinion, the high court agrees. “The record supports the trial court’s finding that Cleveland failed to demonstrate, through his testimony at the motion for new trial hearing or otherwise, that but for his counsel’s failure to avail himself of the State’s open file policy, there is a reasonable probability that Cleveland would have accepted the State’s pretrial plea offer,” states the opinion, written by **Chief Justice Leah Ward Sears**. “Before, during, and after trial, Cleveland adamantly and consistently insisted that he had nothing to do with the drugs and other items that formed the basis for his convictions.”

But **Presiding Justice Carol Hunstein** disagrees. “Because my review of the record establishes that appellant proved a reasonable probability that he would have accepted the State’s plea deal had defense counsel performed in a reasonably competent manner, I respectfully dissent,” she writes.

Attorney for Appellant (Cleveland): James Lamb

Attorneys for Appellee (State): John Conger, District Attorney, W. Donald Kelly, Asst. D.A.

ATMOS ENERGY CORPORATION V. GEORGIA PUBLIC SERVICE COMMISSION (S08G1206)

The state Supreme Court has upheld the Georgia Court of Appeals in this **Fulton County** case involving a utility’s request to allow a rate hike increase. Atmos Energy Corporation, a regulated gas utility, applied to the PSC for approval of a rate increase in May 2005. On Nov. 21, 2005, the Commission entered a 12-page order, approving a slight increase in Atmos’ rates. Although the document was marked “Final Order” at the bottom of each page, it also said a more detailed order would follow. Atmos requested a rehearing seven days later, which the PSC denied by a voice vote on Dec. 20, 2005. On Jan. 19, 2006, Atmos filed an appeal for judicial review in Fulton County Superior Court. The PSC filed a motion to dismiss Atmos’ petition on the basis that the voice vote denying Atmos’ motion for rehearing could not be reviewed by the court because the PSC’s decision had not been reduced to writing. Meanwhile, before the trial court ruled, on Feb. 2, 2006, the PSC issued a second more detailed order on Atmos’ rate hike request. Ultimately, the trial court refused to dismiss Atmos’ petition, but its decision was based on procedural grounds and the court did side with the PSC on the substantive issues. On Feb. 19, 2008, the Court of Appeals threw out the trial court’s order on the ground that the Nov. 21, 2005 order was not a final decision and therefore not subject to review by a court. The Appeals Court also found that state law requires all the PSC’s decisions to be put in writing before they are considered final.

In today’s unanimous opinion, written by **Presiding Justice Carol Hunstein**, the high court agrees. Although Atmos argued that the Court of Appeals was wrong to find that the November order was merely an interim decision by the PSC and not a final order, “Our review of the record reveals no error in this factual finding,” the opinion says.

Attorney for Appellant (Atmos): Julius Hulse

Attorney for Appellee (PSC): Thurbert Baker, Attorney General, Isaac Byrd, Dep. A.G., Sidney Barrett, Jr., Sr. Asst. A.G., Daniel Walsh, Asst. A.G.

OTHER CASES IN WHICH THERE WAS A DISSENT

MOORE V. THE STATE (S09A0119)

The Georgia Supreme Court has upheld murder, aggravated assault and armed robbery convictions against Craig Michael Moore of **Cobb County** in the 2002 convenience store robbery and shooting death of clerk Jeffrey Stephenson. The evidence at the 2007 bench trial – a trial before a judge with no jury – showed that Moore entered the store and was trying to steal a beer when Stephenson confronted him at the back of the store and threatened to call police. Moore pulled a gun on him, and when Stephenson moved back to the cash register, Moore shot

him three times, killing him. Forensic testing showed the bullets recovered at the scene were fired from the Glock pistol Moore had owned, but had sold shortly after the murder. Investigators found more evidence at Moore's home, including tennis shoes with Stephenson's blood on them. Moore confessed to the crimes, and, although the district attorney sought the death penalty, he was sentenced to life in prison with no chance of parole. In addition, Moore was sentenced to 20 years for aggravated assault, another 20 for armed robbery and 10 more for theft by receiving. He later appealed, stating his convictions must be reversed because the State failed to prove the proper "chain of custody" for both the murder weapon and the single cartridge found at his residence, meaning the State didn't follow the procedures designed to protect evidence from being tampered with once it comes into investigators' custody.

"This contention is meritless," says today's 6-to-1 decision, written by **Justice Harold Melton**. Because Moore failed to object when the gun was entered into evidence, he waived his right to bring it up on appeal. "Moreover, even if there had been error in admitting the evidence about which Moore complains, the error would be harmless given the overwhelming nature of the case against Moore, including his confession to the crime," the majority opinion states. The opinion also upholds the trial court's decision to treat the crime of aggravated assault separately from the crime of murder, as opposed to merging them together as one crime. The judge "had the authority to conclude that an aggravated assault was completed on one side of the convenience store before the shooting and murder occurred on the opposite side," the opinion states.

But **Presiding Justice Carol Hunstein** disagrees, writing in her dissent that the conviction for aggravated assault must be merged into the murder conviction. "While I concur fully with the affirmance of the judgment and sentence entered on Moore's convictions for murder, armed robbery and theft by receiving, my review of the record establishes that Moore's conviction for aggravated assault merged as a matter of fact into the murder conviction," the dissent says. Nothing in Moore's statement to police indicates that any "deliberate interval existed between the assaults that indicated the completion of one criminal act before the start of a separate criminal act." As a result, "I would vacate the judgment of conviction and the sentence imposed on Moore for aggravated assault," she writes.

Attorney for Appellant (Moore): Mary Erickson

Attorneys for Appellee (State): Patrick Head, District Attorney, Amelia Pray, Asst. D.A., Dana Norman Asst. D.A., Thurbert Baker, Attorney General, Sara Sahni, Asst. A.G.

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

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| * Mazzetti Alexander (Newton Co.) | <u>ALEXANDER V. THE STATE (S09A0294)</u> |
| * Stanley Tyrone Brooks (Fulton Co.) | <u>BROOKS V. THE STATE (S08A1647)</u> |
| * Gerard Martinis Character (Fulton Co.) | <u>CHARACTER V. THE STATE (S08A2056)</u> |
| * Damian Darnell Henderson (Bibb Co.) | <u>HENDERSON V. THE STATE (S08A1478)</u> |
| * Terrence G. Roberts (Fulton Co.) | <u>ROBERTS V. THE STATE (S08A2057)</u> |
| * Jamie Watkins (Fulton Co.) | <u>WATKINS V. THE STATE (S08A1894)</u> |

- * Edward C. Wilkins, Jr. (Chatham Co.) **WILKINS V. THE STATE (S09A0275)**
- * Christian Wornum (Cobb Co.) **WORNUM V. THE STATE (S09A0300)**

IN DISCIPLINARY MATTERS, the Supreme Court has accepted the petition for **voluntary surrender of license** – tantamount to disbarment – from:

- * Pierce Winningham III **IN THE MATTER OF PIERCE**
WINNINGHAM III (S09Y0770)

In a 4-to-3 decision, the Court has ordered the **one-year suspension** of attorney:

- * Christine M. Livingston **IN THE MATTER OF CHRISTINE LIVINGSTON**
(S08Y0281)

(Chief Justice Leah Ward Sears, Presiding Justice Carol Hunstein and Justice Hugh Thompson dissent. Written by the Chief Justice, the dissent says Livingston should be disbarred. The majority – Justices Robert Benham, George Carley, Harris Hines and Harold Melton – have agreed to the suspension.)

The Court has ordered the **public reprimand** of attorney:

- * Gregory E. Stuhler **IN THE MATTER OF GREGORY STUHLER (S08Y1349)**