



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Monday, July 13, 2015

10:00 A.M. Session

KEMP, SECRETARY OF STATE, V. MONROE COUNTY ET AL. (S15A1251)

BIBB COUNTY V. MONROE COUNTY ET AL. (S15A1252)

The Georgia Secretary of State is appealing a Fulton County court decision regarding a land boundary dispute between Bibb and Monroe counties. Secretary of State Brian P. Kemp argues the trial court has exceeded its authority by restricting the evidence he may consider before determining where the boundary lies, as he is required by law to do.

FACTS: The precise location of the boundary line between **Bibb County** and **Monroe County** has been in dispute for many years, and this is the second time the case has come to the state Supreme Court. Georgia Code § 36-3-20 stipulates that when there is a boundary dispute, the "Governor shall appoint some suitable and competent land surveyor...to survey, mark out, and define the boundary line..." If a county then challenges the surveyor's line, another statute (§ 36-3-24) provides that the "Secretary of State shall determine from the law and evidence the true boundary line in dispute between the respective counties." Ten years ago, at Monroe County's request, Gov. Sonny Perdue appointed a surveyor – Terry M. Scarborough – to survey and define the boundary between the counties. Scarborough filed his survey and plat in 2009 with the then-Secretary of State, as the law requires. Bibb County challenged Scarborough's line, arguing in part that the initial point for the boundary should be an area on the Ocmulgee River

called Waller's Ferry rather than the area called Turrentine's Ferry, as Scarborough's survey denoted. A Special Assistant Administrative Law Judge conducted a three-day hearing to consider Bibb County's challenge, during which the judge heard from nine witnesses and considered more than 150 exhibits and findings of fact and conclusions of law that were submitted by the counties. Following the hearing, the judge recommended the Secretary approve the Scarborough survey, finding it to be "an accurate description of the true boundary line between Bibb County and Monroe County." After reviewing the evidence and hearing arguments, however, the Secretary rejected the survey, finding that there was inconclusive evidence as to the location of Waller's or Turrentine's Ferry, and finding that the survey would leave an "island" of Bibb County entirely surrounded by Monroe County. The Secretary did not establish a definitive boundary line.

Monroe County subsequently filed a petition for judicial review in Fulton County, but the trial court dismissed the petition, saying it lacked authority over what it said was a political decision that was not subject to judicial review. Monroe County then filed a petition for a "Writ of Mandamus," which is issued to compel a government officer to perform his mandatory duties. The trial court issued the writ of mandamus, compelling the Secretary of State to comply with his statutory obligation to establish a definitive boundary line. The trial court further required the Secretary to adopt the Scarborough survey's boundary line. The Secretary of State and Bibb County then appealed to the state Supreme Court.

On March 10, 2014, this Court reversed the lower court's decision and sent the case back to Fulton County after ruling that while Kemp is required by state law to resolve the dispute and decide where the boundary lies, he is not required to pick a particular boundary. "In this instance, the Secretary has a mandatory duty to consider the relevant law and evidence and to render some decision identifying the boundary line," the high court wrote in its opinion. However, "it is not proper either to prescribe how that action is taken or to preordain its result." The Supreme Court held that the process for receiving evidence and reaching a decision was in Kemp's discretion and stated that whether "there has been any gross abuse of discretion in the Secretary's conduct of the proceedings is a question the trial court may elect to address on remand."

In response to the Supreme Court's decision, Kemp notified the counties and Scarborough that he would consider new evidence from both sides, advising them he would hold a hearing in August 2014. Monroe County objected in superior court to Kemp's plan to re-open the record to consider additional evidence, arguing that the Secretary should be limited to the record that existed on June 30, 2011, when he closed the record in the case. Prior to closing the record, the Secretary had held a hearing in May 2011 where the counties each presented their arguments. The governor's surveyor did not attend, as he had said he would not attend any proceedings until he received Bibb County's portion of his fee, which he had not received at that point. When the surveyor did receive Bibb County's share of his fee, he offered to make a presentation to the Secretary in support of his survey, but the Secretary declined the offer. In July 2014, the superior court issued its order on the scope of the proceedings, directing Kemp to consider Scarborough's addendum evidence that Kemp had refused to consider in 2011 and to determine the boundary line, but the order prohibited Kemp from considering additional evidence in a second hearing. The judge said that re-opening the record was prohibited under the law because the "Secretary has already exercised his discretion in ratifying the process established by his predecessor of 'referring the matter to the Special Assistant Administrative

Law Judge....” “To allow another evidentiary hearing suggests bias in favor of Bibb County, is fundamentally unfair, and undermines the statutory process,” the trial court concluded. It stated that the Secretary “is, otherwise, free to use his discretion...to determine the true boundary line between Bibb County and Monroe County and is ordered to do so within a reasonable time.” The trial court referred to the Supreme Court’s first decision in this case, which stated that the “Secretary has already exercised his discretion...by referring the matter to a Special Assistant Administrative Law Judge before whom substantial evidence, including tax maps and historical documents, has been developed, and by undertaking additional investigation, personally visiting the alternative terminating points argued for by each of the counties.” Allowing the Secretary to permit additional evidence would run counter to the Supreme Court’s “explicit directions,” the trial court ruled, and would also run counter to the specific method established by the legislature in the Georgia Code. Secretary Kemp and Bibb County again appeal to the state Supreme Court.

ARGUMENTS (S15A1251): The Attorney General’s office, representing Kemp, argues the trial court erred by directing the manner in which Kemp was to proceed when its only authority was to direct him to set a boundary line. “The Superior Court’s latest order unlawfully bars Secretary of State Brian Kemp from considering the evidence necessary to perform his statutorily-mandated duty to set a proper county line,” Kemp’s attorneys argue in briefs. “The court’s order is unprecedented and improperly constricts not only the available evidence but also the Secretary’s exercise of the discretion provided by statute and under [the Georgia Supreme Court’s] prior decision.” The trial court’s 2014 “Order on the Scope of Proceedings” improperly “orders the Secretary to consider additional evidence from surveyor Terry Scarborough while at the same time prohibiting him from considering responsive evidence from the counties in a second evidentiary hearing,” the attorneys argue in briefs. “In fact, the real puzzle of the Superior Court’s Scope Order is that it would itself introduce a potential claim for abuse of discretion if the counties wished to present responsive evidence and were not permitted to do so.” Regardless, Kemp has concluded that he must consider additional evidence to make a lawful and correct decision regarding the boundary, and under the law, he has the discretion to do so. In its earlier opinion, the state Supreme Court stated that “because the statute prescribes no particular process by which the Secretary is to *receive evidence* and reach a decision, these matters fall within the Secretary’s discretion.” “Here, Secretary Kemp attempted to exercise his discretion to reopen the evidentiary record to consider Mr. Scarborough’s addendum evidence, and to allow the counties to respond to it and to present additional evidence, in part because this Court reserved the question of whether the Secretary’s failure to consider the addendum evidence was a gross abuse of discretion.” “The fact that the Secretary ‘already exercised his discretion’ with regard to taking evidence does not preclude him from continuing to do so,” the State argues. The trial court misinterpreted the Supreme Court’s earlier decision by concluding “that Secretary Kemp is barred from re-opening the evidence because it would ‘allow Bibb County a second chance to meet its evidentiary burden in challenging the survey.’ This was error. At the most basic level, *both* counties will have the opportunity to present new evidence, or a ‘second chance’ to persuade the Secretary about the correctness of their arguments.” Finally, the trial court’s injunction against the Secretary from re-opening the record is barred because sovereign immunity bars injunctive relief against the State and its officials.

Attorneys for Monroe County argue that the State Supreme Court should uphold the trial court’s order because all three of the errors alleged by the Secretary of State are without merit.

“First, the trial court properly ordered the [Secretary] to establish the boundary line based on the record established under the procedures the [Secretary] had already exercised his discretion to enact and had followed,” the attorneys argue in briefs. “Second, the [Secretary’s] decision to reopen the evidentiary record was arbitrary, capricious and a gross abuse of discretion. Third, the trial court’s ruling is not an injunction and is not barred by sovereign immunity.” The trial court did not exceed its authority and did not direct the Secretary to act in any specific manner where he has discretion. “While this Court is the best interpreter of its own opinion, Monroe County respectfully submits that the trial court’s interpretation of this Court’s statement that the Secretary of State ‘has already exercised his discretion,’ and the trial court’s finding that the Secretary is precluded from re-opening the evidentiary record that he had already exercised his discretion to develop (and to close), is consistent with the concept of mandamus under Georgia Law,” Monroe County’s attorneys argue. The Secretary “must now determine the true boundary line based on the evidentiary record he developed. [T]his mandamus action does not provide an opportunity for the Secretary of State to go back and ‘re-exercise’ his discretion to develop a second evidentiary record, nor does it provide Bibb County with a second chance to attempt to meet its burden of proof in the proceedings before the Secretary of State.”

ARGUMENTS (S15A1252): Attorneys for Bibb County argue the Secretary has compelling reasons to open the record. Additional evidence is necessary because the record developed so far assumed the only issue was whether Scarborough’s line was correct, and it was not developed for the purpose of locating the true boundary line. “Contrary to Monroe County’s argument..., the Secretary had good reasons for deciding first the validity of Scarborough’s survey, and upon finding it invalid, then seeking to determine the correct boundary,” the attorneys argue in briefs. “The Secretary has at least as much discretion to reopen evidence as a trial judge, and a trial judge would have discretion to reopen evidence in cases where a party was not given the opportunity to present material evidence.” “In addition to enabling the Secretary to do his job and to resolve the boundary in an efficient manner for all parties, the Secretary must ensure that the process is fair to all parties,” Bibb County’s attorneys argue. “It would not be fair to Bibb County to require it to justify its own preferred line based on an evidentiary record that was developed solely to test the validity of the Scarborough survey, at a time when the Secretary and both counties believed that the sole issue to be decided was the validity of that survey.”

“Bibb County’s arguments are meritless,” attorneys for Monroe County argue. Contrary to Bibb County’s assertion that the hearing before the administrative judge was limited to presenting evidence regarding the reliability of Scarborough’s survey, “Bibb County had the ability to present any evidence that supported an alternate county boundary line, and in fact, Bibb County *did* present such evidence,” the attorneys contend. “The Secretary of State had the opportunity to reopen the record four years ago and, in the exercise of his discretion, he affirmatively chose not to do so. Under these circumstances, it was well within the trial court’s discretion to conclude that the Secretary should be held to the record he exercised his discretion to develop.” “Notwithstanding the fact that the lengthy statutory process of having an independent surveyor appointed by the Governor determine the location of the disputed boundary line was followed, at great expense to the taxpayers of both counties, the Secretary of State failed to establish *any* boundary line at the conclusion of the proceedings requiring him to do so.” Furthermore, he had an obligation to determine the boundary line in one proceeding. Georgia Code § 36-3-24 requires Kemp, “Upon the hearing,” to “determine from the law and

evidence a true boundary line.” He had no authority to conduct multiple hearings over several years before reaching a decision, the attorneys contend. Kemp’s claim that he can now reopen evidence is belied by the fact that four years ago, he declared the record closed and refused to consider any additional evidence, and he denied Monroe County’s request for a new hearing based on his belief that the statute did not authorize a new hearing. It has been 10 years “since the Monroe County grand jury certified the initial presentment to the governor, and substantial sums of taxpayer money have already been spent in this process,” the attorneys argue. It is not an appropriate remedy to allow Kemp to collect evidence today that he should have collected years ago, and it would be unfair to taxpayers to allow Kemp to go back and do what the law required him to do before he closed the record in 2011. Furthermore, Kemp does not have the “broad discretion” of a trial judge to reopen the evidence. “What Bibb County overlooks is that the Secretary of State is not a trial judge, and this is not litigation between two adversarial parties.”

Attorneys for Appellant (Kemp): Samuel Olens, Attorney General, Britt Grant, Solicitor General, W. Wright Banks, Jr., Mary Jo Volkert, Sr. Asst. A.G.

Attorneys for Appellant (Bibb): Virgil Adams, D. James Jordan, Dawn Lewis Charles Cork, III

Attorneys for Appellee (Monroe): Letitia McDonald, Jessica Sabbath, Carolyn Burch, Michael Dillon, Benjamin Vaughn

THE STATE V. LEWIS (S15G0666)

This appeal involves a Georgia Court of Appeals ruling that threw out the prison sentence given to former **DeKalb County** schools Superintendent Crawford Lewis after he agreed to testify against his co-defendants as part of a plea deal. In this unusual case, the State of Georgia agrees with Lewis that the trial court was obligated to impose on Lewis a sentence of probation, rather than confinement, which the parties had agreed to as part of the plea arrangement.

FACTS: Patricia Reid, Anthony Pope, and Lewis were indicted by a DeKalb County grand jury and charged with violating Georgia's Racketeer Influenced and Corrupt Organizations Act (RICO) and felony theft by taking related to some school construction projects. As part of a negotiated plea agreement, District Attorney Robert James agreed to dismiss the felony charges against Lewis in exchange for his guilty plea to one misdemeanor count of hindering and obstructing a law enforcement officer, conditioned upon Lewis testifying truthfully against his co-defendants. Lewis agreed, with the understanding that the State would recommend a sentence of 12 months probation, a \$500 fine, and 240 hours of community service. The record shows that the State and Lewis had a plea discussion with DeKalb County Superior Court Judge Cynthia Becker in chambers prior to the entry of Lewis' plea and that the judge “went along” with the State's recommendation. After accepting Lewis' plea, the trial judge deferred sentencing him until the end of trial.

Lewis subsequently testified at trial, and his co-defendants were ultimately convicted. At Lewis’ sentencing hearing, the District Attorney told the judge Lewis had complied with the plea terms by testifying truthfully and asked the judge to impose the agreed-upon sentence. Denying that she had agreed to impose the recommended sentence, the trial judge refused the State's recommendation and sentenced Lewis to 12 months imprisonment instead of probation. Lewis was taken into immediate custody and the trial judge refused to consider bond, despite Georgia law entitling him to such bond for his misdemeanor conviction.

Lewis' attorneys filed an emergency motion and request for an immediate hearing seeking reconsideration of Lewis' sentence in accordance with the negotiated plea agreement, asking for the recusal of the trial judge if reconsideration was denied and, in the alternative, asking to withdraw Lewis' guilty plea. The trial judge set an emergency hearing for one week later and refused to grant Lewis' request for an immediate bond. Three days later, in response to an emergency motion filed by Lewis in the Court of Appeals, that court issued an order directing the trial court to set a reasonable bond immediately, and Lewis was released. Subsequently, at the emergency hearing, the judge denied Lewis' request for reconsideration and warned him that his prior testimony would be used against him in future prosecution if he withdrew his plea. Furthermore, the judge stated that her decision regarding Lewis' sentence was based on "the credibility, the believability, the probability or the improbability of the testimony," implying that Lewis may have lied at the trial of his co-defendants. Lewis then appealed to the Court of Appeals, which agreed to hear the appeal. Both the State and Lewis filed briefs stating there was no dispute between the parties and asserting that the trial court was obligated to impose the negotiated sentence it had previously accepted.

In its October 2014 opinion, the Court of Appeals found that "the record shows that the State had made a negotiated plea recommendation and that the trial judge went along with this recommendation at the time she accepted the plea. Although Lewis' sentencing was deferred, the trial judge had, at the very least, implicitly agreed to sentence him according to the State's recommendation, provided that he testified truthfully at the trial of his co-defendants. Lewis relied on the trial court's acceptance of his negotiated plea when he later waived his Fifth Amendment rights and testified on behalf of the State at trial, wherein he provided testimony that incriminated himself." Under the circumstances here, the Court of Appeals ruled, "we find that the interests of justice require that Lewis be sentenced according to the State's recommendation pursuant to the negotiated plea, provided that he testified truthfully on behalf of the State at the trial of his co-defendants." However, the Court of Appeals determined that, even though both parties agreed Lewis had complied with the terms of the plea agreement and testified truthfully, the trial court retained the authority to decide whether the terms of the parties' plea bargain had been fulfilled. Based on this part of its ruling, the Court of Appeals vacated the judgment of the trial court and remanded the case for further proceedings consistent with its opinion. The State then appealed to the Georgia Supreme Court, which agreed to review the case to determine whether the Court of Appeals erred in its rulings.

In its appeal to this Court, both the State and Lewis claim the Court of Appeals was wrong to rule that the trial court on its own was authorized to challenge and invalidate the parties' negotiated plea agreement which the trial court had previously accepted and which both parties agreed had been satisfied. Given the parties' non-adversarial posture, their arguments have been combined.

ARGUMENTS: Both the State and Lewis argue the Court of Appeals correctly found that the trial court had accepted the State's sentence recommendation based on the negotiated guilty plea agreement, and that Lewis was entitled to enforcement of the agreed upon terms of the plea. Once a trial court voluntarily gives up its sentencing discretion by telling a defendant that it will impose an agreed-upon sentence and the defendant relies on

that representation to his detriment by waiving his constitutional rights, the trial court cannot then refuse to abide by the agreement, both parties argue. While all plea bargains are subject to the trial court's approval, and the court is not bound to accept a plea agreement between the State and the defense, there are mandatory steps a trial court must take in rejecting a negotiated plea agreement. Specifically, trial judges must “tell defendants explicitly that they have the right to withdraw their plea because the court intends to reject the negotiated plea.” Here, when the plea was entered, the judge did not inform Lewis she intended to reject any part of the agreement. Rather, the trial court “went along” with it.

The parties argue that under its 2013 decision in *Simmons v. State*, the state Supreme Court ruled that a “plea agreement is, in essence, a contract between a defendant and the State.” Here, Lewis relied to his detriment on the trial judge’s acceptance of the negotiated plea agreement when he waved his constitutional rights and gave incriminating testimony. Lewis was unquestionably harmed by his reliance on the negotiated plea agreement and simply withdrawing his guilty plea cannot fix that, the State and Lewis’ attorneys argue. Rather, Lewis would face prosecution after being induced to incriminate himself by promises ratified by the trial court.

Both the State and Lewis’ attorneys argue the Court of Appeals erred, however, in authorizing the trial court to challenge and invalidate a plea agreement the trial court had previously accepted, when neither party claimed the terms of the agreement had been breached. After accepting a plea as given, the trial court has no independent role in determining whether the bargain between the parties has been satisfied, the State’s and Lewis’ attorneys argue. The trial court is a neutral arbitrator of disputes and, in the absence of a dispute between the parties, has no authority to create a dispute of its own making with respect to the parties’ plea bargain. By authorizing the trial judge to challenge whether the plea bargain’s terms were fulfilled, the Court of Appeals’ opinion disregards fundamental contract principles. In this case, the State and Lewis had to join forces against the trial court which relinquished its neutrality and became an adversary to their joint position that Lewis had testified truthfully at trial. In addition, by refusing to accept the parties’ non-adversarial posture, the Court of Appeals opinion undermines the future ability of the State and defendants to enter into plea agreements. In negotiating a plea, the State and defendants typically engage in lengthy back and forth discussions regarding the relevant facts – a process that cannot include the trial court. Because the State was in a better position to assess Lewis’ truthfulness, the trial court should have accepted the State’s conclusion. And because the Court of Appeals ruling on this issue is legally incorrect, its order remanding the case was also improper, both the State and Lewis contend.

Attorneys for Appellant (State): Robert James, District Attorney, Anna Cross, Dep. Chief Asst. D.A.

Attorneys for Appellee (Lewis): Michael Brown, Bernard Taylor, Kacy Brake

SHIRLEY V. THE STATE (S15G0671)

A **Gwinnett County** man is appealing a pre-trial ruling that when his case goes to trial on 17 counts of sexual exploitation of children, the jury will be permitted to see images seized from his computers that were described as “child pornography” in the affidavit police presented to

obtain a search warrant. The man argues the affidavit was insufficient to establish probable cause and the images should be suppressed.

FACTS: In January 2011, the FBI's Safe Child Task Force received information from German authorities whose investigation had led to a website being used to distribute child pornography. The German authorities informed the FBI that they had captured various "internet protocol" (IP) addresses that were accessed on the site, including one from which 150 full and thumbnail-sized image files had been accessed on July 22, 2009. In response to a federal administrative subpoena, AT&T Internet Services identified the IP address as belonging to Michael Scott Shirley and being located at his home in Lawrenceville, GA. On Feb. 18, 2011, two police officers, including Detective D.A. Schad, went to Shirley's home but received no answer. They left a business card and later that evening, Shirley left two voicemail messages for one of the officers. On Feb. 21, 2011, Shirley went to the Lawrenceville police department for an interview. He asked that his wife not be interviewed due to her stress level. During the interview, Shirley stated that he did not look at pornography on the internet, and that he had one desktop computer and one laptop that he had purchased for his son. When asked what he knew about someone accessing a German website to view child pornography, Shirley invoked his right to remain silent until he could speak with an attorney.

In the search warrant affidavit, Detective Schad listed "Possession of Child Pornography" as the offense at issue, based on Georgia Code § 16-12-100 (b) (8), which states: "It is unlawful for any person knowingly to possess or control any material which depicts a minor or a portion of a minor's body engaged in any sexually explicit conduct." The detective described in the affidavit his knowledge of the use of computers as an instrumentality for obtaining and storing child pornography, and he sought a warrant to search Shirley's residence and any its computers and electronic devices that could possibly contain child pornography. The magistrate judge signed the warrant, indicating on the warrant that she did not consider the officer's oral testimony in granting it. Police then executed the warrant on Feb. 1, 2011.

In January 2012, based on a sample of images retrieved from Shirley's computers, a Gwinnett County grand jury indicted Michael Scott Shirley on 17 counts of Sexual Exploitation of Children, which is the name given to Georgia Code § 16-12-100. Shirley's attorney filed a motion to suppress the images when the case went to trial. Following a hearing, the trial court denied the motion. Shirley appealed, and the Court of Appeals upheld the trial court's ruling. Shirley now appeals to the state Supreme Court.

ARGUMENTS: Shirley's attorney argues the Court of Appeals erred in upholding the trial court's denial of the motion to suppress because the search warrant affidavit was not supported by probable cause to show that the images in question were child pornography under Georgia law. Furthermore, both courts erred because the affidavit was not supported by probable cause that the images were "possessed" by Shirley or that the images "accessed" were child pornography. "Essentially the trial court allowed the magistrate to find probable cause that the images in question constituted child pornography simply due to the fact that the local jurisdiction police officer was seeking a warrant, thus relying solely on the officer's conclusion without independent facts with which the magistrate could evaluate that conclusion," the attorney argues in briefs. The affidavit and search warrant contained no description of the "child pornography," no description of the images allegedly accessed by Shirley's email address, no description of Detective Schad's training and experience in child exploitation cases, and no indication that he'd

viewed the images as part of his investigation prior to seeking the warrant, nor did the affidavit indicate whether the images were child pornography under the laws of Germany, the United States or Georgia. Shirley's attorney urges the Georgia Supreme Court to "decline to adopt the rule set by the Court of Appeals that turns Georgia magistrates into a rubber stamp when an officer uses the magic words, 'child pornography.'" Here, "the magistrate had no basis for independently determining that the images were in fact child pornography," and definitions "of child pornography vary widely, making an independent determination by a magistrate essential." "Importantly, nowhere in § 16-12-100...is the term 'child pornography' ever mentioned or defined," the attorney argues. "In fact, the title of the offense itself is called 'sexual exploitation of children,' not 'child pornography....'" The courts also erred because the 19-month delay between the access of the images and the application for a search warrant resulted in the information being "stale," eliminating probable cause for the search, Shirley's attorney argues.

The State argues the search warrant affidavit and application is supported by the facts to show that a fair probability existed that child pornography would be found. As the Georgia Supreme Court stated in its 2009 decision in *State v. Palmer*, a magistrate determines if probable cause exists to issue a warrant by making "a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before [her], including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." "On appeal, a reviewing court gives great deference to the magistrate's determination of probable cause, presumes the validity of the affidavit supporting the search warrant, and resolves doubtful cases in favor of upholding the warrant." The words, "child pornography," need no expert training or experience to clarify their meaning, as federal courts have found. "Warrant applications such as the one submitted by the detective here which describe the contents of images as 'child pornography' are drafted by non-lawyers in the middle of criminal investigations," the State argues. "Courts should not invalidate a warrant by interpreting the affidavit in a hyper-technical, rather than a common sense manner." In this case, "we have a factual description that the images are 'child pornography.' A magistrate applying common sense knows the illegality of such images without further description. Here, we even have two levels of law enforcement passing the information to the officer who applied for the warrant – the German authorities who located a website that distributed child pornography and the FBI Safe Child Task Force...." Also, the affidavit and application demonstrates the detective's experience and expertise in the area, based on his description of the role the computer plays in child pornography – something he knows based on his training and experience in searching and seizing this type of information. "A magistrate could easily conclude the expertise of this detective in the area of investigating child pornographers as the information contained in his application clearly shows knowledge above the ken of a layperson, the standard for experts in Georgia," the State argues. Also, the information here – "acted upon a mere month after received and 19 months after [Shirley] accessed child pornography files – was not stale given the longstanding and common sense understanding of how child pornographers such as [Shirley] maintain their contraband," the State argues. "Deference to the magistrate's finding is appropriate."

Attorney for Appellant (Shirley): Eric Crawford

Attorneys for Appellee (State): Daniel Porter, District Attorney, Richard Armond, Asst. D.A.

2:00 P.M. Session

HENDRIX V. THE STATE (S15A1169)

A man is appealing his murder conviction and prison sentence of life without parole, arguing that his attorney was ineffective at trial, in violation of his constitutional rights.

FACTS: According to prosecutors for the State, the afternoon of Oct. 6, 2011, Dujon Parker walked to a Citgo gas station and car wash on Glenwood Avenue in **DeKalb County** to hang out with friends. Also there were Tywon Porter, Cedric Wheeler, Ferrard Sanford, Samuel Heard, and Charles Porter, the latter of whom worked at the car wash. After Wheeler, Sanford and Heard left for a while to go get food, Sylvester Hendrix – also known as “Snoopy” – drove in and asked Charles Porter to wash his car while he went to the barbershop. While washing the car, Porter inadvertently locked the keys inside. When Hendrix, 43, returned, he was angry and began yelling at Porter. Parker came over, and an altercation broke out between Parker and Hendrix, before Tywon Porter and others broke it up. Eventually, Tywon Porter was able to unlock Hendrix’s car and Hendrix drove away. When Wheeler, Sanford, and Heard returned to the gas station and heard about the altercation, they all warned Parker to leave, but he did not. About 20 minutes later, Hendrix returned to the car wash. According to witnesses, Hendrix got out of his car and walked toward Parker, pointing a gun at him. Hendrix and Parker tussled over the gun, and the gun went off, hitting Parker in the leg. Parker yelled and while the men continued to struggle, Hendrix again shot Parker, fatally wounding him in the chest. Hendrix then got back into the car and left, and Heard called 911. Tywon Porter, Heard, Sanford, and Wheeler later went to the police station and each gave a statement. They all told police Hendrix had shown up with a gun and that Parker was unarmed. The police showed all four men a photo line-up and they each identified Hendrix as the shooter. According to the State, a few days after the incident, Heard and Sanford told a detective they had received a threatening phone call from Hendrix the night of the killing, and that he offered them money to “stay out of it.”

Following a four-day trial, on June 7, 2013, the jury found Hendrix guilty of murder, aggravated assault, and gun charges, and he was sentenced to life without parole. He now appeals to the state Supreme Court.

ARGUMENTS: Hendrix’s appeals attorney argues that his trial attorney rendered “ineffective assistance of counsel” by failing to argue that Hendrix shot Parker in self-defense and “instead presenting a specious, fanciful, concocted defense” of misidentification. As soon as Hendrix hired his trial attorney, he “declared that he had been lawfully defending his life, as he and the deceased had argued, the deceased had wrongly produced a gun, and during a struggle over this gun, the gun discharged and Appellant [i.e. Hendrix] then fled the scene,” the attorney argues in briefs. “Thus, from the time that [Hendrix] hired his trial lawyer, which was immediately after the arrest warrants were issued, until after sentencing, [Hendrix] consistently asserted to his trial counsel that [Hendrix] had been justified in defending his life from the unprovoked armed attack by the deceased, and the gun discharged during the struggle over said gun.” Initially, his attorney prepared a self-defense case. He even filed motions and subpoenaed witnesses who could have testified about Parker’s violent unprovoked attacks against Hendrix, but that conduct would only be admissible as evidence in support of a claim of self-defense. “However, shockingly, Appellant’s trial counsel unilaterally decided at trial, immediately prior to presenting his opening statement, to forego Appellant’s sole defense of self-defense, which

was Appellant's only truthful, competent defense, and instead pursued a misidentification defense, which was a purely unwise and unreasonable." It was unreasonable because every eyewitness identified Hendrix as having been present at the time of the shooting, and nearly every one of them had known Hendrix "prior to this fatal day." "Importantly, and wrongly, Appellant's trial counsel exclusively, without any consultation whatsoever with Appellant, made the unreasonable strategic decision to follow a defense of 'it wasn't me,' 'I was not present,' as opposed to Appellant's true defense of self-defense," Hendrix's attorney argues. "These convictions and sentences cannot go forward. The prosecution's evidence against Appellant was strong, but Appellant had a true defense that went unheard at trial through no fault of Appellant's." Hendrix's trial attorney was also ineffective for not objecting when the judge failed to ask prospective jurors three questions mandated by state law during the jury selection process about their ability to be fair and impartial. The trial judge erred by failing to strike for cause a specific juror who during the selection process said he believed anyone who kills someone deserves the death penalty. And he "could not affirmatively state that he could be fair and impartial in this case." Finally, Hendrix's attorney rendered ineffective assistance of counsel for failing to object to the prosecutor's unsubstantiated statements that Hendrix had threatened and intimidated witnesses before trial. "This line of argument, without the proper foundation being laid, caused Appellant's constitutional right to a fair trial to be obliterated," his attorney argues.

Representing the State, the district attorney and attorney general argue that Hendrix's trial counsel was not ineffective, and that the defense theory his trial attorney chose to pursue was not raised in any of Hendrix's motions asking the court for a new trial. "Regardless, the State contends the record as it exists fails to support Appellant's contention that his trial counsel's strategic decision was unreasonable or without Appellant's knowledge of the decision," the State argues in briefs. Hendrix's trial attorney, Noah Pines, has practiced law since 1995, has experience as an Assistant District Attorney, and has devoted 95 percent of his practice to criminal defense matters. Pines discussed with his client the State's plea offer of life in prison with the possibility of parole, but it was clear to him that Hendrix "was not even interested in a sentence of 20 to 25 years." Pines explained to Hendrix the problem his status as a convicted felon on probation would pose to claiming self-defense, as he was prohibited from having a gun. After interviewing witnesses, who Pines felt were not credible and whose statements were inconsistent, he reviewed the identification evidence "which he believed showed that the police led the witnesses to claim Appellant was the shooter." Therefore he pursued a defense of misidentification, arguing that the detective "poisoned" the witnesses' testimonies, especially during the photo lineups by telling them whom they should identify. "Considering Appellant's criminal history and the other evidence in the case, Mr. Pines made a reasonable strategic decision that the best defense strategy was to claim misidentification," and Hendrix's claim has no merit. "Even if trial counsel had chosen to assert a claim of self-defense, there is no reasonable probability that the outcome of the trial would have been different." The State agrees that the trial judge failed to ask the three statutory questions required to gauge prospective jurors about their impartiality, but there is no right to a post-verdict inquiry by the defendant. Furthermore, Pines was not deficient as he himself questioned the prospective jurors and covered all three questions mandated by Georgia law. Finally, the detective's testimony and the prosecutor's arguments about the witnesses' fear for their lives was supported by the evidence, and there was insufficient basis to excuse the one juror for cause, the State contends.

Attorney for Appellant (Hendrix): Brian Steel

Attorneys for Appellee (State): Robert James, District Attorney, Roderick Wilkerson, Dep. Chief Asst. D.A., Leif Howard, Asst. D.A., Deborah Wellborn, Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Crowder, Asst. A.G.

ALLEN V. THE STATE (S15A1273)

A man is appealing his convictions and sentence to life in prison with no chance of parole that he received in **Walton County** for the 2009 murder of Robert Andrew Nichols

FACTS: In the middle of the night, on Nov. 2, 2009, Chad Ashley Allen awoke in his **Rockdale County** home to a home invasion. Five to six armed and masked men came into the house yelling, “narcotics.” Allen, his girlfriend and three others were held at gunpoint and threatened while the home was ransacked. At the time, Allen and a number of his associates were allegedly involved in the drug trade. The intruders demanded to know where to find his drugs, money and safe. While there was no safe, the perpetrators stole Allen’s motorcycle, truck and other items. Law enforcement officers recovered the motorcycle later that night; they found the truck three days later. Within hours of the break-in and robbery, Allen told investigators he was certain T.R. Crow was among the robbers, along with several others. Investigators never did find evidence of Crow’s involvement or of the others Allen identified. Sometime later, Allen was told that Robert Andrew Nichols, a tattoo artist, had also been involved in the home invasion, but investigators found no evidence of his involvement either. After the home invasion, associates said Allen became paranoid as he vowed to hunt down the people who had broken into his home. He accused friends of committing the robbery, wore a bulletproof vest, and was seen around town carrying a “Rambo” like assault rifle. One witness testified he began “shooting up dope and thinking everybody’s robbed him.” Four days after the home invasion, Allen rode with his girlfriend and others to the home of Terry Drake under the pretense of making a drug deal with Crow, who was at Drake’s house. According to witnesses, the SUV in which Allen was riding pulled into Drake’s driveway, and as Crow walked toward the vehicle, Allen shot at Crow several times, hitting him in the neck. Crow survived, and Allen was later charged with that shooting.

On Dec. 6, 2009, a man heading out to hunt found a body, later identified as Nichols, wrapped in cloth near the man’s home in Social Circle, GA, in Walton County. Nichols had been shot multiple times, including in the back of the head. The last person who spoke to Nichols on Nov. 23rd was a woman, a meth addict, who had called to arrange for Nichols to do some tattoo work on a friend. Investigators found that earlier on Nov. 23, Nichols had made frequent calls to Darren Waddell. The records showed that following those calls, Waddell then immediately called Allen. Allen later admitted to investigators that Waddell was the one who had suggested to him Nichols had been involved in the home invasion. The investigation eventually led to Allen, and on Dec. 9, 2009 he was arrested in Rockdale County. Among the items seized from his truck were a gun, bulletproof vest, ski mask and drugs. Nichols was eventually indicted for murder, aggravated assault, concealing the death of another and gun charges. He was sentenced to life in prison without parole and now appeals to the state Supreme Court.

ARGUMENTS: Allen’s attorney argues the trial court made several errors, including by giving a jury instruction that violated state law. Specifically, the judge told jurors that the “state

is not required to admit into evidence the offensive weapon used by the defendant in order to prove the defendant guilty of murder or aggravated assault.” In this case, the gun used to kill Nichols was never found. By instructing the jury in this way, without saying “the offensive weapon *allegedly* used by the defendant,” “the trial court unlawfully commented on the fact that Appellant [i.e. Allen] himself possessed and used the murder weapon that was never recovered,” Allen’s attorney argues in briefs. The judge also erred by removing a juror who had already begun deliberations and replacing her with an alternate. The “removal of a petit juror without any factual support or for a legally irrelevant reason is prejudicial and is reversible error.” Although trial courts may replace sick jurors, sleeping jurors, or jurors who cannot fulfill their duties with alternate jurors, in this case, the woman who was replaced “was not sick, was not sleeping, and told the trial court that she had an opinion that differed from other jurors, which she could not compromise.” Removing her “without thorough investigation and a clear legal justification created the appearance that the trial court unlawfully valued an expedient result above the result decided by the petit jury that Appellant selected to decide his fate.” Finally, when another juror asked the judge for permission to call and check on her father-in-law who was in hospice, Allen was not present to hear the discussion between the judge and juror. “Any person who is charged with a crime in the Great State of Georgia has the constitutional right to be present at all critical stages of the proceedings,” the attorney argues. Allen’s convictions must therefore be reversed because his constitutional right was violated.

Representing the State, the district attorney and attorney general argue the trial court judge properly instructed the jury in saying that the State was not required to admit into evidence the weapon used to prove the crimes of murder and aggravated assault. The jury charge used by the judge was the standard instruction given in such cases, the judge was not commenting on the evidence, and this allegation by Allen’s attorney is “without merit,” the State contends in briefs. The trial court also properly removed a juror who could not fulfill her duties. “The juror indicated that she could not formulate an opinion either way and went on to tell the court, ‘I just don’t want it on my hands.’” “Because the trial court did not abuse its discretion in removing the juror who was unwilling to deliberate and could not judge the Appellant [Allen], his conviction and sentences should be affirmed.” Finally, the judge did not violate Allen’s constitutional right to be present at critical stages of the proceedings when he was not present during the judge’s brief discussion with a juror about whether she could make a phone call to check on her family member. At the start of the trial, in Allen’s presence, his attorney specifically waived Allen’s right to be present each time someone was called to the bench to confer with the judge. Following his discussion with the juror, the judge told the parties he had asked her whether the situation with her father-in-law would affect her ability to deliberate, and she said it would not. As neither Allen nor his attorney objected, the appellant “acquiesced in the trial court’s action.” “The evidence shows that counsel gave permission for the trial court to speak with the juror and that Appellant was in the courtroom during this conversation,” the State argues. “Appellant’s constitutional right to be present was not violated, and this enumeration lacks merit.”

Attorney for Appellant (Allen): Brian Steel

Attorneys for Appellee (State): Layla Zon, District Attorney, Melanie Bell, Chief Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Youn, Asst. A.G.

WILLIAM CURPHEY V. JEANNIE CURPHEY (S15A0994)

A man is appealing a **Johnson County** court ruling that under the terms of his divorce decree, he is required to dismiss the lawsuit his law firm brought against his wife in the state of Florida.

FACTS: Jeannie Michelle Curphey filed for divorce from William Edward Curphey, III in September 2009. Following a final hearing in January 2011, the couple signed a divorce decree. At that hearing, William Curphey, a licensed attorney, represented himself. Language in the decree included the following: “The parties release each other and their respective family members from all claims of any kind or nature, whether past, present or future, for actions prior to the finalization of the divorce between the parties and any pending claims and/or lawsuits as to any family member of the other party.” At the time of the divorce, the law firm, Curphey & Badger, P.A., had a lawsuit pending against Jeannie Curphey and her mother, Janet Dittmore, in the state of Florida. William Curphey is the firm’s co-owner. The lawsuit alleged that Jeannie Curphey, her mother, and the couple’s daughter had stolen \$10,000 from the law firm. Ohio Casualty Insurance Co. had covered the \$10,000 and the law firm filed the lawsuit on behalf of the insurance company to recover the money. At the final hearing, the trial judge stated that, “as I understand it as a condition of this agreement all other litigation that was pending between these parties or their relatives is now resolved and will be dismissed within 30 days as a part of this resolution.” In April 2013, Jeannie Curphey filed a motion for contempt, arguing that William Curphey had violated the divorce decree by failing to dismiss the Florida lawsuit. Following a hearing in October 2013, the judge ruled that William Curphey had willfully and intentionally disobeyed a prior order and was in willful contempt because his law firm proceeded with the Florida case. The judge also found that he had violated the divorce decree because “he has failed to remedy any delinquency owed to the IRS which is currently being pursued against her, a matter which he is supposed to satisfy pursuant to the terms of the agreement.” William Curphey now appeals to the state Supreme Court.

ARGUMENTS: He argues the law firm of Curphey & Badger was a third party representing the insurance company and was not a party to the divorce. Therefore, the trial court erred, Mr. Curphey’s attorneys argue, by improperly modifying the divorce decree and applying it to multiple non-parties. Trial courts “do not have the power in a contempt proceeding to clarify, modify, or revise the terms of the agreement or decree,” which “clearly did not encompass a lawsuit by the law firm,” they argue in briefs. “In the instant matter, the trial court specifically recognized the disputed provision in the marital settlement was clear and unambiguous on its face. The trial judge then later proceeded to engage in an interpretation and application of the divorce decree which functionally revised the provision in the face of the clear and unambiguous language.” And it did so by relying on a discussion the judge and Mr. Curphey had at the final hearing. The trial court also erred in finding that the law firm is Mr. Curphey’s “alter ego,” i.e. a substitute for himself, and therefore is held to the terms of the divorce. Mr. Curphey “has no control or authority to settle the Florida case without the permission of the firm’s client, Ohio Casualty,” his attorneys argue. The Florida case predated the divorce decree. After the decree was final, Mrs. Curphey filed a motion to dismiss the Florida case, using the same argument she uses here – that it should be dismissed based on language in the decree. But she lost, as the Florida court refused to dismiss the case. Her Florida attorney then recommended she raise it in the Georgia court, which she did – two years after entry of the divorce decree. Her

delay “irreparably harmed [Mr. Curphey] because [he] will likely have to reimburse Ohio Casualty the \$10,000 it paid out for the loss as a result of the theft.” Furthermore, she is not permitted to pursue the very same issue that was already raised and decided by the Florida court. Finally, the trial court erred by shifting the burden of proof onto Mr. Curphey regarding the IRS matter and did not afford him due process, his attorneys contend.

Mrs. Curphey’s attorney argues the trial court ruled correctly. Mr. Curphey’s “entire theory relies upon the presumption that the court has no authority to read the word ‘parties’ in the decree to include Curphey & Badger, P.A. in its litigation in Florida,” the attorney argues in briefs. Mr. Curphey, however, “completely fails to respond to the court’s ruling and underlying findings of fact, as expressed in its Order on Plaintiff’s Motion for Contempt.” In the Contempt Order, the court makes findings of fact concerning the discussion the husband, wife, and judge had which specifically dealt with the interpretation of the word “parties” in this case. The court’s findings were based on a review of the transcript. During that discussion, Mrs. Curphey’s attorney enumerated everything that would be dismissed as a result of the terms of the divorce decree, including the Florida “lawsuit where Mr. Curphey is the plaintiff and Mrs. Curphey, her mother and their daughter which will be dismissed concerning the alleged theft of \$10,000.” The attorney then stated: “All of those will be dismissed and the only thing that will be between these parties and/or their relatives will be the terms of this divorce decree, is that correct?” Mr. Curphey responded, “Yes, your honor,” adding that he was representing himself “and I am also the attorney in Florida.” The trial court’s finding of contempt relies on the interpretation of the decree, “and is not a modification,” Mrs. Curphey’s attorney argues. Mr. Curphey’s assertion that his firm cannot be his alter ego and that the decree did not clearly inform him of his obligations “is sheer folly,” the attorney argues, as Mr. Curphey is “a trained attorney, was present and participated in all proceedings from which these matters derive.” Also the trial court did not err in finding that he violated the terms of the divorce decree by allegedly failing to remedy the IRS matter, and Mrs. Curphey was not prohibited from pursuing a contempt order in Georgia after the Florida court ruled against her, her attorney argues. “A Florida court’s misinterpretation of a Georgia court’s order cannot be binding upon the interpretation of said order by the issuing court.”

Attorneys for Appellant (William): Jonathan Granade, Rayford Taylor, Casey Gilson
Attorney for Appellee (Jeannie): James Garner