



## Supreme Court of Georgia

Jane Hansen, Public Information Officer  
244 Washington Street, Suite 572  
Atlanta, Georgia 30334  
404-651-9385  
hansenj@gasupreme.us



## CASES DUE FOR ORAL ARGUMENT

### Summaries of Facts and Issues

**Please note:** *These summaries are prepared by the Office of Public Information to help news reporters determine if they want to cover the arguments and to inform the public of upcoming cases. The summaries are not part of the case record and are not considered by the Court at any point during its deliberations. For additional information, we encourage you to review the case file available in the Supreme Court Clerk's Office (404-656-3470), or to contact the attorneys involved in the case. Most cases are decided within six months of oral argument.*

**Tuesday, July 14, 2015**

### **10:00 A.M. Session**

#### **MARTIN V. THE STATE (S15P0675)**

In this **Fulton County** death penalty case, DeKelvin Martin is appealing his death sentence for the 2002 murders of his girlfriend's 12-year-old son and grandparents.

**FACTS:** According to State prosecutors, at the time of the crime, Martin and Tymika Wright had been dating five years and were living with her grandparents, Travis Ivery, 83, and Ila Ivery, 77. The Ivery's were in failing health, and Wright helped take care of them. Wright's children, 12-year-old Savion and 2-year-old Christin, also lived with them. Savion was Wright's son from a previous marriage; Christin was Martin's son. The night of Sept. 30, 2002, Martin went out with friends, consumed a lot of alcohol and cocaine, and arrived home at 1:30 a.m. When Wright rejected his sexual advances, he pulled a knife out of the dishwasher and threatened to kill everyone in the house. After he dragged Wright at knifepoint to a couch, she talked him out of hurting her, he apologized and he put down the knife, which she subsequently hid while he wasn't looking. Later, Martin again approached Wright for sex, and she agreed in the hope he would then go to sleep. When Martin could not maintain an erection, he accused her of being unfaithful and she accused him of being on drugs. In a rage, he began to choke her. After she broke free, the two struggled in the hallway and she screamed for help. Savion came from his bedroom, and Martin began stabbing the boy in his neck. When Wright got between

Martin and her son, yelling for Savion to run, she herself was stabbed. When Wright's grandmother came to the aid of Wright and Savion, Martin stabbed the elderly woman multiple times. And when Wright's grandfather tried to intervene, Martin also began stabbing him over and over. As Wright attempted to get Martin off her grandmother, she again yelled for Savion to run. The child took three or four steps before collapsing on the floor. During the attack, Wright begged Martin not to hurt Christin, who was on the floor, laying his head on Savion. At some point, Martin grabbed Wright and took her to a room, where he made her perform oral sex. Throughout the sexual assault, their 2-year-old held onto his mother's leg. Wright later told police that while bloodied from her own stab wounds and as Martin held a knife to her, he raped her. Eventually, Martin ordered Wright into the car and the couple left the home after Martin disabled the phones as Wright's grandmother was trying to call police. While in the car, Martin actually agreed to let Wright stop the car and call police, as they had left the toddler at the house. Wright then called 911 from a pay phone and told the operator there had been a stabbing. She returned to the car and drove toward the Ben Hill area as Martin instructed. Eventually, Martin told Wright he was going to let her go so she could take care of the children. He then got out of the car and left. Wright quickly drove back to the house.

In response to Wright's 911 call, police arrived at the house where they found Christin crawling back and forth near Savion, "as if he was checking on his brother," according to testimony at trial. Police found Wright crying and "hysterical," with stab wounds to her face and back. Christin was in a bloody nightshirt and seemingly in shock. According to testimony, the little boy was wide-eyed, emotionless and had a "death grip" on his uncle, not wanting to let go. First responders found Savion's body covered in blood, lying in the hallway in a fetal position, dressed in underwear and a sock. They found Travis Ivery lying on his back in bed, covered in blood and gasping for air. He died on the way to the hospital. They found Ila Ivery on the floor of a bedroom holding a telephone and an asthma inhaler. She was having difficulty breathing and died in the hospital almost four months later as a result of her stab wounds.

Martin was charged with three counts of murder, rape, cruelty to children, and other crimes. The State announced it would seek the death penalty. And in January 2005, Martin pleaded guilty to all 16 counts in the indictment. In a bench trial – before a judge with no jury – Martin received three death sentences. In 2006, Martin filed a motion asking to withdraw his guilty plea, and another judge allowed him to do so based on the trial court's failure to fully inform him that by pleading guilty, Martin would waive his constitutional rights to be tried by a jury, to confront his accusers, and to not be compelled to testify and incriminate himself. The State appealed, and this Court dismissed the appeal. In 2008, a jury trial was held to determine Martin's competency to stand trial. The jury found him competent. In 2009, Martin was retried before a jury and found guilty. The jury found a number of aggravating circumstances, which qualified him for the death penalty, and after recommending the death sentence, Martin was again sentenced to death for the murders of Savion Wright and Travis Ivery. He was sentenced to life in prison for the murder of Ila Ivery, life in prison for rape, and he received additional sentences for his other crimes. Martin now appeals to the state Supreme Court.

**ARGUMENTS:** In a 176-page brief, Martin's attorneys argue that more than a dozen errors were made in Martin's trial, and the judgments must be reversed, and the case remanded for a new trial. Martin's attorneys argue that among the many errors, the State was allowed to introduce false victim impact testimony, parts of which were not officially sworn in as true. At

Martin's first trial in 2005, Wright read much of the typed version of her statement, but omitted those portions of her written statement to which Martin's attorneys. Wright died before Martin's second trial in 2009. In a pre-trial appeal, the state Supreme Court ruled that her 2005 testimony could be admitted in the retrial because Martin had had a sufficient opportunity to cross-examine Wright at the original trial. However, at the retrial, instead of playing the audio recording of her previous testimony, the State had Wright's aunt read her entire written statement, including the parts previously objected to by the defense and omitted at the original trial. Among the statements that had originally been omitted was Wright's statement that the "person who would do this to people who loved him, would have to be a cold-hearted piece of waste of life with no soul." By incorrectly informing the trial judge, defense counsel, and jury that it was presenting Wright's sworn testimony from the previous trial, the State presented testimony that it knew was false, which requires reversal "if there is any reasonable likelihood the false testimony could have affected the judgment of the jury," Martin's attorneys argue. Admitting the unsworn statements also violated Georgia and U.S. constitutional rights to due process and confrontation, as well as Georgia hearsay law, because Martin did not have a previous opportunity for cross-examination, Martin's attorneys contend.

In response to that one argument, the State points out that at Martin's bench trial in 2005, in addition to Wright's live testimony, the State admitted her full signed statement as an exhibit. Yet Martin's attorneys made no objections regarding the alleged untruthfulness of the written statement. They also had the opportunity to cross-examine Wright regarding the statement at the first trial but failed to do so. Also, they made no objection at the retrial to the reading of the written statement. And the State never asserted that the statement to be read would be the same as the redacted version Wright read at the first trial. Finally, Martin has shown no evidence that Wright's written statement was false. Even if it were false, his attorneys can show no reasonable likelihood that it harmed his case, the State argues.

**Attorneys for Appellant (Martin):** Bidish Sarma, Ty Alper, Thomas Clegg, Maurice Kenner  
**Attorneys for Appellee (State):** Paul Howard, Jr., District Attorney, Paige Whitaker, Dep. D.A., Lenny Krick, Sr. Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Sabrina Graham, Sr. Asst. A.G., Richard Tangum, Asst. A.G.

### **WALKER V. TENSOR MACHINERY, LTD. (S15Q1222)**

In another case involving "apportionment" – or the percentage of fault assigned to various parties when someone sues for damages – a man injured on the job has sued in federal court the manufacturer of the machine that crushed his foot. The federal court has asked the Georgia Supreme Court to answer a question about Georgia law before deciding the case.

**FACTS:** In August 2010, Jock L. Walker sustained an injury while working for his employer, OFS Fitel, Inc., which manufactures fiber optic cable. Walker was working on a machine, called a "dual binder," that was designed and manufactured by Tensor Machinery, LTD. The machine, which binds loose fiber optic cable, moves right to left along a track or rail. Walker placed his foot on the rail and while controlling the movement of the dual binder, his foot was crushed before he could remove it. Walker and his wife sued his employer under the Georgia workers' compensation statute and obtained a settlement. The Walkers then sued Tensor in the United States District Court for the Northern District of Georgia (Newnan Division) for several things, including

negligence for providing no warnings about a latent pinch point on the machine – a hazard that Walker claimed crushed his foot. Tensor in turn sought to apportion responsibility for the incident to OFS Fitel, Walker’s employer. Tensor named OFS Fitel as a “non-party” to the lawsuit which may have contributed to Walker’s injuries, based on Walker’s own testimony that his employer had trained him to place his foot on the rail while the binder was in motion. (“...that’s what I was taught to do. ...For production reasons, they wanted to get cable out. I got cable out.”) Georgia’s apportionment statute, Georgia Code § 51-12-33, states that in assessing percentages of fault, the judge or jury “shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit.” In response, the Walkers filed a motion to exclude all evidence concerning apportionment, arguing the statute does not apply in cases where the employer has already paid an injured employee workers’ compensation benefits and is immune from liability under the state’s workers’ compensation statute, Georgia Code § 34-9-11. The federal court then asked the state Supreme Court to answer the following question about Georgia law before issuing its final decision in the case: “Does Georgia Code § 51-12-33 (c) allow the jury to assess a percentage of fault to the non-party employer of a plaintiff who sues a product manufacturer and seller for negligence in failing to warn about a product danger, even though the non-party employer has immunity under Georgia Code § 34-9-11?”

**ARGUMENTS:** Attorneys for the Walkers argue the answer is no. The plain language of the apportionment statute does not allow apportionment of damages to a non-party employer that is immune from “tort” liability under § 34-9-11, the attorneys contend. (Tort is a legal term for a wrongful act for which the injured party may be entitled to compensation.) Because workers’ compensation was Walker’s exclusive remedy against his employer, the employer cannot be “liable” or “at fault” for his injuries. Therefore, Tensor cannot blame the employer under § 51-12-33 for purposes of apportioning responsibility for Walker’s damages. The attempted apportionment of damages in this case is prohibited by § 51-12-33 (e), which does not allow apportionment to a non-party that has any defense or immunity. “The express limiting language of subsection (d) ensures that non-party apportionment does not re-write 200 plus years of established substantive law by somehow allowing the inequitable assessment of fault against non-parties that have legitimate defenses or immunities,” Walker’s attorneys argue. Among other arguments, the attorneys contend that under its 2012 ruling in *Couch v. Red Roof Inns*, the Georgia Supreme Court ruled that apportionment is appropriate to parties and non-parties alike who are “at-fault” and who “are liable.” “Immune parties are neither,” the attorneys argue. In *Couch*, this Court stated that the purpose of the apportionment statute is to have the jury consider all the wrongdoers “who **may be liable** to the plaintiff together, so their respective responsibilities for the harm can be determined...**One is liable to a plaintiff if he or she ‘is responsible or answerable in law.’**” Here, “OFS Fitel is not ‘answerable in law’ because it has legal immunity from tort responsibility,” Walker’s attorneys argue. In conclusion, the “statute and case law of Georgia are clear...that an employer who has paid workers’ compensation benefits to its

employee has no liability in tort to the employee,” the attorneys contend. “This is the law today, and has been for about a century.”

Attorneys for Tensor argue the answer to the federal court’s question is yes. They contend that “OFS Fitel owes Mr. Walker the same duty to warn as is applicable to Tensor.” Georgia Code § 34-7-20 states: “If there are latent defects in machinery or dangers incident to an employment..., then the employer shall give the employee **warning** with respect thereto.” “The jury in this case should be given the opportunity to apportion fault to OFS Fitel, as [the Georgia Supreme] Court cannot hold that an employer, as a matter of law, is incapable of contributing to an injury to its own employee.” The plain language of § 51-12-33 demands apportionment to employers, as the statute “is designed to allocate fault to persons and entities based upon their **conduct**, not upon a plaintiff’s ability to recover in a tort suit for harm caused by the acts or omissions of that person or entity,” Tensor’s attorneys argue. “Without question, the purpose of § 51-12-33 is to allow for the apportionment of fault among parties and non-parties based upon a jury’s determination of their respective contribution to a plaintiff’s injuries.” “A further purpose of § 51-12-33 is to ensure that a defendant does not pay for the negligence or fault of another.” The apportionment statute is susceptible to only one interpretation: it is immaterial that a plaintiff or defendant was unable to bring suit against a non-party; the *fault* of a non-party who contributed to the injury or damages shall be considered by a jury to determine the relative fault of the named parties to the suit. “If the General Assembly had intended to limit the universe of potential non-parties to just those persons whom a plaintiff could have sued in tort, they could have easily said so,” the attorneys argue. But they did not. The statute says that “**all** persons or entities” that have contributed to the injury shall be considered in assessing fault “**regardless**” of whether the person or entities could have been “named as a party to the suit.” “There is no reasonable construction of the words ‘all’ and ‘regardless’ as used in § 51-12-33 (c) which supports Appellants’ chosen construction of it.” Finally, the Walkers are incorrect that the *Couch* decision supports their interpretation of the apportionment statute, Tensor’s attorneys argue. This Court specifically stated in *Couch* that § 51-12-33 “is designed to apportion damages among ‘all persons or entities who contributed to the alleged injury or damages’ – even persons who are not and could not be made parties to the lawsuit.”

**Attorneys for Appellants (Walkers):** Dana Norman, T. Charles Blaska, Thomas Blaska, Brian Parker

**Attorneys for Appellee (Tensor):** Matthew Moffett, Jason Hergenroether

### **HARRELL V. THE STATE (S15A1045)**

A man convicted of animal cruelty and intimidating court officers is appealing his convictions and prison sentence, arguing the Georgia law under which he was convicted is unconstitutional.

**FACTS:** Lister W. Harrell was charged in **Dodge County** Superior Court with violating the state law that deals with a Landlord’s Duties to Tenants by allegedly cutting off a tenant’s electricity. When he did not appear for court, an arrest warrant was issued. According to the State’s case, in April 2013, Harrell called Court Clerk Rhett Walker. Walker testified that Harrell

said “that if I didn’t have that bench warrant lifted by such and such a time that day that he was going to turn my world upside down.” Walker testified the call “concerned me” and he had to “try to keep from getting a little nervous because I knew from what was going on that he may not have been stable mentally.” And he stated, “I felt intimidated.” Walker subsequently found a posting by Harrell on Facebook allegedly telling him what to do. Deputy Chief Clerk of Court Tammy Graham testified that she learned from friends and family that Harrell had posted on Facebook that Graham had engaged in group sex acts with him and others. And he said he would provide access to a video depicting the group sex if the bench warrant was not lifted. The posting was read to the jury. Around the same time, Shirley Webb – Harrell’s former girlfriend and the mother of his children – was engaged in frequent litigation with Harrell, mostly regarding domestic issues. According to prosecutors, Harrell called Webb and left a voicemail, stating that she would find her “dead pussy” in her mailbox. In the second voicemail, he accused Webb of engaging in group sex activities and threatened to release a video of the sex acts on the Internet. Sid Carter, Webb’s current boyfriend, testified that after hearing the voicemail he went to the mailbox and found the dead cat stuffed inside. He said that while he was still at the mailbox, Harrell drove by, slowed down and pointed at the mailbox, which was by then closed. In addition to the testimony, both voicemails were played for the jury.

Harrell was arrested and in June 2013, he was indicted on two felony counts of Intimidation of a Court Officer and one felony count of Aggravated Cruelty to Animals, which charged that Harrell “did knowingly and maliciously cause death to a cat.” Harrell was eventually released on bond, but his bond was later revoked when he was charged with several unrelated felonies that included Aggravated Stalking (regarding his daughter) and Driving Under the Influence. At trial, Harrell testified he did not kill a cat or put a dead cat into a mailbox on April 16, 2013. He admitted making the phone call to Graham, making the Facebook postings, and lying about Graham, but he denied any threats or intimidation. In June 2014, a jury found Harrell guilty of misdemeanor Cruelty to Animals and to both counts of intimidating a court officer. He was sentenced to six years in prison followed by six years on probation. Harrell now appeals to the state Supreme Court.

**ARGUMENTS:** Harrell’s attorney argues the trial court made 11 errors, including its refusal to throw out the charges involving intimidation of a court officer because the statute is unconstitutional. Georgia Code § 16-10-97 makes it illegal for a person to try to intimidate through “any threatening action, letter or communication” an officer of the court. Harrell argues the statute is unconstitutional because it prohibits speech that is protected by the First Amendment of the U.S. Constitution. “The hallmark of the protection of free speech is to allow ‘free trade in ideas’ – even ideas that the overwhelming majority of the people might find distasteful or discomfoting,” his attorney argues in briefs. While the First Amendment permits a state to ban a “true threat,” the U.S. Supreme Court has defined a “true threat” as a person’s “serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” Graham testified she was “embarrassed” but not threatened. “Certainly the speech employed by the Appellant [i.e. Harrell] while objectionable and downright bad, did not amount to ‘true threats,’” the attorney argues. The trial court also erred by joining the animal cruelty charge in the same indictment with the intimidation charges. The indictment should have been dismissed for “improper joinder.” “The charges are wholly, totally, absolutely unrelated,” and state law only allows offenses be combined “when the same conduct of an accused may

establish the commission of more than one crime....” In its 1995 ruling in *Dingler v. State*, the Georgia Supreme Court ruled that severance of charges is mandatory “when two or more crimes are charged in separate counts in a single indictment, though committed at different times and places and involving transactions with different persons, and are of the same general nature or species, and the mode of trial is the same....” Here, the crimes charged are not even “of the same general nature or species,” the attorney argues. “In fact, it is hard to imagine crimes being more different than cruelty to animals and intimidation of a court officer.” Among other arguments, Harrell contends that the indictment was flawed and did not adequately apprise him of the nature of the charges against him. “Each individual count of the indictment must allege every essential element of the crime charged, or the indictment is defective,” Harrell’s attorney argues. “The indictment did not comport with these principles and therefore violated the Appellant’s rights, and therefore should be quashed.”

The District Attorney, representing the State, argues that the trial court did not err in refusing to declare Georgia Code § 16-10-97 unconstitutional “because a threat to a Court Officer that would disrupt the entire criminal justice system is clearly outside the scope of protected speech of the First Amendment.” Here, both Graham and Walker “suffered extensive intimidation, impediment, and embarrassment because of the actions of the Appellant, all of which obstructed their ability to perform the vital services they administer to the justice system,” the State argues in briefs. “To allow a criminal defendant to blackmail a Clerk of Court, an elected constitutional officer, into withdrawing a bench warrant in blatant disregard to an order of a Superior Court Judge, would deprive every member of our society the requisite level of justice required just to survive.” Furthermore, joining the three counts in the indictment was proper “because the uncontradicted evidence presented at trial showed [Harrell] used internet and phone communication to relay threats regarding fake group sex videos to parties involved in litigation with the Appellant.” As the trial court stated in its order: “In this case, the clear evidence at trial was that all three victims of the Defendant were threatened by use of a cell phone, all three victims were threatened as retaliation for their participation in a court case in which the Defendant was involved, and all threats occurred in a close proximity of time. Additionally, all victims were threatened with blackmail involving an alleged pornographic video or Facebook videos involving each respective victim and the defendant. Therefore, all three charges contained such strikingly similar evidence of common motives, plans, schemes, and bent of mind that the charges are properly joined.” Also, Harrell’s contention that the indictment failed to adequately apprise him of the charges against him is “meritless and frivolous,” the State argues.

**Attorney for Appellant (Harrell):** Thomas Jarriel

**Attorneys for Appellee (State):** Timothy Vaughn, District Attorney, Christopher Gordon, Asst. D.A.