



## Supreme Court of Georgia

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## CASES DUE FOR ORAL ARGUMENT

### Summaries of Facts and Issues

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**Friday, October 16, 2015**

**Special Session  
Gilmer County Courthouse  
Ellijay, Georgia**

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

### **OLVERA ET AL. V. UNIVERSITY SYSTEM OF GEORGIA'S BOARD OF REGENTS ET AL. (S15G1130)**

College students who are not U.S. citizens are appealing a Georgia Court of Appeals decision that upheld the dismissal of their lawsuit by a **Fulton County** judge. The students are seeking a decision that they are entitled to in-state tuition at Georgia's colleges and universities.

**FACTS:** In 2010, the state Board of Regents amended its policy manual to require that all students who wish to attend any institution in the University System of Georgia be "lawfully present" in the United States. The policy manual also required that for any non-citizen student to receive in-state tuition, the student had to be "legally in this state." On June 15, 2012, the U.S. Department of Homeland Security established the "Deferred Action for Childhood Arrivals" program, which allows certain young people who are in the country illegally to remain here without fear of removal for at least two years.

Miguel Angel Martinez Olvera and other non-citizen college students who are beneficiaries of the federal deferral program, brought a lawsuit against the Board of Regents seeking a “declaratory judgment” from the trial court that they are “lawfully present” in Georgia and are therefore entitled to in-state tuition. The Board of Regents claimed that the students’ lawsuit was barred by “sovereign immunity,” and that the students in the deferred action program are not in “lawful status” in this country. The Board filed a motion asking the court to dismiss the case, which the trial court did, finding that the Board of Regents was immune from the lawsuit based on sovereign immunity, which is the legal doctrine that protects the government from being sued. The students appealed, but the Court of Appeals upheld the lower court’s decision. The students now appeal to the Georgia Supreme Court, which has agreed to review the case to determine whether the Court of Appeals erred in ruling that a legal action seeking a declaratory judgment was barred by sovereign immunity.

The legal arguments in this case involve two different types of legal remedies. When people file lawsuits, they must specify what type of legal remedy they are asking the court to grant them. “Injunctive relief,” or an injunction, usually involves an order by the court to do something or to stop doing something, depending on what the plaintiff is requesting. A “declaratory judgment,” on the other hand, is a judgment by the court that declares the legal rights of the parties but that does not award damages or order that any action be taken or stopped.

**ARGUMENTS:** The students’ attorney argues the Court of Appeals and trial court are wrong, and the Board of Regents is not shielded by sovereign immunity in a simple declaratory judgment action. Under the Georgia Supreme Court’s 2014 decision in *Department of Natural Resources v. Center for a Sustainable Coast*, the Board of Regents and other state agencies are protected by sovereign immunity against lawsuits involving damages or injunctive relief. But what the Board of Regents, and the Court of Appeals, “fail to acknowledge is that there has never been a decision from the Georgia courts barring a simple declaratory judgment action against the Board of Regents,” the attorney argues in briefs. “A declaratory judgment action simply seeks a declaration of the rights of the parties, and asks the court to opine on a question of law without ordering that anything be done. The Court of Appeals’ decision in this matter fails to recognize the limitation imposed by the Supreme Court’s decision in *Sustainable Coast*, when that decision never discussed a stand-alone declaratory judgment action, but instead spoke specifically about the requested injunctive relief being barred.” If the Supreme Court extends sovereign immunity to bar actions for a declaratory judgment, “then, effectively, the executive branch of the Georgia government (and specifically the Board of Regents) can make any administrative rule they want, interpret it any way they want, and then stand behind the doctrine of sovereign immunity to claim that its flawed interpretation is unreviewable by any court,” the students’ attorney argues. Furthermore, the Georgia Constitution gives the students the right to seek redress of grievances. It states: “The people have the right to assemble peaceably for their common good and to apply by petition or remonstrance to those vested with the powers of government for redress of grievances.” The Court of Appeals also erred in determining that the Board of Regents’ policy manual is an “interpretive rule,” making it unreviewable for a court to issue a declaratory judgment under state law. Clearly the rules at issue are “substantive agency rules” with general applicability and this statement contains “no discussion of facts or citation to legal authority,” the attorney argues. The students’ case should be remanded to the superior court for a full hearing on the merits of the students’ case.

The Attorney General's office, representing the state Board of Regents, argues that the state Supreme Court's decision in *Sustainable Coast*, which found that sovereign immunity bars injunctive action against the State unless the General Assembly has specifically waived it, "applies with equal force to declaratory judgment actions brought against the State and its officials." "As correctly found by both the trial court and the Court of Appeals, the same constitutional analysis that protects the State from actions for damages and claims for injunctive relief applies with equal force in protecting the state from declaratory relief." the State contends. The students bear the burden of establishing that the legislature waived sovereign immunity. And as both the trial court and the Court of Appeals found, there is no waiver of sovereign immunity that applies to this case. As a result, the trial court correctly dismissed the students' claims for declaratory relief. "The claim for declaratory relief brought by Appellants [i.e. the students] is a legal action against the State, subjecting the State – here the Board of Regents – to legal process if Appellants' claims are permitted to proceed," the State argues. "As this Court has previously found, Georgia adopted the common law doctrine of sovereign immunity which 'protected governments at all levels from unconsented-to-legal actions.'" That immunity applies to the State and all its agencies "absent an *express* waiver by the General Assembly." In its 1980 decision in *Hennessy v. Webb*, the state Supreme Court stated, "Any suit against an officer or agent of the State, in his official capacity, in which a judgment can be rendered controlling the action or property of the State in a manner not prescribed by statute, is a suit against the State...and cannot be maintained without [the State's] consent." As the state Supreme Court has twice before declined to decide whether sovereign immunity applies to declaratory judgment actions that have not been specifically waived, this case places the issue "squarely before this Court," the State argues. The Constitution is clear and there has been no express waiver of sovereign immunity by the General Assembly that would permit the students' action for declaratory relief to proceed. And while the students argue that the plain language of the declaratory judgment statute, Georgia Code § 9-4-2, provides a waiver of sovereign immunity, "It is clear from its express terms that it does not do so," the State contends. The dismissal of the students' lawsuit was proper, and this Court should uphold the Court of Appeals' and trial court's rulings.

**Attorney for Appellants (Students):** Charles Kuck

**Attorneys for Appellees (Board of Regents):** Samuel Olens, Attorney General, Dennis Dunn, Dep. A.G., Britt Grant, Solicitor General, Russell Willard, Sr. Asst. A.G., Allen Lightcap, Asst. A.G.

### **FINNEY V. THE STATE (S15A1739)**

A man charged with murdering a woman is appealing a **Bibb County** judge's refusal to suppress evidence from a wiretap when his case goes to trial.

**FACTS:** Around early 2008, an investigator with the Jones County Sheriff's Office approached the Bibb County District Attorney's Office about conducting a wiretap investigation on the cell phone of Benjamin Finney. At the time, law enforcement officers believed Finney was involved in dealing cocaine and other controlled substances in Jones and Bibb counties. In February 2008, Assistant District Attorney Kimberly Schwartz applied for the 30-day wiretap warrant to put Finney's text messages, emails and phone conversations on his wireless phone under surveillance. By then, Finney was also a suspect in the early 2008 murder of Gwendolyn Cole in Bibb County. Judge Tilman Self, III granted the warrant application in February, and on

March 7, a different judge (Judge Edgar Ennis, Jr.) signed an order that allowed the warrant to remain in effect another 30 days until April 7, 2008. The interception of Finney's communications ended on March 20, 2008, and Finney was arrested and told that police had had his cell phone under surveillance and that he had the right to examine and copy the recordings that had been made.

Under federal law (U.S. Code § 2518), the government's electronic surveillance of a person generally requires a court order. And the recordings must be done in a way that will protect them from any alterations. Under the law, if State prosecutors want to use the recordings at trial, they must have the wiretap evidence sealed immediately upon expiration of the wiretap warrant to ensure there is no tampering with the evidence. Specifically the law states: "Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions." And: "The presence of the seal provided for by this subsection, or a *satisfactory explanation* for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom."

In this case, surveillance stopped on March 20, 2008 and the wiretap warrant expired April 7, 2008. However, it was not until April 23 (16 days after the expiration of the warrant) that the wiretap evidence was submitted to Judge Self and the evidence was sealed. After Finney was indicted in 2013 for murder, aggravated assault and gun charges, he filed a motion to suppress the wiretap evidence. Following a hearing, the trial court denied the motion, finding that the State had provided a "satisfactory explanation" for its failure to immediately seal the evidence. The trial court concluded there were two circumstances which explained the State's 16-day delay: Prosecutor Schwartz had been preoccupied by a high-profile death penalty appeal at the time, and Judge Self was unavailable until April 14, 2008 because he was attending a two-week training session by the National Judicial Council that ended April 10. Finney now appeals this pre-trial ruling to the state Supreme Court.

**ARGUMENTS:** Finney's attorneys argue in briefs that neither of the circumstances cited by the trial court were the actual reasons for the delay, and the judge erred in denying the request to suppress the evidence. Schwartz never claimed she was too preoccupied to seal the wiretap information. She had two other prosecutors who had "primary" control over the wiretapping operation. "Because Schwartz's involvement was only peripheral, her preoccupation was irrelevant to excuse the State's delay," the attorneys argue. And Judge Self's absence was also irrelevant for two reasons. "First, because any Bibb County judge could have entered the sealing order, Judge Self's availability made no difference." In its 1979 opinion in *United States v. Lawson*, the U.S. Court of Appeals for the 2<sup>nd</sup> Circuit stated that, "it should be clear that in the courts of this Circuit, tapes sealed by a judge other than the 'issuing judge,' because of the absence or unavailability of the latter, are considered properly sealed." When the State needed an extension of the warrant, it went to Judge Ennis, the lawyers point out. Similarly, the State never claimed it believed it would have to seal the recordings with Judge Self, and it offered no explanation for its failure to contact Judge Ennis, one of two of the "issuing judges." Furthermore, there is nothing in the record to show that the State tried and failed to seal the documents while Judge Self was unavailable or immediately upon his return. He returned April 14, yet the State failed to file the recordings until April 23. "Even if the State's arguments explain the delay, they do not excuse it," the attorneys argue. In 1990, the U.S. Supreme Court

ruled in *United States v. Ojeda Rios* that if the State does not immediately seal the evidence upon expiration of the warrant, it must “explain not only why a delay occurred but also why it is excusable.” “There was no complicated reason why the State did not fulfill its duty here, no perfect storm of preoccupation and unforeseeable circumstances,” Finney’s attorneys argue. “The State simply did not do it and could only guess as to why.” As a result, Finney “respectfully requests that this Court reverse the trial court’s order denying the motion to suppress.”

The Attorney General and District Attorney, representing the State, argue that the trial court properly ruled that the State established a “satisfactory explanation” for the delay in sealing the wiretap recordings. “The reasons for delay cited by the trial court were the actual reasons for the delay,” they argue in briefs. And Finney “fails to put forth any evidence that there was any other reason for the delay in sealing the wiretap recordings other than those found by the trial court in its denial of the motion to suppress.” Schwartz’s “preoccupation at the time of sealing reasonably had an impact on the timing of the sealing of the wiretap information in this case,” the State argues. She was the lead prosecutor in the high-profile death penalty case of *Antron Dawayne Fair v. State of Georgia*, and oral arguments in that case were held before the Georgia Supreme Court on April 15, 2008. “Her status as lead counsel on a case that was actively before this Court in the midst of the 16-day delay constitutes an *actual* reason for the delay,” the State’s attorneys contend. Also, the State argues, “Absent a showing of bad faith, an issuing judge’s scheduling problems constitute a commonly accepted excuse for delay in sealing.” The federal statute states that at the expiration of the wiretap warrant, “such recordings shall be made available to the judge *issuing such order and sealed under his directions*.” It is not unreasonable that Schwartz believed she had to get the record sealed by the issuing judge. And from what Schwartz could recall six years later, she believed it was likely that Judge Self was out of town and unavailable at the time. “As the trial court found, the State’s reasons excused the delay in sealing the wiretap information,” the State argues, and “the trial court properly denied the motion to suppress.” “Whether the government’s explanation for delay is ‘satisfactory’ is related to the purpose of the wiretap statute: the prevention of government tampering,” the State argues. In this case, “the record establishes that there was little chance of tampering with the recordings.” The law enforcement officer who oversaw the technical aspects of the wiretap, testified that the disc containing the recordings could not be altered in any way. “As the disc could not be altered, there was no risk of the State actors associated with this case tampering with the evidence.” “This combination of facts provides a satisfactory explanation for the delay in sealing the wiretap information involving Appellant’s cell phone,” and “the State prays that this Court uphold the trial court’s denial of Appellant’s motion to suppress.”

**Attorneys for Appellant (Finney):** Andrew Fleischman, James Bonner, Jr.

**Attorneys for Appellee (State):** K. David Cook, Jr., District Attorney, Jason Wilbanks, Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G.