Supreme Court of Georgia
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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Tuesday, October 20, 2015

10:00 A.M. Session

TDGA, LLC V. GEORGIA DEPARTMENT OF REVENUE, ET AL. (S15A1638)

A private company that buys properties under foreclosure is appealing a **Forsyth County** judge's dismissal of its lawsuit in which it is seeking a ruling that two state agencies no longer have any interest in a property the company purchased.

FACTS: TDGA, a limited liability company, purchased property in a tax sale at 6030 Bethelview Blvd. off Atlanta Highway in Cumming, GA. Both the Georgia Department of Revenue and the Georgia Department of Labor had liens on the property, based on the former owner's failure to pay debts. After purchasing the property, TDGA went through the required process of "redemption," which gives the former owner a set period of time to get his property back by paying the buyer the cost paid at auction, as well as any penalties and interest. If the former owner does not pay all the costs by the end of the time period, the current owner may "foreclose on the right to redeem," and the former owner has no further rights to the property. Following its foreclosure of the right to redeem, TDGA filed a court action to get the property released from any interest by the state agencies so TDGA would be free to sell it in the future. Specifically TDGA filed a "petition to quiet title," the legal action taken to clear up any disputes over ownership of a piece of property. In response, the agencies filed a motion to dismiss the lawsuit, and the trial court granted it, agreeing with the state departments that they were

protected from the company's claims by sovereign immunity, the legal doctrine that prevents state government agencies or their employees from being sued. The trial court ruled that under the high court's 2014 decision in *Georgia Department of Natural Resources v. Center for Sustainable Coast*, the state legislature had not specifically waived sovereign immunity for such claims as TDGA's. Attorneys for TDGA now appeal to the Georgia Supreme Court.

ARGUMENTS: The trial court made a number of errors, the attorneys for TDGA contend. First, the trial court erred by ignoring the nature of a quiet title action, which is a claim against the property, not against the State as conceived by the policies behind the doctrine of sovereign immunity. A quiet title action does not ask the courts to compel the legislature or governor to do anything. It does not seek monetary damages to be paid from the State treasury, which sovereign immunity is designed to protect. It asks only that the court decide the rights of the parties claiming interest in the property. Here, TDGA is merely asking the court to grant an order stating that TDGA "was properly served the Notice of Foreclosure of the Right to Redeem, that no party, including the State of Georgia has redeemed the subject property, and that therefore, no party, including the State of Georgia, has any further claim to the subject property." The Georgia Supreme Court has ruled in other cases that a quiet title action deserves special consideration in the context of sovereign immunity, the attorneys argue. In its 1985 decision in *Tanner v. Brasher*, the state supreme Court said: "Sovereign immunity does not enable state officials to prove the state's ownership of land simply by saying that the state owns the land….To hold otherwise would throw the constitutional doctrine of sovereign immunity in conflict with the constitutional provision for separation of powers…." "It is clear then that the State cannot just be allowed to claim sovereign immunity and thereby deny a claimant a determination by any court of proper title to property," the attorneys contend. In this case, TDGA's claim has no direct effect on the State. "The State will still have its lien and can still enforce its lien against the parties that incurred the lien, but because Forsyth County sold the subject property at a tax sale, and because [TDGA] properly foreclosed the right of redemption, the State cannot make any further claim on the subject property," TDGA's attorneys argue. "Additionally, the trial court and the State have incorrectly equated a quiet title action to a declaratory judgment action in finding that sovereign immunity applied to quiet title actions." Under state law, the purpose of a declaratory judgment is to "settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." A quiet title action, on the other hand, is an action to determine ownership of the competing claims to real property. "It is clear then that quiet title actions and declaratory judgment actions are not identical, and the State and the trial court have erred in treating them as identical causes of action," the attorneys contend. Furthermore, the state Supreme Court has not even ruled yet that a declaratory action is barred by sovereign immunity. Yet the trial court has "made the leap" that a quiet title action is the same as a declaratory judgment which is the same as an action for "injunctive relief." (An injunction is a court order to do something or refrain from doing something.) And under the *Sustainable Coast* ruling, an action for injunctive relief is barred by sovereign immunity, the lawyers contend. The trial court also erred because two tax sale statutes, Georgia Code # 48-4-1 and 48-4-40, serve as an express waiver of sovereign immunity. TDGA's interest in the property arose by virtue of a tax sale. "The tax sale simply transferred the State's interest in the subject property, as lienholder for unpaid taxes, to [TDGA]," the attorneys argue. "The State should not at once benefit under the tax sale statute by collecting on unpaid taxes and

then simultaneously claim it can prevent a tax deed purchaser from perfecting title to the property sold for unpaid taxes." The trial court also erred because the State's claim that sovereign immunity bars TDGA's lawsuit amounts to an "unconstitutional taking" under both the U.S. and Georgia constitutions as it means title to the property can never be deemed marketable and sold. Finally the trial court's ruling violates the public policy rationales behind the tax sale statutes. "The purpose of the tax sale statutes, in addition to satisfying previous years' taxes that have gone unpaid, is to cause tax delinquent properties to become tax performing again by placing them in the hands of a new owner," the attorneys argue. "Applying sovereign immunity to [TDGA's] action would also undermine the very purpose of the quiet title statutes, which exist 'so that there shall be no occasion for land in this state to be unmarketable because of any uncertainty as to the owner of the every interest therein.'" "A ruling in the State's favor would have grave consequences on the real estate industry and would have the effect of destroying the entire quiet title action proceeding for any property that might have a governmental interest," TDGA's attorneys argue. "This Court should clarify that sovereign immunity does not apply to a quiet title action."

The Attorney General, representing the state agencies, argues the trial court properly granted the motion to dismiss TDGA's lawsuit, as its claims are barred by sovereign immunity. The Georgia Constitution specifically states: "The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver." The trial court properly ruled that the State's sovereign immunity has not been waived to permit TDGA's request for declaratory relief. "Quiet title actions are a form of declaratory relief," the State contends. Here, TDGA sought a declaration from the court regarding the legal description of the property. "Such declaratory relief is barred by sovereign immunity," the State contends. (The same issue was recently argued before the state Supreme Court in ---, for which there has not yet been a ruling.) The Georgia Supreme court made clear in *Sustainable Coast* that if the General Assembly does not explicitly waive sovereign immunity as to a certain legal action, the action is barred. And contrary to TDGA's contention, the tax sale statutes, # 48-4-1 and 48-4-40, do not contain such a waiver. "Nowhere in the Georgia Constitution or in any act of the General Assembly has sovereign immunity been waived to permit the relief sought by [TDGA]," the State argues. The company's argument that the agencies' assertion they are protected by sovereign immunity constitutes an "unconstitutional taking" is an "absurd argument," the State argues. TDGA "could easily have the departments' liens removed from the subject property by paying the respective debts associated with the liens. However, [TDGA] does not wish to do so. Rather, [TDGA] seeks to strip the departments of their interest in the subject property by naming the departments as defendants in the present action and nullifying their tax liens." "The departments took no affirmative action in this case to 'take' the property of [TDGA]. Rather the departments are passive holders of liens which attach to the subject property." Finally, TDGA's public policy arguments "are without argument," the State contends.

Attorneys for Appellant (TDGA): John Ayoub, Carolina Bryant

Attorneys for Appellee (State): Samuel Olens, Attorney General, W. Wright Banks, Jr., Dep. A.G., Julie Jacobs, Sr. Asst. A.G., Brittany Bolton, Asst. A.G.

<u>SMITH V. ASHFORD ET AL.</u> (S15A1515)

A widow is appealing a **Gwinnett County** probate judge's ruling that because her late husband's will was very clear, most of what he left behind in his trust would go to his two minor daughters rather than to her.

FACTS: Jay Richard Smith died in October 2013, leaving a wife, Kathy Kristina Smith, and two young children. In May 2014, Mrs. Smith filed a petition in court to "probate," or validate, her husband's will. The briefs filed in this appeal do not say whether the children were Mr. and Mrs. Smith's together, but in response to her petition, the court appointed Dana Ashford, an attorney, as "guardian ad litem" to protect the children's interests. Ashford had no objection to the probate court authenticating the will as written, and subsequently, the will was "admitted to probate." In June 2014, Mrs. Smith filed a "Petition for Declaratory Judgment and Construction of a Will" in which she asked the court to declare that the will exercised the "power of appointment" in her favor that was granted to Mr. Smith in the "Jay Smith Irrevocable Trust."

About a year before his death, Mr. Smith's parents, Myron and Doris Alpert, created the Jay Richard Smith Irrevocable Trust, naming their son as lifetime beneficiary, with his descendants being successor beneficiaries. However, the trust gave Mr. Smith the power "to appoint all or any portion of the principal and undistributed income remaining in his trust at his death among one or more persons…." Any part of the trust "that is not appointed" would pass to his descendants, which would be his daughters. As of March 2014, the trust account balance was $126,148.33. The trust also stated that the power of appointment granted under the trust "may be exercised by a will, living trust or other written instrument specifically referring to the power of appointment." Mr. Smith's Last Will and Testament, dated Sept. 5, 2013 will, states under a section titled, "Trust Interest from Family Limited Liability Corporation:" "Upon my death I give a power of appointment to my spouse related to any real and personal property and other tangible assets that I benefit from under the Limited Liability Corporation created by my deceased parents which is formally known as ALPERT CAPITAL INVESTMENTS LLC, C/O DORIS ALPERT MANAGING…and which is currently shared by me with my siblings. If my spouse shall predecease me or fails to exercise this power of appointment, this gift shall benefit my children…." Mrs. Smith contends her husband intended that power of appointment to cover the entire trust as he wanted to leave *all* his assets and *everything* in the trust to her. But Ashford, the children's guardian ad litem, contends that's not what his will says. Ashford, therefore, objected to Mrs. Smith's petition for a "construction of the will," which is only done to determine a deceased person's intent when the will is ambiguous. On Jan. 29, 2015, the probate judge signed an order agreeing with Ashford. The judge ruled that the will was not ambiguous and therefore he could not consider any "parol," or oral, evidence "beyond the four corners of a document to ascertain the testator's [i.e. Mr. Smith's] intent." The judge determined that the will "clearly, and unambiguously does not exercise a power of appointment, as required by the terms of the trust." Therefore, since no power of appointment was exercised, the trust assets must go to Mr. Smith's children. Mrs. Smith now appeals to the state Supreme Court.

ARGUMENTS: Mrs. Smith's attorney argues the probate court erred in failing to consider the circumstances surrounding the creation of the will to determine Mr. Smith's intent. "The cardinal rule of will construction is the determination of the intention of the testator [ie. Mr. Smith]," the attorney argues in briefs. Mrs. Smith presented an affidavit signed by the Florida attorney who had drafted the trust for Mr. Smith's parents in which he stated that Mr. Smith

"indicated verbally to me that it was his intention to exercise his testamentary general power of appointment and appoint the assets in his legacy trust…to his spouse Kathy Smith." Mrs. Smith also submitted an affidavit signed by the attorney who had drafted Mr. Smith's will who also testified "to the effect that he wished to grant all his interest in the trust to his wife," the attorney contends. "Nevertheless, the Probate Court of Gwinnett County found that parol evidence could not be considered to ascertain Mr. Smith's intent." "The general rule upon this subject is that parol testimony is inadmissible to explain a will <u>except for the purpose of proving the circumstances surrounding the testator,</u> that is to say, his situation in his relation to persons and things about him," the attorney argues, quoting an 1853 decision by the Georgia Supreme Court. "Only a few months before the execution of the subject will, Mr. Smith had told his lawyer that he wished to leave **everything** (including the 'family asset') to his wife and he executed a will to that effect." In that will, which Mr. Smith signed in March, he stated he intended to leave "all of my right, title and interest in and to my share of the family trust and Limited Liability Corporation created by my parents" to Mrs. Smith. Unlike the March will, however, the September will only mentioned the company, not the trust. "Beyond question, the language in both wills is awkward and non-technical," Mrs. Smith's attorney argues. "Nevertheless, one of the circumstances surrounding the execution of the September will was the fact that Mr. Smith was not a lawyer, did not have a copy of the trust, and that the language in both wills is completely consistent with his general testamentary intent to leave everything to his spouse if she survived him." The trial judge "incorrectly focused on the application of the parol evidence rule in 'ambiguity' cases and overlooked the 'surrounding circumstances' rule," the attorney contends. "In constructing a will, the court may hear parol evidence of the circumstances surrounding the testator at the time of execution to explain all ambiguities, whether latent or patent." "The probate court mistakenly failed to apply all of the correct rules of construction and, thereby, ignored the testator's intent."

Ashford, an attorney, argues in briefs that the probate judge "did not commit error in failing to consider the circumstances of the creation of and execution of the will to ascertain Mr. Smith's intent because the will is not ambiguous and a construction of the will is not necessary." While Mrs. Smith argues that parol evidence should be considered in this case to discern her late husband's intent, there is "no authority in Georgia law to support this proposition," Ashford argues. "Georgia law is clear that an ambiguity **must** exist in a will before the rules of construction, which includes the introduction of parol evidence, will be applied. Where the terms of a will are plain and unambiguous, they cannot be varied or explained by parol evidence." Contrary to Mrs. Smith's contention, Mr. Smith never signed the March will. The unsigned March will and the affidavits signed by the two attorneys, who never testified in the court proceedings, "were never introduced as evidence in the trial court, nor were they considered by the trial court," Ashford argues, and they cannot be considered now. "This case was correctly decided by the trial court as a matter of law based on the Last Will and Testament of Jay Richard Smith dated Sept. 5, 2013." That will "makes no mention **whatsoever** of the trust." Mrs. Smith's argument that parol evidence should be reviewed to determine Mr. Smith's intent fails on two levels: First the language of the will is "unambiguous and not subject to interpretation," Ashford argues. Second, there is no valid exercise of the power of appointment contained in the trust. "A power cannot be extended beyond its express terms and the clear intention of the donor," she

argues, quoting a 1938 Georgia Supreme Court opinion. "To do so would divest the children of their beneficial interest in the trust."
Attorney for Appellant (Mrs. Smith): Tom Pye
Attorney for Appellee (Ashford): Dana Ashford

ROLLF V. CARTER, WARDEN (S15A1505)

A man who cut his estranged wife's throat, nearly killing her, is appealing a lower court's refusal to consider his claim that he deserves a less harsh penalty than the 30-year prison sentence he received in **Chatham County** for criminal attempt to commit murder.

FACTS: Russell Rollf and Tamara Thurman were at a motel with her four children, two of whom were Rollf's. After a night of drinking, they began arguing and Thurman tried to get someone to come take her and the children back to her mother's house. Rollf punched her in the nose, and after she went into the bathroom, he grabbed her by the hair and dragged her back into the bedroom. According to one of the children, Rollf then grabbed a butcher knife and cut her. Thurman later said she felt something "real sharp and hot" go across her neck and she began bleeding profusely. As she struggled to get up, Rollf sliced her left hand between her thumb and index finger, leaving her thumb dangling. After getting a towel to wrap around her neck, she begged him to call 911, which he did, with the children screaming in the background. An officer with the Savannah-Chatham Metropolitan Police found Rollf and Thurman sitting on the floor with a towel around Thurman's neck and blood everywhere. When Rolff told the officer Thurman had cut herself, Thurman said Rollf had cut her. The officer later testified she could see Thurman's pulse through the large cut on her neck. The paramedic who treated Thurman described her neck injury as life-threatening and noted she was going into "decompensated shock" when he arrived. Rolff was arrested and later indicted for criminal attempt to commit murder, aggravated assault, and felony and misdemeanor cruelty to children.

At the April 2010 trial, the 911 call was played for the jury, who could hear the children crying in the background. Also at trial, the State introduced two similar incidents, which occurred in Florida in 2005. In one, Thurman reported that Rollf had struck her, pulled her to the ground by her hair, and kicked her. Photos of her injuries were introduced as evidence. In another incident, police found Thurman hysterical and bleeding from her ear and nose. Following the 2010 trial, the Chatham County jury convicted Rollf of all charges. For sentencing purposes, the trial judge "merged" the less serious count of aggravated assault into criminal attempt to commit murder and sentenced Rollf to 30 years in prison. (If a person is convicted of more than one crime involving the same incident, courts are supposed to "merge" the less serious crime into the more serious offense and sentence the defendant only to the more serious crime.) On appeal, Rollf argued that under the "rule of lenity," he should have been sentenced for the less serious count of aggravated assault. The rule of lenity states that when a statute or statutes provide both a greater and lesser penalty for the same act, and "any uncertainty develops as to which penal clause is applicable, the accused is entitled to have the lesser of two penalties administered." But the Georgia Court of Appeals upheld Rollf's convictions and sentence, stating that the rule of lenity does not apply to convictions involving two felonies but only when one is a misdemeanor and the other is a felony. More than a year later, in *McNair v. State,* the state Supreme Court "disapproved" of appellate decisions such as Rollf's "to the extent they hold that the rule of lenity cannot be applied" to cases involving two felony convictions. Rollf, by

then in prison and representing himself, filed a petition for a "writ of habeas corpus," – a civil proceeding which allows already convicted prisoners to challenge their sentence on constitutional grounds in the county where they're incarcerated. They generally file the action against the prison warden, who in this case was Alan Carter. Rollf claimed in his petition that his constitutional right to due process was violated because "the Supreme Court of Georgia expressly disapproved the Appeals Court decision" in his case. In February 2015, the habeas court found that Rollf's petition lacked merit and dismissed it, stating it was bound under the "law of the case doctrine" to the Court of Appeals decision, even though it may be erroneous. Also, *McNair* announced a procedural rather than a substantive rule and therefore it did not apply retroactively, the habeas court determined. Rollf then appealed the habeas court's decision to the state Supreme Court, which agreed to review his case to determine whether the habeas court erred by failing to rule on the merits of Rollf's claim that the trial court should have applied the rule of lenity to his conviction.

ARGUMENTS: Rollf's attorneys argue the rule of lenity should have applied to Rollf's case upon conviction at trial "because there was an ambiguity between the two offenses for which Mr. Rollf was convicted." In 2002 in *McClellan v. State,* the Georgia Supreme Court held that the rule of lenity applies when "a penal statute providing two possible grades of punishment or penalty for the same offense (i.e., one as a felony and one as a misdemeanor) is uncertain and the defendant is entitled to the lesser of the two penalties contained in the statute." The high court's use of the parenthetical, "i.e. one as a felony and one as a misdemeanor," was merely used as an example of when the rule of lenity particularly applied, the attorneys argue. But in 2005 in *Shabazz v. State*, the Court of Appeals erroneously construed the Supreme Court's *McClellan* decision to mean that the rule of lenity only applied in cases where the conduct could have been punished as a misdemeanor or a felony. In *Shabazz,* the defendant was denied relief "because this [was] not a case in which the defendant's conduct could have been punished as either a misdemeanor or a felony," and therefore, "it does not invoke the rule of lenity." Every case following, including Rollf's, was then denied relief where the circumstances involved two felony convictions. The state Supreme Court's decision in *McNair* "changed eight years of erroneous Court of Appeals opinions holding that the rue of lenity is not limited to instances where ambiguity exists between only a felony and misdemeanor," Rollf's attorneys argue. In the decision, the high court stated it "has never held" that the rule of lenity only applied when the punishments are as between a misdemeanor and a felony. In *McNair,* the attorneys argue, the high court said that "the key question, when applying the rule of lenity, is whether there is an ambiguity that would result in varying degrees of punishment for the same offense." "The conduct chosen by the State for the jury to consider, namely, assaulting Ms. Chapman with a knife, was precisely sufficient to sustain a conviction for attempted murder or aggravated assault," the attorneys contend. "Because the identical conduct was sufficient to sustain a conviction for each offense, Mr. Rollf should have been given the benefit of the ambiguity and sentenced under aggravated assault and the trial court erred in failing to do so." The habeas court was wrong not to have considered the merits of Rollf's claims because his claims are that his right to due process has been violated. "Notions of fundamental fairness demand that Mr. Rollf receive the benefit this court's opinion disparaging the improper analysis performed in the opinion affirming Mr. Rollf's convictions, his attorneys argue. A habeas court is generally bound by an appellate court's ruling unless there has been a change in the facts of the law, in which

case it would apply retroactively. Here, *McNair* established a new substantive rule of criminal rule, as opposed to a procedural rule, and it therefore should be applied retroactively in post-conviction review by a habeas court, the attorneys contend. "*McNair* substantively changed the law in Georgia because it expressly disapproved of the appellate court's decision, and overturned almost 10 years of precedent denying relief to every individual asserting lenity claims arising from two felony statutes."

The Attorney General, representing the warden for the State, argues that the trial court properly merged aggravated assault into criminal attempt to commit murder because the rule of lenity did not apply to Rollf's case. The rule of lenity applies when statutes establish different punishments *for the same offense* and it resolves the *ambiguity* in favor of the defendant, who then receives the lesser punishment. Here, unlike aggravated assault, criminal attempt to commit murder requires "proof that defendant intended to commit murder whereas assault with the knife, as charged, did not require proof of specific intent," attorneys for the State argue. The plain law of Georgia statutes "reveals that they define different offenses. Therefore, their co-existence cannot be said to create an ambiguity, and for that reason, the very threshold requirement for the rule of lenity's application did not exist in petitioner's case," the State argues. "Therefore, had the habeas court reached the merits of Petitioner's ground, it nonetheless would have determined that the rule of lenity was inapplicable, and that the trial court properly merged aggravated assault into attempted murder via the principle of factual merger. Simply because Petitioner's conduct violated more than one statute does not entitle him to be sentenced to the offense with the smallest punishment." The habeas court correctly did not consider the merits of Rollf's due process claim because the *McNair* decision does not apply retroactively for two reasons: It did not announce a change in substantive state law, but rather a change in procedural law, and therefore does not apply retroactively. Also, habeas corpus relief is limited to violations of a petitioner's state or federal constitutional rights. The so-called "rule" announced in McNair simply says when the rule of lenity applies and "alters neither the range of conduct, nor the class of persons that a law punishes," the State argues. It is hardly a change that rises to the level of "constitutional significance," which is required to grant a petitioner habeas relief. "Therefore, the habeas court properly both (1) determined that it was bound by the Court of Appeals' decision via the law of the case doctrine, and (2) did not reach the merits of Petitioner's claim."
Attorneys for Appellant (McNair): Sarah Flack, Sarah Gerwig-Moore
Attorneys for Appellee (Carter): Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Michael Oldham, Asst. A.G.

<u>OTIS V. THE STATE</u> (S15A1717)

A man is appealing a judge's ruling denying his claim that because the judge declared a mistrial after a jury had been picked, he can no longer be prosecuted for murder as that would subject him to double jeopardy in violation of his constitutional rights.

FACTS: Geary Otis was described as a native of New Orleans who had moved to Atlanta in 1988, worked hard, and retired in 2009. In March 2014, he was indicted by a **Fulton County** grand jury for murder in connection with the stabbing death of 75-year-old Mary Oliverf and the aggravated assault of 71-year-old Emmanuel Surry, as well as for two counts of a possession of a knife during the commission of a felony and other crimes. The State gave notice it would seek a life prison sentence with no chance of parole. On April 7, 2014, trial began, and a

jury was selected and sworn in, after which both sides gave opening statements. Otis's attorney began hers by stating, "Geary Otis last June just snapped." She said that would be the only explanation the jury would hear for what happened. She said the evidence would show that Otis, 64 and overweight, suddenly exhibited "incredible physical prowess, superhuman strength," as he ran up the stairs in a high-rise independent living facility, fought with Surry, kicked down a metal door and stabbed Mary Oliver several times, cutting into her bone and spinal column. The attorney described how police had to use a taser to subdue him, with Otis yelling, "You a lie, you a lie." The lawyer asked the jury to consider "what crazy people look like" as "mental illness" comes in many forms. "I'll be asking for the only verdict that speaks the truth in this case, and that is that Geary is not guilty by reason of insanity." It was the first the State heard that the defense planned to use "not guilty by reason of insanity" as its defense. Following opening statements, the State prosecutor objected to Otis's intent to pursue the insanity defense because prosecutors had not been given any pre-trial notice of the defense strategey. While Otis's attorney agreed she had not given any pre-trial notice, she asserted it was not required as she did not intend to use any expert testimony but instead would rely only on lay witnesses. The judge recessed the proceedings until the next morning, instructing the parties to prepare to address the issue of notice under Uniform Superior Court Rule 31.1, which requires that notice be given by the defense when it plans to use an insanity defense. The next morning, the prosecutor agreed that because the defense attorney would not be relying on expert witnesses, the defense attorney was not required to give the State notice of its planned defense strategy. Neither the State nor the defense requested a mistrial. The trial judge stated he still thought Otis was required to give the State notice he was pursuing an insanity defense even if he was doing so through lay witnesses. The prosecutor pointed out how the State had been harmed by the lack of pre-trial notice, as it could have tried to speak with family members in Louisiana about Otis's mental health history and tried to find whether any medical records existed or not. The prosecutor requested a three-day postponement until the following Monday, April 14, to attempt to locate lay witnesses to refute the insanity defense. The defense, meanwhile, said it wished to "go forward with the trial." The trial judge stated he was unsure three days would be long enough for the State to prepare to rebut the defendant's defense and also said he himself had "other plans" the following week. The judge suggested the trial could be set for April 21, but he did not want to hold the jury that long. The judge concluded a continuance under these facts was "not the proper vehicle." He then, on his own and without either party's request ("sua sponte"), declared a mistrial. However, he suggested the trial would be on the trial calendar in less than two weeks.

On April 14, 2014, Otis's attorney filed a "plea in bar," arguing that the State could not re-try him because a jury had already been impaneled and therefore a re-trial would result in double jeopardy. The trial judge denied the plea in bar, entering an order citing "manifest necessity" as the basis for the mistrial due to the defense's failure to give notice of the insanity defense. The trial court determined that, "Defendant's right to have the trial completed by the impaneled jury is outweighed by the public interest in affording the State one full and fair opportunity to present its evidence…." Otis's attorneys now appeal, arguing that because the trial court violated his constitutional right to trial by the jury he chose, double jeopardy now precludes any further litigation against him.

ARGUMENTS: Otis's attorneys argue the trial court erred in ruling that defense counsel was required to give notice of its intent to present an insanity defense when it was only planning

to present lay testimony in support. In 1995, the Georgia Supreme Court ruled in *Abernathy v. State* that, "Because the purpose of notice is to give the State an opportunity to obtain an independent expert mental health evaluation and prepare its evidence in rebuttal…[a defendant] need not provide notice pre-trial ***if he intends to present evidence of mental illness solely through lay witnesses."*** In Otis's case, the trial court was wrong to conclude that *Abernathy* did not apply to his case because *Abernathy* involved the pursuit of an insanity defense in the penalty phase of a capital trial, not "the guilt or innocence phase of a non-capital case." "This analysis is both factually incorrect and interprets language that is not present within the *Abernathy* opinion, Otis's attorneys argue. *Abernathy* never limited its holding solely to the sentencing phase of a death penalty trial. The trial court also erred in granting a mistrial on its own over the defense attorney's objection without the existence of "manifest necessity" and without considering less severe alternatives such as keeping the same jury but granting a postponement, or by calling in another judge if the trial judge was going to be unavailable. The trial court "completely misstated Georgia law in granting a mistrial" by ruling that Otis's attorney had failed to comply with rule 31.1 and by ruling that the public's interest in the State being able to have a "full and fair" trial outweighed the defendant's right to have the trial completed by the impaneled jury. "The law from this Court for more than a century has been that if a trial judge's misinterpretation of the law leads to a mistrial, double jeopardy bars a subsequent retrial of the defendant," the attorneys contend. In *Oliveros v. State,* the Georgia Supreme Court stated in 1904 that "if a judge capriciously or erroneously declares a mistrial and the accused is again put upon trial, he will be placed in jeopardy a second time for the same offense." "Manifest necessity" is a doctrine used to address urgent and unforeseen circumstances that occur during a trial. There were no such circumstances in this case. Here, the State requested a three-day continuance, indicating its belief that a "full and fair opportunity" to present its case had not been affected. Also, there were other alternatives. The judge's statement, "Well I have other plans next week" is not manifest necessity, the attorneys argue. In other words, the trial court "decided that its 'other plans' outweighted Geary Otis' right to be tried by *his jury.*" Finally, the trial court erred in not discharging him from further prosecution "because double jeopardy attached after the jury was impaneled and sworn for Appellant's trial," the attorneys argue. "Georgia law is clear that once a jury is impaneled, jeopardy attaches." "Because the trial court declared a sua sponte mistrial without any urgent circumstances or manifest necessity, double jeopardy bars a retrial of Appellant," the attorneys argue, and Otis should be acquitted of the indictment against him.

The State, represented by the District Attorney and Attorney General, argues the trial court properly ruled that Otis was required to give notice to pursue an insanity defense. The State contends that Otis's reliance on the *Abernathy* decision is "misplaced." The "confluence of competing interests where the death penalty was being sought and which led to the result in *Abernathy* are not present here," the State argues. Otis's reliance on *Abernathy* is designed to "circumvent the notice provisions set forth in Rules 31.1 and 31.5, requiring pre-trial notice of insanity defense at trial." The trial court properly ruled that *Abernathy* did not apply because the death penalty was being sought in that case, and because Otis "has robbed the State of the opportunity to prepare rebuttal evidence" by failing to "comply with the mandatory notice requirement of Rule 31.1." The rule states that "notices of the intention of the defense to raise the issue of insanity or mental illness…shall be given and filed at least 10 days before trial…." The State argues that the purpose of Rule 31 "is not simply to facilitate the State's ability to obtain a

rebuttal expert. A second purpose is to give the State the opportunity to marshal and prepare rebuttal evidence, as the trial court noted." Otis's "actions here in waiting until jeopardy had attached and then stating in his opening that he would be pursuing an insanity defense denied the State an opportunity to prepare rebuttal evidence…" The trial court also properly declared a mistrial under the "manifest necessity" standard. "The trial court, in declaring a mistrial sua sponte, recognized a fundamental, and perhaps often overlooked principle explicitly recognized by the United States Supreme Court in *Arizona v. Washington*: **It is not only a defendant who is entitled to a fair trial; the State is similarly entitled to one full and fair opportunity to present its evidence to an impartial jury,**" the State argues. "Notice requirements are designed to protect the State against the surprise of an unknown defense at trial, and one that the State cannot reasonably be expected to be prepared to rebut at trial." Finally, because the trial court properly granted a mistrial due to Otis's failure to provide notice of his insanity defense, "it naturally follows that the trial court properly denied appellant's plea in bar," the State argues. While Otis's attorneys argue the trial court improperly declared a mistrial over his trial attorney's objection and where there were other alternatives available, "this Court has repeatedly held that 'the trial court's decision to reject alternatives to granting a mistrial is given great deference, and the availability of another alternative without more does not mean the mistrial was not necessary," the State contends. "In light of all the facts before this Court, specifically the fact that there was no prosecutorial misconduct involved in the trial court's decision to grant a mistrial in this case, the trial court properly exercised its broad discretion in concluding that a mistrial was necessary to afford the State's right to a fair trial." The trial court properly denied Otis's plea in bar "because his designed and calculated ambush during opening statements not only failed to comply with well-established law, but severely prejudiced the State in having a 'full and fair opportunity' to present its case to an impartial jury."
Attorneys for Appellant (Otis): Amanda Grantham, Bryan Grantham
Attorneys for Appellee (State): Paul Howard, Jr., Paige Whitaker, Dep. D.A., Sheila Gallow, Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G.

2:00 P.M. Session

DOWNEY V. THE STATE (S15A1681)

A young man is appealing the conviction and life prison sentence he received for his role in the shooting death of an 18-year-old girl.

FACTS: On April 10, 2008, four **Tattnall County** high school girls from Reidsville, GA went to nearby Glennville where one of the girls had a hair appointment. While in an area known as "The Projects," located on Martin Luther King Road, they got into a fight with some of the Glennville girls. During the altercation, one of the girls, who was pregnant, was kicked in the stomach. One of the girls called Jerry Downey, cousin of the girl who was kicked. Downey quickly amassed a group to accompany him to Glennville. They went in two cars, with Downey driving a blue Crown Victoria and leading the group. With him was his friend, Melvin Browder. Three others followed in a white Dodge Avenger. Once in Glennville, Downey and the other car drove through The Projects twice without stopping. A group of young people began forming on

the streets. On their third pass, Downey's car and the other car stopped, as a group began to crowd around with bars and sticks. After they stopped, one of the Glennville boys approached, yelling and cursing at them. His girlfriend, 18-year-old Eboni Galloway, was behind him. Downey asked Browder if he had his gun ready, to which Browder replied, "Yeah, I got it," according to testimony. Browder then fired his gun from the car. He later testified he shot in the air, hoping to scare the crowd away. But as the crowd scattered, lying face down on the concrete was Galloway in a pool of blood. Downey and his group then fled the scene back to Reidsville. The girl was transferred to the hospital, but after about a week, she was taken off life support and pronounced dead from a gunshot wound to the neck. An investigation led to the arrest of Downey and Browder. Following a joint jury trial, in October 2009, both were convicted of murder, aggravated assault, and possession of a firearm during the commission of a felony. Downey, who is now appealing to the state Supreme Court, was sentenced to life plus five years in prison.

ARGUMENTS: Downey's attorney argues that six errors were made during his trial, and his convictions should be reversed. Among the errors, the attorney argues Downey's trial attorney provided "ineffective assistance of counsel," in violation of his constitutional rights, for his failure to object to the racial discrimination used by the prosecutor in picking the jury. The attorney points out that Downey is black and it is "obvious that black defendants in Georgia have an interest in impaneling a jury that has not been chosen for discriminatory reasons." Yet during jury selection, "100 percent of the peremptory strikes used by the State were against black individuals," the attorney argues. Peremptory strikes, unlike those done "for cause," allow lawyers to reject a certain number of potential jurors without stating why. But the law forbids them to strike people based on race or gender. Ultimately, Downey's jury was made up of four blacks and eight whites, but the State used all three of its peremptory challenges on black members of the jury panel, and used none on white jurors. "This disparity is unlikely to have been produced by happenstance," the appeals attorney argues. If Downey's trial attorney had objected at trial and challenged jury selection, using the process required by the U.S. Supreme Court's 1986 decision in *Batson v. Kentucky*, "the State would not have been able to provide the court with a race-neutral reason, and the defense would have been able to show purposeful discrimination," Downey's attorney argues. Downey's constitutional right to a fair and impartial jury was also violated, and his trial was actually biased, when during jury selection, one man, who was well-known in Glennville, misrepresented his close ties to the prosecutor, judge and law enforcement community. Wayne Dasher, who ultimately became jury foreman, answered when asked during jury selection where he was employed that he was in the banking business and worked at Claxton Bank. He did not say that he was also a member of the Board of the Department of Corrections, founder of Glennville's annual Law Enforcement Appreciation Cookout, and an Honorary Life Member of the Georgia Sheriff's Association. By denying his position on the board and his close ties to law enforcement, "he denied defense counsel the opportunity to inquire into his impartiality," the attorney argues. "Had defense counsel been aware of Mr. Dasher's position, they would have likely foreseen the issues caused by him being on the jury, the impact it would have had on the fairness of the trial, and formulated an argument to strike him for cause. Therefore, appellant's [i.e. Downey's] right to an impartial jury was materially infringed upon in violation of his constitutional rights." Downey's trial was also "tainted by the appearance of impropriety when the prosecutor and judge failed to disclose that

they knew Wayne Dasher, that he worked for the Department of Corrections, and that he had substantial connections to law enforcement." Among other arguments, Downey's sentence should be thrown out because the evidence was insufficient to convict him of murder. In Browder's appeal, the Georgia Supreme Court found the evidence was insufficient to establish that Downey and Browder had the specific intent to kill. Instead, they ruled that Browder acted with reckless disregard for human life when he fired the gun. Based on this reckless disregard, Browder had "implied malice" and was therefore guilty of murder. But Downey neither possessed nor shot the gun, and therefore only could have been convicted as a party to the crime." Yet Downey was convicted of murder without directly committing the crime. Even to be convicted as a party to the crime, Downey had to share intent with Browder. But Browder was convicted of murder based on a theory of implied malice, or extremely negligent conduct. Browder did not have a criminal intent. Without sharing co-defendant's intent, Downey "could not have been convicted as a party to the crime," the attorney argues. "Appellant Downey is entitled to have his conviction reversed because the evidence was insufficient to convict co-defendant Browder of specific intent murder."

The State argues that Downey's attorney was not ineffective for not raising a *Batson* challenge over jury selection. This Court has specifically ruled that when a defendant is claiming ineffective assistance of counsel based on a failure to raise a *Batson* challenge, to succeed, the defendant is required to show not only that the attorney should have raised the challenge but that the challenge would have been legally successful. Here, Downey "has failed to show that trial counsel should have raised a *Batson* challenge." Downey's trial attorney has been a criminal defense attorney for more than 40 years, worked on five death penalty cases, and tried about 1,000 cases. Downey's other attorney was also experienced. They later testified that the issue of a *Batson* challenge never came up because the prosecutor only used three of his nine strikes, and they did not think race was an issue, as both the victims and the defendants were black. Ultimately the jury that was picked consisted of one third black jurors and two thirds white, "which resulted in a jury that was reflective of the county population as a whole and the jury pool as a whole," the State argues. The State also contends that Downey had a fair and impartial jury because the jury pool was asked numerous times to declare their bias. The juror Downey complains about – Wayne Dasher – answered the questions posed by the trial court under oath and did not "misrepresent" material facts during jury selection. "No juror gave information about board memberships, organizational activities, and civic awards," in answer to the judge's request for basic information, the State argues. Downey's attorney has "maligned a conscientious juror, calling him a liar," when he should have subpoenaed Dasher to the hearing on Downey's motion requesting a new trial so he could confront him about his "intentional 'misrepresentation.'" Also, the trial of this case "was not 'tainted' by the 'appearance of impropriety' by the fact that the judge and the prosecutor knew a juror," the State argues. Finally, the jury was entitled by the evidence to find that Downey "acted individually, and as a party to the crime," with implied malice and intent to commit aggravated assault and murder, the State contends. Downey argues "erroneously" that he could not have had the intent required to convict him of malice murder and aggravated assault, arguing that this Court found that his co-defendant Browder acted with recklessness and therefore, it was impossible for Downey to share a criminal intent of reckless disregard with Browder. The Georgia Code states that, "Every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission

of the crime." Here, Downey drove the car from which the shots were fired; he recruited Browder and the others; he was the cousin of the pregnant teen who was purportedly kicked in the stomach; and seeking retribution, he knew Browder had a gun before the shooting, asking him if he had the gun ready. It was Downey who drove the lead car through The Projects, and it was Downey who sped away from the scene. "The jurors were authorized to find that appellant's actions, before, during and after the crime, exhibited a specific intent to kill," the state contends.
Attorney for Appellant (Downey): Matthew Grossman
Attorneys for Appellee (State): Sandra Dutton, Assistant District Attorney, Samuel Olens, District Attorney, Beth Burton, Dep., A.G., Paula Smith, Sr. A.G., Mary Catherine Greaber, Asst. A.G.

SMITH V. THE STATE (S15A1705)

A man is appealing his murder conviction and life prison sentence for his role in shooting and killing one man and wounding another during a robbery at a known drug house in Atlanta.

FACTS: Victor Powell was hired by a man known as "Quan" to do periodic work at his house on Redford Drive in **Fulton County**. In the early morning hours of Dec. 29, 2007, he stopped by the house to collect his payment. Quan and his girlfriend were still at a nightclub, but Russell Roland was there, and he agreed Powell could come inside to wait for Quan. While there, Powell noticed a red or burgundy Toyota Camry pull in the driveway, back out, and then pull backwards into the driveway. A man who identified himself as "Lil Chris from College Park" knocked on the door. Roland told Powell he knew the man and to let him in. The man told Roland that he and some friends had a flat screen television they wanted to sell for $700. Powell said he could give them $400 in cash plus $300 worth of cocaine. "Chris" said he had to check with his friends and went outside to the car. Powell described Chris as a black male with a mustache and tattoo on the left side of his neck. Chris and two other men returned to the house and all came inside. While they were talking to Roland, Quan's girlfriend, Shawnell Johnson, returned in a cab from the nightclub. She said she and Quan had gotten into an argument, so she had left the club and come back to the house, looking for her wallet and keys. She said she needed money for the cab and Roland gave her $30. She also said the cab driver wanted to buy some cocaine, so Roland told her to tell him to come in. Roland reached under his chair, pulled out a cigar box containing cocaine, weighed some of it, and sold it to the cab driver for $150. Johnson asked for a "cut" for bringing Roland a client, so he gave her $20. Johnson later said that while she recognized Roland, she did not know the other three men who were in the house. Johnson found her wallet but not her keys before she and the cab driver left.

Powell was closing the door behind them when he was shot in the leg. After he fell to the floor, one of the three men put a gun to his head and told him not to move. "Lil Chris" grabbed Roland's AK-47 next to Roland's chair and pointed it at Roland while one of the others pulled out a handgun and also pointed it at Roland. They demanded Roland give them the money and the drugs. He reached in his pocket and handed over the cash, at which time Chris pulled the trigger on the assault rifle, but it didn't fire. He threw the rifle on the floor and pulled out a handgun, demanding that Roland also give him the drugs. Roland directed the men to the cigar box, and they took the drugs. Together Chris and the other man then shot Roland multiple times, hitting him in the abdomen and chest. Roland died at the scene. The man who had been holding the gun to Powell said they had not come for him, then he too left. Powell later said he heard

someone outside tell the man to go back inside and kill Powell. The man came back inside, shot at Powell, but missed. Powell was able to get to a neighbor's house and call 911.

Johnson identified Smith in a photographic lineup and later at trial as one of the three men she did not know who was at her boyfriend's house. She was not there when Roland and Powell were shot. Powell said that in addition to the red Camry, he had also seen a black Monte Carlo in the driveway the morning of the shooting. Investigators ultimately tied the name "Lil Chris" to Christopher Smith and learned he owned a black Monte Carlo. When Smith was arrested, a drug scale with suspected cocaine residue and a small amount of suspected marijuana were found in his residence.

In January 2011, a jury convicted Smith of murder, armed robbery, aggravated assault and gun charges. He was sentenced to life plus 25 years in prison. Smith now appeals to the Georgia Supreme Court.

ARGUMENTS: Smith's attorney argues his convictions must be reversed for two reasons. A criminal defendant has a fundamental right to be present for all significant events in the trial of his case, and that includes jury selection. But during voir dire in Smith's case, the judge excused a juror when Smith was permitted to go to the bathroom. "A critical stage of Mr. Smith's trial – the request to strike a juror for cause – was conducted outside his presence," the attorney argues. "There was no knowing waiver or acquiescence in this fundamental error." While the judge subsequently recommended they "do it again when your client is here," no hearing about the juror who was excused was ever held in Smith's presence. "A violation of the Georgia Constitution's right to be present is presumed to be prejudicial," the attorney argues. "Thus, absent a valid waiver by the defendant, a violation of the right to be present enshrined in the Georgia Constitution triggers reversal and remand for a new trial whenever the issue is properly raised on direct appeal." In addition, Smith's trial attorney rendered "ineffective assistance of counsel" in violation of Smith's constitutional rights for failing to challenge "the State's otherwise thin case," Smith's appeals attorney argues. Smith was originally tried in 2010, but the trial ended in a hung jury, with a vote of 11-to-1 in favor of acquittal. Yet his January 2011 trial ended in conviction. "What was so different between these two trials? A significant difference was the repetitive failure of trial counsel to repeat the effective cross-examination he had already performed in the first trial. This failure 'falls below an objective standard of reasonableness,'" the attorney argues. For instance, the trial attorney failed to object to inadmissible hearsay evidence that was used to wrongly connect Smith to the name, "Lil Chris." The trial attorney's failures "were particularly prejudicial, because they provided the State with its most compelling evidence in this otherwise unusually weak case." Powell did not identify Smith in court. While he claimed to have identified him in a photographic lineup, detectives rebutted his claim. There was no physical evidence connecting Smith to the crime. The only identification came from Johnson, yet the attorney allowed her identification to go unchallenged during the second trial. "These failures together turned what was a weak case for the State into a marketable one," the attorney argues. "Had trial counsel performed his adversarial function, this second jury would likely have rendered no worse an outcome than the first."

The Attorney General and District Attorney, representing the State, say that the argument the trial court erred by allowing a juror to be excused when he was not in the courtroom can't be raised for the first time on appeal. Smith's attorney failed to object at trial or file a motion for a mistrial when he first had the opportunity to do so, and he therefore failed to preserve the issue

for appeal. "A proceeding at which the composition of the jury is selected or changed is a critical stage at which a defendant is entitled to be present," the State argues in briefs. "However, the right to be present belongs to the defendant, and he is free to relinquish it if he so chooses." Smith had been present and was aware the judge and attorneys were about to discuss whether to strike a particular juror when he asked to be allowed to use the restroom. His absence "clearly constitutes a voluntary waiver" on his part, the State contends. Smith's trial attorney also provided effective assistance, the State argues. While Smith contends that his trial attorney's failure to challenge the State's case caused an otherwise close case to end in conviction, Smith failed to prove individual instances where the attorney's performance was deficient. And even if the attorney erred in the five specific ways his attorney claims in briefs, he failed to show that but for those errors, there is a "reasonable probability" his trial would have had a different outcome. This Court should uphold the lower court's ruling, the State contends.
Attorney for Appellant (Smith): Gerard Kleinrock
Attorneys for Appellee (State): Paul Howard, Jr., District Attorney, Paige Whitaker, Dep. D.A., Cynthia Cartwright, Sr. Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Crowder, Asst. A.G.

THOMAS JERRY STEELE V. ASHLEY OLIVIA STEELE (S15F1535)

A man is appealing the Final Judgment and Divorce Decree granted by a **Henry County** judge, arguing it does not accurately reflect the terms to which he and his ex-wife agreed.

FACTS: In January 2011, Ashley Steele filed for divorce from Thomas Steele, citing an "irretrievably broken marriage." In November 2014, prior to trial, the two met together with their lawyers to negotiate a settlement. Her attorney prepared a "Memorandum of Settlement," which both parties signed. In it, Jerry agreed to pay Ashley a lump sum alimony payment of $400,000 or convey a 40 percent interest in a Rosemary Beach, FL, house that was in his name. Two days later, one of Jerry's creditors, RES-GA, LLC, obtained a Temporary Restraining Order in Fulton County Court, against Jerry and 23 others. The TRO restrained Jerry, his sons, and many of their respective businesses from "transferring, encumbering, concealing, selling, or in any manner disposing of or interfering with any funds, personal and/or real property or assets of any kind…." On Dec. 15, 2014, Ashely filed a "Motion to Enforce Settlement Agreement," asking the trial court to enforce the Memo. Her attorney attached to the motion a quitclaim deed for an undivided 40 percent interest in the Rosemary Beach property and a proposed Final Judgment and Decree of Divorce. On Jan. 14, 2015, the trial court held a hearing on Ashley's motion where Jerry, whose attorneys had withdrawn from his case, represented himself. As evidence, he submitted the judgment in favor of RES-GA that had been awarded against him in the amount of $3,278,935.57, which he said substantially changed his circumstances; the TRO entered in Fulton County; and a Mortgage and Security Agreement for the Rosemary Beach property he signed over to RES-GA on Dec. 1, 2014, after he had signed the settlement Memo with Ashley. At the hearing, one of his former attorneys testified that given the TRO, Jerry likely would have been held in contempt of court had he made any payment or conveyed any property to Ashley. Jerry also called as a witness a corporate representative of RES-GA, who said that the company "had filed an all-encompassing fraudulent transfer" lawsuit against Jerry, and that the TRO was designed to "tie up his assets and prevent transfers and preserve them for collection…." On Feb.

4, 2015, the trial court ruled in favor of Ashley and entered the Final Judgment and Divorce Decree as proposed. Jerry Steele now appeals to the state Supreme Court.

ARGUMENTS: Jerry's attorneys argue the trial court erred in entering the Final Judgment "because the judgment was based on the Memo, which is merely an unenforceable agreement to agree." "Under Georgia law, "'No contract exists until all essential terms have been agreed to,' and the failure to agree to even one essential term means there is 'no agreement to be enforced.'" The Memo lacks specifics and does not address the terms of the deed by which Jerry is supposedly obligated to convey a 40 percent interest in the Rosemary Beach residence. The trial court abused its discretion in approving and enforcing the Memo in light of the change in Jerry's circumstances between the time he signed it and the judge entered the Final Judgment. The TRO "prohibited Mr. Steele from delivering any property" to Mrs. Steele, his attorneys argue. Among other errors, they contend that even if the Memo were an enforceable agreement, the trial judge erred in entering the Final Judgment because it contains "additional, substantive terms that were not included in the Memo or agreed upon by the parties." While the Memo did not even mention the word "divorce," the "Final Judgment states that divorce will be granted 'upon the statutory grounds that the marriage between the parties is irretrievably broken…and there is no hope of reconciliation between the parties.'" Yet, in his answer to Ashley's filing for divorce, Jerry specifically denied that the marriage was "irretrievably broken," and there was a "complete lack of evidence" to support that it was, his attorneys argue. The trial court also erred by indicating that the Final Judgment was a "consent judgment" because Jerry never agreed to it or signed it. Finally, the court never ruled on the admissibility of the Memo into evidence. "Because the Memo was not admitted into evidence, it should not have been considered by the trial court or comprised the basis for the terms of the Final Judgment," his attorneys argue.

Ashley's attorney argues that the Memorandum of Settlement constitutes an enforceable settlement. In its 2014 decision in *Buckner v. Buckner,* which involved similar circumstances, this Court held that the settlement memorandum was enforceable. "The settlement memorandum contained all the material terms necessary to resolve the claims of the parties, i.e. alimony and equitable division," the attorney argues. While Jerry argues the Final Judgment failed to provide a number of specifics, "Each of these matters is either immaterial, or is an implied term, or both." "There is no record evidence that Jerry Steele objected to any of the 'myriad defects' he now argues are in the Final Decree, until after Ashley Steele moved to enforce the settlement," her attorney contends. The trial court properly enforced the settlement agreement despite the subsequent developments in the separate litigation between Jerry and RES-GA. "Jerry Steele voluntarily entered into the Fulton Superior Court consent judgment and voluntarily granted the mortgage in favor of RES-GA, LLC, and did so with the knowledge that he had a preexisting contract with Ashley Steele to pay her $400,000 or convey a 40 percent interest in the Rosemary Beach residence," the attorney argues. While he argues it is now "impossible" for him to perform under the settlement agreement due to the TRO, "impossibility cannot be invoked by a party who has made performance infeasible through his own actions." Besides, "Jerry Steele can pay the $400,000 lump sum alimony, inasmuch as he is apparently able to satisfy the multi-million dollar judgment of RES-GA, LLC." Also, the Final Divorce Decree does accurately reflect the terms agreed to by the parties and does not materially vary from the settlement memorandum. The trial court inherently granted Ashley's motion to enforce settlement by entering the proposed Final Decree, the attorney contends. Finally, Jerry did not object at the first opportunity to the

admissibility, and consideration by the trial court, of the settlement memorandum. Therefore, he is prohibited from bringing it up for the first time on appeal, her attorney argues.
Attorneys for Appellant (Jerry): Tyler Henderson, Leon Jones
Attorney for Appellee (Ashley): Allen Bodiford