Supreme Court of Georgia
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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Tuesday, October 6, 2015

10:00 A.M. Session

<u>THE STATE V. KELLEY</u> (S15G1197)

The appeal in this case raises again the question of whether a trial judge may alter the prison sentence recommended by State prosecutors after the judge has accepted a plea bargain agreement. In this **Fulton County** case, the District Attorney, representing the State, is appealing a decision by the Georgia Court of Appeals, which concluded the judge had the authority to reduce a man's sentence to below what the District Attorney recommended.

FACTS: Terry Kelley and three others were indicted in Fulton County in 2012 and charged with felony murder, burglary and other crimes for his alleged participation in an armed robbery attempt that resulted in the death of a fifth participant. In October 2012, Kelley and State prosecutors told the trial court that rather than go to trial, they had negotiated a plea agreement in which the State agreed to reduce Kelley's felony murder charge to the "lesser-included" (less serious) charge of voluntary manslaughter and to recommend to the court a prison sentence of 20 years. All the other charges would be "nolle prossed" or dismissed in exchange for Kelley's guilty plea to voluntary manslaughter and his truthful testimony at the trials of his co-defendants. The trial judge accepted Kelley's plea to the reduced charge as having been "knowingly, freely and intelligently" entered. However, the judge determined the sentence recommended by the State was too high, stating after hearing from witnesses that "there's a substantial factual basis

for mitigation in this particular case," including the facts of the case, Kelley's admission of his involvement and remorse, his lack of any criminal history and his willingness to provide truthful testimony about his co-defendants. Instead, the judge sentenced Kelly to 10 years, with the first five to be spent in prison followed by five on probation. The State immediately objected and asked to withdraw Kelley's plea and proceed to trial. The judge orally refused and upheld the sentence. The State then filed a written "Motion to Set Aside an Illegal Judgment," alleging that the trial court lacked the authority to impose a sentence different from the negotiated and recommended sentence. In doing so, the State claimed the trial court was improperly participating in the plea negotiation process by accepting a "non-negotiated" plea to an offense that was not included in the formal indictment. And in a non-negotiated plea, the defendant may only plea to charges in the indictment, and the trial court has no authority to reduce the charges. In November 2012, the trial court granted the State's motion, agreeing with the State that it had no authority to sentence Kelley to a lesser offense not charged in the indictment. In May 2013, the trial court resentenced Kelley to 20 years as originally recommended by the State. When Kelley appealed, however, the Georgia Court of Appeals reversed the ruling, finding that the trial court had accepted the plea agreement in large part and only rejected the sentence recommended by the State. And while "the crime with which to charge a defendant is within the exclusive purview of the State," "the sentence to be imposed with regard to a charge is within the exclusive province of the trial court unless that discretion has been removed by statute," the appellate court said. It further ruled that the trial court's rejection of the State's recommended sentence did not give the State the right to withdraw from the plea agreement. The State now appeals to the Georgia Supreme Court.

ARGUMENTS: The District Attorney's office argues for the State that the Court of Appeals erred in allowing the trial court to reject the negotiated sentence but still purport to accept a plea to the reduced offense, over the State's objection. It further erred in ruling that the State had no right to withdraw its consent to reduced charges upon rejection of the negotiated sentence. "A trial court is not authorized to undercut the negotiated sentence of a proposed plea to reduced charges yet simultaneously accept that guilty plea over the State's objection," the State argues in briefs. "Although in Georgia the Uniform Superior Court Rules make a negotiated sentence only a recommendation to the presiding judge, still, the authority to withhold approval of a negotiated plea does not permit the court to engage in plea bargaining by changing terms (sentence) or to reduce charges without the consent of the prosecutor." Once the State and defendant finalize a plea agreement, the trial court is limited to accepting the plea or rejecting it. "This is an 'up-or-down/yes-or-no' proposition," the State contends. "Unilateral modification of the negotiated agreement by the court is not an option." The State in this case agreed to reduce the indicted offense from felony murder to voluntary manslaughter only in exchange for Kelley's guilty plea, the negotiated sentence of 20 years and Kelley's truthful testimony at trial. "If words are to have any meaning, the trial court's rejection of a material term, such as the negotiated sentence, is a rejection of the entire plea bargain, such that defendant's proffer becomes a non-negotiated guilty plea, and the court cannot reduce charges over the State's objection. To do so is impermissible plea bargaining by the court." Finally, the State argues, "It is not a slavish adherence to contract principles to recognize that the State as well as the defendant has the right to withdraw from the agreement if the trial court will not follow the negotiated outcome involving charge reduction. If the public – via the State – is deprived of the benefit of its bargain,

the plea necessarily becomes non-negotiated. In that case, the trial court is not authorized to accept reduced charges over the State's objection."

Kelley's attorneys argue the Court of Appeals ruled correctly. "It is well settled law in the state of Georgia that a trial court has no authority, absent the consent of the State, to accept a plea, enter judgment and impose sentence for an uncharged lesser included offense upon the plea of guilty of such an offense," the attorneys write in briefs. "However, a trial court has the authority to accept a negotiated plea to a reduced uncharged offense tendered to the trial court by the State upon a finding (a) that the plea is voluntary, (b) that the plea is knowingly entered into by the accused, and (c) that the plea has a factual basis." In this case, after the acceptance of the plea, the trial court had the "absolute authority to impose any legal sentence upon the accused without the consent of the State and notwithstanding the terms of the negotiated sentence." Under Uniform Superior Court Rule 33.5 (C), a trial court "should give the agreement due consideration, but notwithstanding its existence, must reach an independent decision on whether to grant charge or sentence leniency." Contrary to the State's arguments, here "the trial court took no unilateral action. The trial court did not [on its own] reduce Kelley's murder charges to voluntary manslaughter. Nor did the trial court allow Kelley to *unilaterally* enter a plea to a reduced offense that was not included in the indictment without the State's consent and approval to do so." Rather, the State presented the negotiated plea to a reduced charge of voluntary manslaughter, the trial court accepted the felony plea agreed upon by the State and Kelley, but then chose not to follow the State's recommendation of a sentence, "as was well within its authority," Kelley's attorneys argue. Finally, "There is no legal authority in Georgia statutes or case law affording the State the right to withdraw its consent to a negotiated plea tendered to the trial court under the context presented in the instant case. To the contrary, the Uniform Superior Court Rules contemplate that the right to withdraw from a negotiated plea is a right only afforded to the accused." While the State argues it was entitled to be informed by the trial judge of the intent to reject its recommended sentence so it had the opportunity to withdraw from the negotiated agreement, the State "makes this declaration without citing to any legal authority," Kelley's attorneys argue. It does so "because no such legal authority exists."

Attorneys for Appellant (State): Paul Howard, Jr., District Attorney, Paige Whitaker, Dep. D.A., Marc Mallon, Sr. Asst. D.A.

Attorneys for Appellee (Kelley): Curtis Hubbard, Jr., Todd Barbee

BARROW V. MIKELL, COMMISSIONER ET AL. (S15G1168)

A citizen of Gambia, who is seeking asylum in the United States, is appealing a Georgia Court of Appeals decision. The appellate court ruled that the man failed to appeal the denial of the reinstatement of his driver's license within the time period required under state law.

FACTS: Abdou Barrow has been in the United States for 23 years since he arrived from Gambia in 1992 and filed an application for asylum in 1997. In 1999, his asylum application was denied and he was ordered removed from this country. Although Barrow had been issued a driver's license, in 2001 it was cancelled after he pleaded guilty to a number of traffic offenses in Georgia, including hit and run. He was issued a new driver's license in February 2009, but in April 2010, the Georgia Department of Driver Services revoked Barrow's license for "fraud or fictitious use of license." Barrow immediately applied to reinstate the license. At the time, however, federal Immigration and Customs Enforcement (ICE) records showed that Barrow had

a "warrant of removal" pending against him. In June 2010, the Department of Driver Services notified Barrow that it could not reinstate his license because his legal presence in the United States could not be verified. In the same notification, the department instructed Barrow to come into the department with "all your official documents, including all valid immigration documents," by July 13, 2010. Barrow did not do so, nor did he appeal the April 2010 revocation of his license or the June 2010 denial of his application for reinstatement.

Almost three years later, in April 2013, Barrow learned that the Immigration Court in San Antonio, Texas, had re-opened the federal removal proceedings against him and his asylum application had been revived. In August 2013, Barrow was arrested for driving with a cancelled license. He then applied in November 2013 at the Snellville, GA office of the Department of Driver Services to have his license reinstated. But on Nov. 25, 2013, the Department of Driver Services sent emails to Barrow's lawyer saying it would not reinstate the license due to his immigration status.

Within 30 days, on Dec. 2, 2013, his lawyer filed an appeal in the **Fulton County** Superior Court. In response, the State filed a motion to dismiss the appeal, arguing that Barrow had failed to file the appeal within 30 days of an "appealable decision" under Georgia Code § 40-5-66. The Georgia statute says that an aggrieved person "shall have the right to enter an appeal" of "any decision rendered by the [Department of Driver Services]" and that such an appeal "must be filed within 30 days from the date the department enters its decision or order." At issue in this case is which of the decisions started the clock ticking, beginning with the original revocation of his license in April 2010. The trial court agreed with the State and granted its motion to dismiss Barrow's case. Barrow then appealed to the Georgia Court of Appeals, which upheld the Fulton court's ruling. In his appeal, Barrow argued that the revival of his application for asylum in 2013 gave him the right both to apply for reinstatement of his license and to appeal the denial of the reinstatement, which he did within 30 days. But the Court of Appeals disagreed. It acknowledged that the language in the statute giving the right to appeal "any decision" of the Department of Driver Services is "very broad." However, the appellate court said that under the state Supreme Court's 1987 decision in *Earp v. Lynch*, "a driver who had failed to request reinstatement until approximately a year after the original revocation had waived his right to an appeal because '§ 40-5-66 requires appeals to be made within 30 days of the revocation decision by the Department.'" "Although we recognize that Barrow did not have any grounds for appealing the initial revocation decision in 2010, we are constrained to affirm the trial court's denial of his 2013 appeal (based on a change to his immigration status) as untimely under the rational of *[Earp]* which binds this court," the Court of Appeals decision says. Barrow now appeals to the state Supreme Court.

ARGUMENTS: Barrow's attorneys argue the trial court and Court of Appeals erred in dismissing the appeal of the department's denial of his application for reinstatement of his driver's license, which he sought after the renewal of his petition for asylum. Barrow met the statute's time requirement because he filed the 2013 appeal within 30 days of the denial to reinstate his license. When the immigration court reopened Barrow's removal proceedings and his asylum application was revived, "he was lawfully present and eligible for a driver's license," his attorneys argue in briefs. "These changed facts and circumstances of the Appellant's lawful presence status per his revived asylum application presented a new 'decision' for the Department of Driver Services to make." The statute gives the aggrieved person the right to appeal "any

decision rendered by the department." If the Supreme Court upholds the trial court's ruling that Barrow's failure to appeal the department's cancellation of his license more than six years ago, "the result will be he is forever barred from seeking judicial review of any subsequent applications no matter what his status," the attorneys argue. Even if Barrow is eventually granted asylum and becomes a naturalized U.S. citizen, under the superior court's logic, "he would still be barred forever from receiving a driver's license – an absurd result." Under the statute, any adverse action taken by the department "should be appealable, so long as it can be classified as a 'decision,' an 'order,' an 'act,' a 'suspension,' or a revocation.'" Furthermore, there is no language in the statute that distinguishes between decisions that are "appealable" or "not appealable," the attorneys contend. A prior decision by the department to cancel a license does not prohibit subsequent applications for a license. The department's own rules state that the "cancellation of a license is without prejudice, and application for a **new license may be made at *any* time after such cancellation.**"

The Attorney General's office, representing Robert Mikell, Commissioner of the Department of Driver Services, argues that the trial court property applied § 40-5-66 in dismissing Barrow's appeal because it was not filed on time. Barrow argues that "every single action taken by the Department of Driver Services should constitute a 'final decision' which can then be appealed," the State argues in briefs. Barrow's license was revoked for lack of proof of lawful status on April 9, 2010. He then applied for reinstatement of that license on April 27, 2010. "His time to appeal either decision of the department – his cancellation or his reinstatement – has long since passed," the State argues. If the state Supreme Court now rules "that every subsequent denial of reinstatement at a department office is a 'final decision' and appealable, then a licensee could go daily, weekly, or monthly to the local Department of Driver Services office, apply for reinstatement, and thus restart the appeals clock regarding the decision and vitiate the holding in *Earp…,"* the State contends. Barrow "is not barred from obtaining a driver's license in the future should he be able to present the proper and necessary documentation to the department to obtain a license," the State argues. "He is merely prevented from appealing the denial to superior court." Barrow is not without recourse, and he can apply for reinstatement of his license at any time. If he is indeed eligible to get his license back but still denied reinstatement, he can file in court a petition for a "writ of mandamus," which is done to compel government officials to perform their public duties. "The 30-day time limit for appeals merely bars the appeal, not every avenue available to an eligible person to receive back their license," the State argues.

Attorneys for Appellant (Barrow): Justin Chaney, S. Anne Thompson
Attorneys for Appellee (Mikell): Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Joseph Drolet, Sr. Asst. A.G., Amy Radley, Asst. A.G.

HOARD V. BEVERIDGE (S15A1685)

In the appeal of this contentious divorce, a woman claims a **Fulton County** court "grossly abused" its discretion by requiring her to pay nearly a quarter of a million dollars to cover her ex-husband's legal expenses.

FACTS: In November 2009, Brett W. Beveridge filed for divorce from Vivian D. Hoard. The parties, both tax attorneys, have one child, a daughter born in 1999. To assist the parties and trial court in determining custody of the daughter, in February 2010, the court appointed Dr.

Carol Webb, a psychologist, as a "custody evaluator." In September 2010, Webb recommended in her "Child Custody Evaluation" joint physical custody on an alternating week basis. The evaluation included psychological profiles of the parties. At a temporary hearing, Webb testified Beveridge's psychological profile was normal but Hoard's was less so. Webb testified that the effect of Hoard's profile on her ability to co-parent was that "she will relentlessly pursue getting her own way and to her advantage, and sometimes even not to her advantage." Hoard claimed Webb was biased against her and subsequently filed motions to have her disqualified from the case, all of which the trial court denied. Beveridge offered three times to settle the case but Hoard rejected his offers. The final trial began in December 2011 and lasted 10 days. In October 2012, the trial court issued its Final Judgment and Divorce Decree. The judge ordered that the parties share joint physical custody of their daughter, and Hoard was ordered to pay Beveridge $70,000 in property division and some of his other expenses. The judge stated he did not rely on Webb's evaluation in deciding custody, but that her evaluation "was not inconsistent with the other evidence presented in this case." Both parties then filed motions asking the court to require the other party to pay legal fees. Hoard requested $431,411.25 in fees; Beveridge requested $400,974.90 in attorney's fees and expenses. The original judge recused himself from the attorney's fees argument, and the case was transferred to Judge Bensonetta Tipton Lane. Hoard then requested that Lane recuse herself, arguing that her staff attorney had made a derogatory comment about the case that indicated both the judge and the staff attorney were predisposed toward the father's attorney and Webb. After denying Hoard's motion to recuse, the judge issued a Fees Order in October 2014, requiring Hoard to pay Beveridge $232,114 in attorney's fees and expenses. The order stated that Hoard's numerous attempts to disqualify and discredit Webb had "unnecessarily expanded this litigation." The order also mentioned that Beveridge had made several attempts to settle the case to no avail and that Hoard had a "superior ability to pay the attorney's fees." Georgia Code § 19-6-2 requires the court to "consider the financial circumstances of both parties as a part of its determination of the amount of attorney's fees, if any, to be allowed against either party." The judge determined that while the parties earned similar salaries with Beveridge earning $19,000 a month and Hoard earning $20,000 a month, he paid for their child's private school tuition and had far less equity in his home than she had in hers. Hoard now appeals the Fees Order to the state Supreme Court.

ARGUMENTS: Hoard's attorneys, who include former Attorney General Michael J. Bowers, argue that the "egregious order which walloped Appellant [i.e. Hoard] with nearly a quarter of a million dollars in fees is infected with legal error and must be overturned." The trial court improperly awarded fees under § 19-6-2, which requires consideration of the parties' income. In this case, the parties have "nearly identical monthly incomes" and it was error not to apportion the award of fees, the attorneys argue. "Further, the trial court's order is infected with error because it relied on out-of-date financial information." Under another statute, § 9-15-14, the trial court's award of fees was also error "because it failed to make the requisite findings of fact to substantiate the award," the attorneys argue. "Finally, the award of fees and expenses – in the jaw-dropping amount of $232,114 – is itself an abuse of discretion because it requires periodic payments equal to Ms. Hoard's entire gross monthly income, and the total award exceeds the equity in her home. Although Ms. Hoard now has primary custody of their minor child, the trial court is effectively forcing Ms. Hoard to sell her home to pay her ex-husband's legal fees." (The daughter elected to live with her mother when she turned 14.) The court also

erred in finding that Hoard "unnecessarily expanded" the proceedings by attempting to have Webb disqualified. Although she had initially agreed to the appointment of Webb, she did not know at the time that Webb had asked Beveridge's attorney, Elizabeth Lindsey, to ask her husband, then-state Rep. Edward Lindsey, for a recommendation requesting Webb's reappointment to the Georgia Board of Examiners of Psychologists. Under deposition, Edward Lindsey said his wife had asked him via email for the recommendation, that he had made the recommendation to then-Gov. Sonny Perdue, and that Perdue had subsequently reappointed Webb. Only when Hoard became aware of the "political patronage between Rep. Lindsey and Dr. Webb" did she by necessity file a motion to disqualify Webb. "The failure to disclose the fact Dr. Webb obtained valuable political favors from the Lindseys constitutes constructive fraud under Georgia law," Hoard's attorneys argue. Webb had "an undisclosed conflict of interest," yet when Hoard tried to do something about it, "the trial court severely punished her." Hoard never would have agreed to the consent order appointing Webb as custody evaluator if "either Ms. Lindsey or Dr. Webb had come clean about the full extent of their relationship." Hoard should have been awarded attorney's fees because under the law, Beveridge and his attorney "unnecessarily expanded the proceedings by duping her into agreeing to a consent order that appointed Ms. Lindsey's crony as the 'independent' custody evaluator," the attorneys contend.

Beveridge's attorney argues that the trial court was correct in awarding attorney's fees in a case in which Hoard chose "to litigate not over custody or the best interests of the child, but instead chose to use the litigation as a personal vendetta against the custody evaluator." The state Supreme Court should affirm the trial court's award of attorney's fees to Beveridge for at least four reasons: the trial court correctly considered his attempts to settle the case and the financial circumstances of the parties; Hoard asserted a position that was completely contrary to both the law and facts; she unnecessarily expanded the litigation; and the award can be sustained under both § 9-15-14 and § 19-6-2. Among his three settlement offers, Beveridge offered Hoard better custody arrangements and more favorable finances than she actually received in the final decree. Hoard also prolonged the litigation through her relentless attacks on Webb when neither the law nor the facts supported having her disqualified. "The purpose of awards under § 9-15-14 is not only to punish abusive litigation behavior, but also to compensate parties 'who are forced to expend their resources in contending with [abusive litigation],'" the attorney argues. Many of Hoard's allegations of bias or conflict of interest "were based on exaggerated and misleading facts, if not pure fabrication." Contrary to Hoard's assertion, for instance, Beveridge's attorney was not Webb's "best friend." Webb testified that at the time she made her custody evaluation in this case, she did not know whether the husband of Beveredge's attorney had written a recommendation for her or not, and she said she did not even remember asking him to do so. "Appellant's abusive tactics included questioning the ethics and professionalism of anyone who disagreed with her," the attorney argues. She threatened to report Dr. Webb to her licensing agency, to report [Beveridge's] counsel to the State Bar, and even to place the judge under the 'same scrutiny.'"

Attorneys for Appellant (Hoard): Michael Bowers, Joshua Moore
Attorney for Appellee (Beveridge): Elizabeth Lindsey

LEWIS, JUDGE V. CHATHAM CO. BOARD OF COMMISSIONERS ET AL. (S15A1741)

A probate court judge who sued the **Chatham County** Board of Commissioners for paying magistrate judges more than he earns, is appealing a local court's ruling against him.

FACTS: In 2013, the Board of Commissioners gave two 5 percent increases to judges of the Magistrate Court and Recorder's Court. The supplements, which the County called "longevity increases," were based on the number of four-year terms completed by the various Magistrate and Recorder's Court judges and were made retroactive to January 2008. However, the County did not give the same raise to Probate Court Judge Harris Lewis. Lewis then sued the County and Commissioners, claiming that the 2007 local legislation, which the County claimed was the basis for the longevity increases, applied equally to him. Specifically, he sought a declaration from the trial court that the County's failure to give him the same increase in compensation that it gave Magistrate Court and Recorder's Court judges violated the equal protection clause of the Georgia Constitution. He also asked the trial court to order the County to pay him the increase and make it retroactive to Jan. 1, 2008. On March 23, 2015, the trial court entered an order denying both his requests. Lewis now appeals to the state Supreme Court.

ARGUMENTS: As background, attorneys for Lewis argue that judges of Georgia's various courts are paid based on either state statute or local legislation, which sets compensation for a particular county. Under state statutes, minimum salaries are set for all judges of the Superior, Probate, Magistrate and Juvenile Courts in Georgia. State law, however also allows a judge's compensation to be set instead by local law. Under Georgia Code § 15-10-23 and § 15-9-63, the minimum salary for both magistrates and probate judges in a county with a population of 250,000-299,000, such as Chatham, is the same: $91,682.66. State statutes also provide for longevity increases for judges who complete more than one four-year term of service. Lewis' attorneys argue that under the state statutes, judges are not entitled to the longevity increases if their salaries under local legislation exceed what is provided under the state system. According to Lewis, in 2007, after determining that judges' salaries were inconsistent and "all over the board," the County got the Georgia General Assembly to pass local legislation that set the salaries for Chatham's magistrates and probate judge at 80 percent of the annual salary paid to Superior Court judges. In addition, they would receive 80 percent of any supplement given to a Superior Court judge. In other words, Lewis argues, "just like the statewide compensation statutes, the 2007 legislation set equal salaries for the judges of the probate and magistrate courts." But the Magistrate Court and Recorder's Court judges wanted more, Lewis claims, and they asked the County for 90 percent of a Superior Court judge's pay. So in 2013, the County gave just the magistrates and Recorder's Court judges two 5 percent increases. But they were not applied to the state minimum salaries for Magistrate Court judges ($91,682.22) "as would be appropriate if providing a longevity increase under state law; rather the 5 percent increases were calculated upon the compensation set for the Magistrate Court judges under local law – 80 percent of the Superior Court judge pay or $149,069," Lewis' attorneys argue. "Further, while state law longevity increases are always calculated upon, and tied back to, the base statutory minimum, the Chatham County increases were compounded; that is, the second 5 percent increase was applied upon the salary as increased by the first 5 percent raise. The result was that the base compensation for a Chatham County Magistrate Court judge was increased to $164,254 – nearly the 90 percent of the total Superior Court pay initially requested by the Magistrate Court

judges." In addition, each magistrate was awarded about $31,900 in back pay longevity increases. In 2015, after the judge sued, the local delegation got the legislature to approve new local legislation to replace the 2007 legislation, the judge contends. Under the new law, while the Probate Court judge's salary remains at 80 percent of Superior Court judges' pay with an annual longevity increase of $800, Magistrate Court judges' pay has moved up to 85 percent plus a longevity increase of $850.The new legislation includes a provision that allows the Magistrate Court judges to retain their two earlier longevity pay increases so their pay under the new law wasn't reduced. The history of the 2007 legislation shows that the legislature intended to replace the "piece-meal legislation" that sets judges' salaries to achieve uniformity and avoid inequity, the judge's attorneys argue. With all of that as background, Lewis' attorneys argue that the trial court erred in ruling against Lewis' petition asking the court to rule that the granting of the local longevity supplement to the Magistrate Court judges but not to Lewis violated the equal protection clause of the state Constitution. "Appellant [i.e. Lewis] and the Magistrate Court judges were 'similarly situated' under the express language and purpose of the 2007 legislation," they argue. Furthermore, "both in statewide and local legislation, the value of the services provided by the Probate and Magistrate judges was determined to be equal." "There is no 'rational basis' for the disparate treatment which reasonably relates to the objective of the 2007 legislation." The County's actions "turned the 2007 legislation on its head by 1) destroying the previously existing uniformity as to how compensation is calculated for the inferior court judges of Chatham County, and 2) creating the very inequities it was designed to eliminate," the judge's attorneys argue. The trial court also erred in denying the judge's petition for a writ of mandamus to force the County to pay him the same supplements as it awarded to the Magistrate and Recorder's Court judges. The trial court reasoned that neither state law nor the 2007 local legislation provided for local longevity pay to Lewis. However, Lewis' "clear legal right" springs not from legislation but "from the equal protection clause of the Georgia Constitution as a result of the County's arbitrary and inequitable actions in 2013," the attorneys contend. "The County's actions in this matter were not the product of a mistake but rather were deliberate and implemented as a 'means to an end' – to provide increases in compensation to certain judges that requested them, regardless of the local legislation and resulting inequity."

Attorneys for the County argue that Lewis has "no clear legal right" to longevity pay under the Georgia Code "because it is clear from the plain language of the Code that it does not apply to a probate judge as highly compensated as Chatham County's." Georgia Code § 15-9-65, which deals with longevity increases for Probate Court judges, is the only law that provides these judges a longevity supplement, but it carves out this exception: "This Code section **shall not** be construed to affect any local legislation except where the local legislation provides for a salary lower than the salary provided in" § 15-9-63, which is the state statute that sets minimum salaries for probate judges. At the same time, however, § 15-10-23, which sets the magistrate judges' minimum salaries, includes the 5 percent longevity supplement, but without the exception that applies to probate judges. Lewis also has no right to the longevity pay based on the local act, which is controlling and which does not provide for longevity pay for the probate judge. And he has no legal right based on the Association County Commissioners of Georgia Manual, the lawyers contend. The probate judge quotes no general law that equates a magistrate judge to that of a probate judge. "Further, if the Legislature intended these two different courts to be treated

the same, it would not have two separate pay schemes in two different" Georgia Code sections. Lewis "has no clear right to equal protection under the law," the County's attorneys contend.
Attorneys for Appellant (Lewis): Owen Murphy, Noble Boykin, Jr.
Attorneys for Appellee (County): R. Jonathan Hart, Jennifer Burns

2:00 P.M. Session

MOSLEY, SOLICITOR GENERAL ET AL. V. LOWE (S15A1722)

The **Clayton County** Solicitor General is appealing a Superior Court ruling that granted a woman's request to expunge from public view records of her 1996 arrest for simple assault.

FACTS: In February 1996, Belinda Lowe was arrested by the Clayton County Sheriff's Office and charged with simple assault after the alleged victim, a woman, filled out and signed an Application for Criminal Arrest Warrant. But at trial, the alleged victim, who was the prosecution's only witness, failed to appear. On May 28, 1996, the State Court granted the prosecution's motion to dismiss or "Nolle Prosse" the charge because the witness had "failed to appear." In August 2014, Lowe submitted an application to the Clayton County Sheriff's Office seeking to restrict her arrest record under the state's record restriction statute, Georgia Code § 35-3-37. The Clayton County Solicitor General's Office denied Lowe's restriction request, stating the denial was based in part "upon the subsequent arrests in 1997 and 2009 for violent offenses." On Nov. 13, 2014, Lowe petitioned the Clayton County Superior Court asking the court to review the denial of her restriction request, as authorized under § 35-3-37. Mosley and Sheriff Victor Hill opposed restricting her arrest records, arguing that while a 2013 amended version of the law expanded the grounds for restricting criminal history record information, it did not apply retroactively to Lowe. And under the statute that applied to her, they had no option other than to deny her application. However, the trial court disagreed and ruled in Lowe's favor, finding that the legislature did intend that the record restriction statute, as amended, "should apply to arrests occurring before July 1, 2013, and did not express any intention to restrict the review of such a request to the substantive law relative to expungement and record restriction that was in effect at the time of the arrest." The trial court stated that the amended statute "is predominantly procedural, as it sets forth the method that one uses to obtain record restriction and the guidelines that should apply to such a request." Therefore, because the amended statute was "procedural" as opposed to "substantive," the trial court found it constitutionally could be applied retroactively to Lowe's 1996 arrest records, and the court ordered the record restricted. The Solicitor General and Sheriff now appeal to the state Supreme Court.

ARGUMENTS: Attorneys for the prosecutor argue the trial court erred in applying the current amended version of § 35-3-37 retroactively and granting Lowe's application for record restriction. The amendments created additional "substantive" rights, duties and obligations. It is not merely a "procedural" law, and the Georgia Constitution prohibits the passage of "retroactive laws" unless the statute is merely procedural. Instead, "legislation which affects substantive rights may operate prospectively only," the attorneys write in briefs. "Substantive law creates rights, duties and obligations, whereas procedural law prescribes the methods of enforcement of rights, duties and obligations." Here, the amendments have "created additional rights for individuals to have their criminal record restricted," the attorneys argue. Prior to the recent

amendments, Lowe would not have been eligible for record restriction, they contend. "Therefore, the amended, current statute clearly provides Lowe with a substantive right that she did not have prior to its enactment." The amended law also created new obligations for the prosecuting attorney who must now take steps to restrict criminal history record information she was not required to restrict before. "It is evident that this provision does not merely prescribe the methods of enforcing rights and obligations, but creates them," they argue. "The creation of these rights and obligations makes amended § 35-3-37 **substantive** in nature, and a retroactive application would be unconstitutional." Under the statute that applied at the time of Lowe's alleged offense, the restriction application had to be denied if the charge was dismissed. Specifically, the earlier statute stated that, "After the filing of an indictment or accusation, a record shall not be expunged if the prosecuting attorney shows that the charges were nolle prossed, dead docketed, or otherwise dismissed because:…**(C) A material witness refused to testify or was unavailable to testify…."** Even if the trial court properly applied the amended statute retroactively, Lowe failed to meet her burden of proving that the harm to her outweighed any public interest. The amended statute says a decision by the prosecuting attorney to decline a request to restrict access to a criminal history shall be upheld "unless the individual demonstrates by clear and convincing evidence" that "the harm otherwise resulting to the privacy of the individual clearly outweighs the public interest in the criminal history record information being publicly available." "Nowhere in the record is there any evidence that Lowe suffered harm to her privacy." Lowe's references to various studies "hardly constitutes *evidence* of any actual harm," Mosley's attorneys argue. "What the record reveals, however, is that Lowe had subsequent arrests in 1997, 2000, and 2004, which she does not seek to have restricted." A background check would to prospective employers reveal not only her 1996 arrest but all the others as well.

Lawyers with the Georgia Justice Project who are representing Lowe argue the trial court made the right ruling. "By its clear language, the amended Restriction Statute applies to all arrests, including those that occurred prior to July 1, 2013," which is the state the amended statute took effect. The statute specifically says: "…*as to arrests occurring before July 1, 2013,* an individual may, in writing, request the arresting law enforcement agency to restrict the criminal history record of information of an arrest…, and "*the prosecuting attorney shall review the request to determine if the request meets the criteria set forth in subsection (h) of this Code section for record restriction….*" Subsection (h) states that access to the record will be restricted if "all charges were dismissed or nolle prossed." The amended law was part of the recent comprehensive reform of Georgia's criminal justice system in an effort to reduce recidivism. "An important component of these reform efforts was and continues to be increasing access to housing, education and employment for people who have been involved in the criminal justice system in Georgia," the attorneys argue. "Revisions to Georgia's record restriction law address reform goals directly because the record of an arrest, even when it did not lead to conviction, can limit an individual's ability to find work, housing or get educational grants." The trial court correctly held that the amended statute is primarily procedural in nature and therefore it is not unconstitutional to apply it retroactively to Lowe's 1996 arrest. Even if the Supreme Court were to decide that the former statute, rather than the amended one, applied, Lowe's arrest still would be subject to record restriction. "On appeal, Solicitor Mosley and Sheriff Hill rely solely on the provision in the prior version that provides that a record may not be restricted if a 'material witness refused to testify or was unavailable to testify…" But there was no evidence that the

witness was either, only that she didn't show up for court. "In this case, Appellants [i.e. Mosley and Hill] have presented no evidence that they made reasonable efforts to locate the complaining witness and secure her presence at the hearing," the attorneys argue. "Given the paucity of evidence on this issue, the complaining witness cannot be found to have been 'unavailable to testify' under Georgia law, and there is no basis for denying Ms. Lowe's restriction request on this basis."
Attorneys for Appellants (Mosley): Jack Hancock, A. Ali Sabzevari
Attorneys for Appellee (Lowe): Brenda Smeeton, Michele Young

TYE v. THE STATE (S15A1522)

In this **Fulton County** case, a young man who was 17 years old when he was convicted of murder is appealing his conviction and sentence to life in prison for causing the death of a man while stealing his car.

FACTS: On Nov. 18, 2006, Vernon Rouse was attacked at a Citgo gas station off Campbellton Road in Atlanta. It was late at night, and Rouse had stopped at the gas station after leaving his second job. According to prosecutors, Cortez Tye and Kenyatta "Big Boy" Calhoun approached Rouse while he was in the parking lot intending to steal his 2006 silver Chevrolet Equinox car. A struggle ensued as Tye tried to get the keys to Rouse's car, and Tye knocked Rouse to the ground, causing him to hit the back of his head. Tye and Calhoun then got into Rouse's car and drove away. Sometime after, an Atlanta Police Department officer responded to a call regarding an injured man lying in the parking lot and arrived on the scene in time to speak with the victim. Rouse was unable to move, but could communicate with the officer and said he had been hit in the back of the head by an unknown object by a young African American male and that his car had been stolen. An ambulance transported Rouse to Atlanta Medical Center, where he was unable to move his extremities upon arrival, suffering from symptoms consistent with blunt force trauma.

Four nights later, a different Atlanta police officer patrolling Campbellton Road attempted to pull over a 2006 silver Chevrolet Equinox because the driver was not wearing a seatbelt. When the officer turned his car around to investigate the seatbelt infraction, the driver sped off and turned down a side street. Once the car reached a parking lot of a nearby apartment complex, all six people in the car took off running. The Officer pursued the driver, Tye, on foot and eventually found him hiding in a closet of one of the vacant apartments. Tye was arrested for not having his lights on and for obstruction, but it had not yet been reported that the car was stolen. Darrian Dupree, one of the passengers who was also arrested that night, provided police with a statement that Tye told him he had stolen the car from a man at the gas station off Campbellton Road. In the course of their investigation, law enforcement officers learned that Tye and the others had been involved in a string of carjackings at the same gas station. Two separate victims of carjackings from the Citgo station identified Tye and the men as part of the group that had stolen their cars.

At the time of the attack, Rouse was an end-stage renal patient who had been on dialysis for over 20 years. His condition rapidly worsened after the trauma, requiring a respirator, resulting in a loss of speech, and requiring medication to breathe. He passed away Dec. 8, 2006 – less than a month after the attack. The cause of death was an infection in his lungs from the pneumonia he developed in the hospital as a result of his injuries. Tye was arrested and formally

charged with two counts of felony murder (in the commission of robbery and aggravated assault), one count of robbery by force, and one count of aggravated assault.

Shortly before trial, Tye's trial attorney filed a "special plea of incompetency" and a request for a competency examination as provided under Georgia Code § 17-7-130, which the trial court denied. In 2008, a jury convicted him on all counts, and he was sentenced to life in prison. Four to five years later, another attorney for Tye filed a motion for new trial based on the denial of the pretrial competency hearing. That attorney arranged for a comprehensive mental competency examination of Tye. The trial court held a hearing where Tye's expert testified that Tye was presently incompetent and would have been less competent at the time of trial. She also testified that state-administered "competency-restoration" programs could improve Tye's understanding of the criminal trial process so that he would be able to assist his attorney and participate in his own defense. However, the State offered a different expert who testified that Tye was, in fact, competent to stand trial and would have been competent in 2008. In 2013, the trial court denied Tye's motion for a new trial, concluding that his competency to stand trial could be determined retroactively and concluding that Tye had been competent in March 2008 at the time of his trial. Tye now appeals to the state Supreme Court.

ARGUMENTS: Tye's main arguments revolve around the trial court's initial denial of his request for a competency examination and its subsequent denial of his motion for new trial. Tye maintains that he was and is incompetent to stand trial, and the trial court erred in ruling that Tye's competency at trial could be retroactively determined five years after his trial. The denial of Tye's pre-trial request for a psychological competency examination "was flatly contrary to Georgia law as embodied in § 17-7-130," Tye's attorney argues in briefs. Given proper assistance from the State, Tye could be restored to competency for a re-trial, but that did not happen when he was tried in 2008. Tests showed that Tye scored in the lowest 6th percentile for working memory and IQ, and the lowest 4th percentile for verbal comprehension. His trial attorney, who was assigned to the case only shortly before trial, explained that Tye did not seem to understand the proceeding and could communicate "little, if none." As a result, Tye's lack of competency interfered with his right to effective assistance of counsel. The "only appropriate remedy for the trial court's erroneous denial of the requested pretrial competency evaluation – the only remedy calculated to protect the critically important constitutional interests implicated in the circumstances of this case – is to order Mr. Tye to be enrolled in the State's competency-enhancement program, and then (upon his completion of that program and certification, by State-engaged officials, as competent to stand trial) the granting of a new trial to him, then so 'restored,'" Tye's attorney contends.

The State, however, argues that the trial court correctly denied the motion for new trial and correctly found that Tye was competent to stand trial in 2008. The State's expert, a forensic psychiatrist, testified contrary to Tye's expert that Tye "demonstrated an ability to understand his legal situation and meaningfully discuss plea options and their possible consequences as they pertained to his specific case." She testified that she did not think that Tye's borderline intellectual functioning, as found by the defense's expert rendered him incompetent. Neither of Tye's first two trial attorneys even raised any concern with his competency. Only the third questioned Tye's competency to stand trial, saying Tye was having a "great deal of confusion about the charges against him and his circumstances regarding the charges." Georgia Code § 17-7-130 states that, "If the accused files a special plea alleging that the accused is mentally

incompetent to stand trial, it shall be the duty of the court to have a bench trial, unless the state or the accused demands a special jury trial, to determine the accused's competency to stand trial." While the State conceded that the trial court's initial denial of a pretrial competency hearing was likely error, the trial court properly conducted a post-trial competency hearing in accord with the procedure established by the Georgia Supreme Court in its 1982 decision, *Baker v. State.* In *Baker,* this Court specifically set up the procedure that should be followed in cases where a "special plea of incompetency" is filed prior to trial, the trial court denies the request, and the case proceeds to trial. "In such a case, the matter should be remanded to the trial court for a determination of the defendant's competence at the time of trial through a post-conviction hearing," the State writes in its brief. That is precisely the procedure that was followed here with the August 2013 competency hearing. There was ample evidence, both at the competency hearing and at trial, to show that Tye was competent at the time of trial, the State contends. The trial court was well within its discretion to deny the motion for new trial, and Tye failed to meet the standard of proof for incompetency. Therefore, Tye's arguments do not have merit, and this court should affirm the trial court's denial of the motion for new trial, the State contends.
Attorney for Appellant (Tye): Roger Wilson
Attorneys for Appellee (The State): Paul Howard, Jr., District Attorney, Paige Whitaker, Dep. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Crowder, Asst. A.G.