**Supreme Court of Georgia**
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# SUMMARIES OF OPINIONS

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**STATE OF GEORGIA ET AL. V. INTERNATIONAL KEYSTONE KNIGHTS OF THE KU KLUX KLAN, INC. (S16A0367)**

The Ku Klux Klan has won a partial victory under a decision today by the Supreme Court of Georgia.

In today's unanimous opinion, written by **Justice Keith Blackwell**, the high court has dismissed the State's appeal of a **Fulton County** court ruling because the state Department of Transportation failed to follow the correct procedure in filing its appeal.

As a result, the Klan's lawsuit against the State for denying its application to participate in Georgia's "Adopt-A-Highway" program may proceed to trial.

According to the facts of the case, the Adopt-A-Highway program was created in 1989 and is administered by the Georgia Department of Transportation. The program's purpose is to enlist volunteers to help remove litter from state roadsides. Volunteers accepted into the program adopt at least a one-mile stretch of highway and agree to remove litter from both sides of the road at least four times a year for a two-year period. According to the program's brochure, applicants include any "civic-minded organization, business, individual, family, city, county, state, or federal agency." In exchange for the volunteer work, the brochure states that to "show the community that you are doing your part to clean up Georgia, the department will erect a sign with the Adopt-A-Highway logo and your group's name." In May 2012, April Chambers and Harley Hanson, members of the International Keystone Knights of the Ku Klux Klan, submitted to Union County an application to participate in the Adopt-A-Highway program and remove trash along a portion of State Route 515. In their application, they requested that "Georgia IKK Ku Klux Klan" be the name listed on the signs that would be placed along both sides of the

highway. A County Commissioner gave them trash bags and vests they could use to begin picking up the trash. Later that month, however, they received a letter stating they needed to apply instead directly to the state Department of Transportation, which they did. On June 12, 2012, Chambers and Hanson received a letter from the then-Commissioner of Transportation, denying their application due to the Ku Klux Klan's "long-rooted history of civil disturbance" and the "potential for social unrest." The letter from the State said that "were the application granted, the goal of the program, to allow civic-minded organizations to participate in public service for the State of Georgia, would not be met." The same day, the State also published a press release announcing its denial of the Klan's application, according to briefs filed in the case.

On Sept, 13, 2012, the KKK sued the State in Fulton County Superior Court, naming the Department of Transportation, the Commissioner and Governor as defendants. The Klan sought a permanent injunction prohibiting the State from denying the Klan an Adopt-A-Highway Permit and a "declaratory judgment," declaring that the State was wrong to deny the permit and that the Adopt-A-Highway program violated the state Constitution, as well as the Klan's right to free speech. It sought a "writ of mandamus" to force the Department to approve its application. The State filed a motion asking the court to dismiss the lawsuit on the ground that the Klan's claims for declaratory and injunctive relief were prohibited by the legal doctrine of sovereign immunity, which shields the State and its agencies from being sued. On May 31, 2013, the trial judge dismissed the Klan's mandamus claim but allowed the claims for a permanent injunction and the declaratory judgment to go forward.

In March 2014, both sides filed motions for "summary judgment," which a judge grants after deciding a trial is unnecessary because the facts are undisputed and the law falls squarely on the side of one of the parties. The trial court partially granted the Klan's motion for summary judgment and denied the State's. Specifically, the judge rejected the State's argument that the claims were barred by sovereign immunity. In her ruling, the judge acknowledged the state Supreme Court's recent 2014 ruling in *Ga. Dept. of Natural Resources v. Center for a Sustainable Coast, Inc.*, which stated that sovereign immunity bars claims for injunctive relief. However, the judge held that this case was different because the Klan was raising constitutional claims regarding free speech. The judge stated in her judgment that "a denial of an application to the [Adopt-A-Highway program] for public concern related to a group's history of civil disturbance represents an unconstitutional infringement on an applicant's right of free speech," and she further prohibited the Department of Transportation from "denying applications to the [program] for public concern related to a group's history of civil disturbance." The State then appealed to the Georgia Supreme Court.

In today's opinion, the high court has provided an extensive explanation of an area of appellate law that has caused tremendous difficulty in the past. In this case, it has concluded that it lacks the authority – or jurisdiction – to consider the State's appeal.

"To invoke the jurisdiction of an appellate court, an appellant must bring its appeal in a way that comports with the requirements of the Appellate Practice Act of 1965 as amended," today's 33-page opinion states. If one has an automatic right to appeal under the law, he may do so by filing a "notice of appeal" in the trial court. In some cases, however, there is no automatic right to appeal and one must file an application to appeal, asking the court to exercise its discretion and grant the appeal.

In this case, the Department had no automatic right to appeal under Georgia Code § 5-6-35 (a) (1) because it involved a judgment by a superior court regarding a decision by a state administrative agency. Yet the Department failed to file an application to appeal.

"Because the Department appeals from a decision of a superior court reviewing a decision of a state administrative agency, it was required under § 5-6-35 (a) (1) to bring its appeal by way of an application for discretionary review," the opinion concludes. "The Department failed to do so, and that circumstance leaves this Court without appellate jurisdiction. Accordingly, this appeal must be dismissed."

**Attorneys for Appellants (State):** Samuel Olens, Attorney General, W. Wright Banks, Jr., Dep. A.G., Julie Jacobs, Sr. Asst. A.G., Daniel Strowe, Asst. A.G., Brittany Bolton, Asst. A.G.
**Attorneys for Appellees (KKK):** Alan Begner, Cory Begner, Nora Benavidez

**SCOTT v. THE STATE (S16A0323)**

The Georgia Supreme Court has upheld as constitutional the Georgia statute which criminalizes sexual Internet contact with a child.

As a result of today's opinion, a man arrested for sexual exploitation of children has lost his appeal of a **Camden County** judge's refusal to throw out his charges before the case goes to trial. The man argued the statute violated his right to free speech and is therefore unconstitutional.

But in today's opinion, **Justice Carol Hunstein** writes for a unanimous court that the statute "is not unconstitutionally overbroad under the First Amendment," and the high court has upheld the lower court's decision.

Jack Bernard Scott was arrested in February 2014 for sexual exploitation of children, which allegedly occurred between November and December of 2013. He was indicted in January 2015 on two counts of the offense stemming from allegedly engaging in sexually explicit online communications with a minor 15 or younger. In June of that same year, Scott's attorneys filed a motion to dismiss and quash (or throw out) the indictment, arguing that the state's "Computer or Electronic Pornography and Child Exploitation Act (Georgia Code section 16-12-100.2 (e)) violated his First Amendment right to free speech and was "overly broad." The statute makes illegal any Internet contact with a child involving "explicit verbal descriptions or narrative account of sexually explicit nudity, sexual conduct, sexual excitement, or sadomasochistic abuse that is intended to arouse or satisfy the sexual desire of either the child or the person." The trial court denied his motion, letting the case against Scott stand and continue down the path to a jury trial. Scott then appealed that denial to the state Supreme Court, which agreed to review the case to consider the merits of Scott's First Amendment challenge.

In today's opinion, the high court interprets the statute as prohibiting online contact involving verbal descriptions of any of the four categories of offending content listed in the statute that are made "with the specific intent to arouse or satisfy the sexual desires of the accused or the child victim." Those four categories are: "sexually explicit nudity," "sexual conduct," sexual excitement," or "sadomasochistic abuse." "The crime of obscene Internet contact with a child," the opinion says, is therefore comprised of (1) online contact involving offending content with someone believed to be 15 years old or younger and (2) the intent to arouse or satisfy the sexual desire of the child or the accused.

"Having thus construed the statute, we now turn to the question of whether the statute…can on its face survive First Amendment overbreadth scrutiny."

In today's 19-page opinion, the Court concludes it can, finding that the statute "does not prohibit a real and substantial amount of constitutionally protected expression."

"The key to this conclusion is the statute's mens rea element, which requires the accused, with the knowledge or belief that the victim is in fact a child younger than 16, to make contact with that victim with the specific intent to arouse or satisfy his own or the victim's sexual desire," the opinion says. "This specific intent requirement dramatically reduces the range of expression that is subject to the statutory prohibition."

"Though creative attorneys may dream up 'fanciful hypotheticals' under which the statute here reaches protected expression, we are not convinced that these scenarios are sufficiently numerous or likely to warrant the statute's wholesale invalidation."

The Supreme Court upholds the Camden County judge's refusal to throw out Scott's charges, and his case will proceed to trial.

**Attorneys for Appellant (Scott):** Mark Bennett of Bennett & Bennett, Cris Schneider of the Schneider Law Firm, and Jason Clark of Jason Clark, P.C.

**Attorneys for Appellee (State):** Jackie Johnson, District Attorney, Andrew Ekonomou, Asst. D.A., and Jay Sekulow, Spec. Asst. D.A. of the Brunswick Judicial Circuit District Attorney's Office

**Attorneys for Amicus (National Center on Sexual):** Elizabeth Hodges of Cohen, Pollock, Merlin & Small, P.C., and Patrick Trueman, Danielle Bianculli, and Brittany Conklin of The National Center on Sexual Exploitation and Civil Lawyers Against World Sex-Slavery

**SCAPA DRYER FABRICS, INC. V. KNIGHT ET AL. (S15G1278)**

A man whose cancer was caused by exposure to asbestos has lost a **Ware County** jury award of more than $4 million under an opinion today by the Supreme Court of Georgia.

With today's unanimous decision, written by **Justice Keith Blackwell**, the high court has reversed a Georgia Court of Appeals decision and ruled that an expert witness's testimony that the man's cancer was caused by exposure to asbestos while working at a textile company's mill should have been excluded by the trial court.

According to the facts of the case, in 2009, Roy Knight was diagnosed with malignant mesothelioma, a cancer of the pleural lining of the lungs that is most commonly caused by inhaling airborne asbestos fibers. Knight and his wife sued Scapa Dryer Fabrics, Inc. Nearly 40 years earlier, Knight had worked at Scapa's Waycross, GA mill on multiple occasions as an independent contractor doing sheet metal work from 1967 to 1973. Scapa made dryer felts for the paper-making industry, and most of the felts were made from yarn that contained asbestos. Knight also helped maintain the plant's pipe and boiler insulation which contained asbestos fibers as well. In addition to Scapa, the Knights sued Union Carbide Corporation, claiming that Knight's mesothelioma was caused by his exposure to asbestos which Union Carbide had sold to Georgia Pacific, LLC (not a party to the lawsuit). The Knights alleged that Georgia Pacific had used the asbestos to manufacture a joint compound and that Knight was exposed to the asbestos during drywall installation at his house between 1973 and 1975.

Before trial, Scapa filed a motion to exclude the testimony of the Knights' expert witness, Dr. Jerrold Abraham, under what is now Georgia Code § 24-7-702, the statute that restricts

expert testimony. The trial judge denied the motion and the case went to trial. During the trial, the jury considered evidence that Knight was also exposed during his life to many other products containing asbestos and considered whether 29 additional entities (also not parties) associated with these products were at fault for Knight's development of cancer. The jury concluded that Knight's mesothelioma was caused in large part by the negligence of defendants Scapa and Union Carbide, and in part by the negligence of Georgia Pacific. Under Georgia Code 51-12-33, which allows for the apportionment of damages according to the percentage of fault, the jury returned a verdict of $10.5 million in compensatory damages to the Knights, apportioning 20 percent of the fault to Georgia Pacific, which had settled with the Knights before trial, 40 percent to Union Carbide, which also settled with the Knights, and 40 percent to Scapa. The judgment against Scapa amounted to $4,187,068.95. Scapa appealed to the Georgia Court of Appeals, challenging the sufficiency of the evidence and alleging numerous trial court errors, including the admission of Abraham's testimony. A divided Court of Appeals upheld the lower court's ruling, finding that the trial court did not err when it concluded that Abraham's testimony was admissible under the expert testimony statute (then Georgia Code § 24-9-67.1). Specifically, the majority rejected Scapa's argument that Abraham's testimony was based on "junk science" and therefore inadmissible under the law. Scapa then appealed to the Georgia Supreme Court, which agreed to review the case to determine whether the Court of Appeals erred when it concluded that the trial court was authorized to admit the testimony of the Knights' expert witness.

"To prove causation as against Scapa under settled Georgia law, Knight and his wife had to show that exposure to asbestos at the Waycross facility was 'a contributing factor in bringing about [his mesothelioma,]'" today's opinion says. "We previously have rejected the notion that the 'contribution to the resulting injury [must] be 'substantial' to show legal causation. At the same time, however, we cautioned that a 'de minimis' contribution is not enough." ("De minimis" is Latin for minimal to insignificant, or trifling.) "Put another way, although Knight and his wife did not have to prove that exposure to asbestos at the Waycross facility made a *substantial* contribution to his mesothelioma, they did have to show that it made a *meaningful* contribution."

At trial, the Knights' expert witness, Abraham, testified that exposure to asbestos beyond the breathable asbestos fibers that are natural in the air can cause mesothelioma, regardless of the extent of the exposure. In testimony, "Dr. Abraham essentially told the jury that it was unnecessary to resolve the extent of exposure at the Waycross facility – if the jury determined that Knight was exposed at the facility to *any* asbestos beyond background, that exposure contributed to his cumulative exposure, and according to Dr. Abraham, it was, therefore, a contributing cause of the mesothelioma," today's opinion says. Twice in his testimony, Abraham said he only needed to know that the exposure was more than "zero."

"In the circumstances of this case, we agree that the critical opinion conveyed by Dr. Abraham in his testimony – that any exposure to asbestos at the Waycross facility was a cause of Knight's mesothelioma, regardless of the extent of the exposure – does not 'fit' the legal question of causation that the jury was charged with resolving, and for that reason, the admission of his testimony under former Georgia Code § 24-9-67.1 (b) was not helpful to the jury and amounted to an abuse of discretion."

"And given that Dr. Abraham's opinion 'went to the heart' of the dispute about the extent of exposure and causation, 'the erroneous admission of the opinion requires that we reverse the Court of Appeals' affirmance of the trial court's judgment."

**Attorneys for Appellant (Scapa):** William Barwick, J.D. Smith, H. Lane Young, M. Elizabeth O'Neill

**Attorneys for Appellees (Knights):** Robert Buck, Denyse Clancy

**DOCTORS HOSPITAL OF AUGUSTA ET AL. V. ALICEA, ADMINISTRATRIX (S15G1571)**

The Georgia Supreme Court has cleared the way for a jury trial to proceed in a medical malpractice lawsuit brought by a woman against a **Richmond County** physician and hospital for violating her grandmother's directive not to perform extreme measures on her when she was in the process of dying.

With today's unanimous decision, written by **Justice David Nahmias**, the high court has upheld a Georgia Court of Appeals decision and ruled that if a physician is aware of a designated health care agent's directives but doesn't follow them, he cannot claim immunity from liability under Georgia law.

In November 2009, Bucilla Stephenson, then 89 years old, signed an "Advance Directive," naming Jacqueline Alicea, her granddaughter with whom she lived, as her health care agent. The document stated that Alicea was "authorized to make all health-care decisions for me, including decisions to provide, withhold, or withdraw artificial nutrition and hydration, and all other forms of health care to keep me alive." The directive stated that "in determining my best interest, my agent shall consider my personal values to the extent known to my agent."

According to family members, Stephenson often said, "when it's my time, it's my time, don't prolong it," and "she was ready to go when the good Lord called her." She specifically told her granddaughter that she did not want "to rely on a machine to have to live," including a ventilator that would breathe for her. In the advance directive, Stephenson initialed the option that said: "Choice NOT to Prolong Life."

In February 2012, Stephenson was admitted to Doctors Hospital of Augusta, LLC, and her granddaughter gave medical staff her grandmother's advance directive. While Alicea at one point approved a physician's request to insert a tube into Stephenson's chest to drain fluid from her lungs, she emphasized to medical staff that "no heroic measures were to be used" to prolong her grandmother's life, and she directed the doctor to call her before intubating her. Another physician, Dr. Phillip William Catalano, who was unfamiliar with the advance directive, later requested Alicea's consent to do a "surgical" thoracentesis to drain more fluid, to which she agreed. But he did not explain that he would have to intubate her and then put her on a ventilator, and he did not ask for her consent. Stephenson was taken off the ventilator in the recovery room, but two days later, Catalano had her intubated again and returned to a ventilator when she went into respiratory distress, again without consulting Alicea. Stephenson's condition worsened and during the next week, for her grandmother's sake, Alicea consented to a feeding tube, a bronchoscopy to remove pus from Stephenson's airway, and a tracheostomy to provide an alternative airway. When her kidneys began to shut down and she needed dialysis, Alicea gathered the family and authorized her grandmother's removal from the ventilator. On March 17, 2012, Stephenson died.

On May 14, 2013, Alicea sued Catalano and the hospital for breach of agreement, negligence, medical battery, infliction of emotional distress, and breach of fiduciary duty. Alicea alleged that by intubating her grandmother and putting her on a ventilator, they had prolonged her life when her condition was terminal. The procedures caused Stephenson to suffer and were contrary to her advance directive and Alicea's specific directions.

Attorneys for Catalano and Doctors Hospital filed a motion asking the trial judge to grant them "summary judgment," which a judge does only after determining that a jury trial is unnecessary because the facts are undisputed and the law falls squarely on the side of the party requesting it. They argued that under Georgia's Advance Directive Act (Georgia Code § 31-32-10 (a) (2) and (3)), they were immune from liability for intubating the grandmother on March 7, 2012; that they had obtained informed consent from Alicea for the March 5, 2012 surgical procedure they performed on the grandmother; and that they had obtained basic consent for both the March 5 procedure and the March 7 intubation. The trial judge, however, denied summary judgment to the physician and hospital, finding that there were disputed issues of fact that should be decided by a jury. The physician and hospital then appealed that ruling to the Georgia Court of Appeals, which accepted their pre-trial appeal. The appellate court then partially upheld the trial court's ruling by denying the doctor and hospital summary judgment on their claim that they were shielded from liability and that the lawsuit should be dismissed. The physician and hospital then appealed to the state Supreme Court, arguing that the General Assembly intended to broadly immunize health care providers for "failure to comply" with the directives of health care agents.

"The Court of Appeals rejected this reading of the statute, and so do we," today's 32-page opinion says. "Recall that a primary purpose of the Advance Directive Act is to ensure that in making decisions about a patient's health care, it is the will of the patient or her designated agent, rather than the will of the health care provider, that controls."

"If a provider is aware of what the agent has decided, and then proceeds as the statute mandates in § 31-32-8 (2) – either by complying with that decision or by taking the steps required when he is unwilling to comply with the decision – then he may look to the immunity provisions in § 31-32-10 (a) for protection. But a provider cannot claim this immunity when his action was not based in good faith on the agent's direction…." In other words, "when the health care provider makes the patient's health care decisions on his own, without relying in good faith on what the patient's agent directed, the provider must defend his actions without the immunity given in § 31-32-10 (a)."

"Because there is at least a disputed issue of fact as to whether Dr. Catalano acted with good faith reliance on any decision made by his patient's health care agent, Dr. Catalano cannot on motion for summary judgment claim the immunity that subsections (a) (1), (2), and (3) give to providers who honestly depend on such a decision to either comply with it or promptly inform the patient that they are unwilling to comply with it," the opinion says.

As a result, "the trial court correctly denied the defendants' motion for summary judgment as to their claim of immunity from civil liability under § 31-32-10 (a) (2) and (3), and the Court of Appeals correctly affirmed that ruling."

**Attorneys for Appellant (Doctors):** Kevin Race, David Johnson, Brett Tarver
**Attorneys for Appellee (Alicea):** Harry Revell, Kenneth Connor, Camille Godwin

**WASHINGTON, WARDEN, V. HOPSON (S16A0148)**

The state Supreme Court has reinstated a man's rape conviction that had been thrown out due to the improper conduct of a well-known former **Fulton County** prosecutor.

After successfully prosecuting the man, Assistant District Attorney Ashutosh Joshi went into private practice as a defense attorney and sought to represent the man, telling his parents he had believed during the trial that the victim was "lying." (In 2005, Joshi was in the midst of prosecuting Brian Nichols for rape the day Nichols went on a courthouse killing spree.)

According to the facts of this case, in June 2004, Jason Hopson met a young woman and her friend at a party at Zoo Atlanta that was sponsored by a local radio station. Both women had been drinking and proceeded to drink more with Hopson and his friends. According to briefs filed in the case, eventually the victim's friend got sick, and while the victim was waiting for her outside the restroom, Hopson approached and tried to kiss her, but she resisted. When the victim's friend returned from the restroom, Hopson offered her a glass of what appeared to be water. The friend took a sip before giving it to the victim, who then drank "quite a bit" of it. Within minutes, the victim felt dizzy and light-headed, and was unable to move. Her friend, who was also disoriented and vomiting, was unaware that Hopson dragged the semiconscious victim to a secluded and restricted area of the zoo, where he raped her. A Zoo Atlanta maintenance worker later found the victim unconscious in the restricted area, with her pants down and her shirt lifted. He saw Hopson nearby pulling up his pants. The worker called for security, and police later found Hopson in another area of the party.

In November 2004, Hopson was indicted for rape, kidnapping, aggravated assault, aggravated sexual battery and aggravated sodomy. In December of that year, a jury convicted him of rape and acquitted him of the remaining charges, other than aggravated assault, which it entered as "nolle prosequi," which means the prosecution decided not to pursue the charge. Hopson was sentenced to 15 years in prison for rape. Hopson appealed, but the Georgia Court of Appeals upheld the conviction.

In January 2007, Hopson's attorney filed an "extraordinary motion" for new trial, claiming prosecutorial misconduct that was new evidence and had only come to light after Hopson's trial. Specifically, Hopson claimed that Joshi had believed during the trial that the victim and her friend had been lying, and he therefore "had an ethical obligation" to inform the court and stop the trial, which he did not do. The trial court held a hearing on the extraordinary motion and in January 2009 denied the motion, finding the evidence was not "new evidence" as required to order a new trial, because it was no more than the prosecutor's opinion of the credibility of a witness. The judge noted the victim had never recanted her statement, and the facts upon which Joshi's opinion were based had been presented at trial and were known to the defense attorney. Hopson appealed that decision, and again the Court of Appeals upheld the trial court's ruling, finding that Hopson had not satisfied the six-pronged test for granting an extraordinary motion for a new trial. Hopson also filed in another court a petition for a "Writ of Habeas Corpus." Habeas corpus is a civil proceeding that allows already convicted prisoners to challenge their conviction on constitutional grounds in the county where they're incarcerated. They generally file the action against the prison warden, who in this case was Anthony Washington.

On June 30, 2015, the Chattooga County Superior Court granted Hopson habeas relief and threw out his conviction, finding that Hopson's constitutional right to due process had been

violated by Joshi who first prosecuted Hopson for rape, then left for private practice and solicited $15,000 from Hopson's family to secure Hopson's release based on his belief that the victim and her friend had lied at trial. Hopson's parents had recorded the conversation, in which Joshi told them that for the money, he could get Hopson released. "Due process, at its most basic level, should prevent a convicted felon from being propositioned for money from his former prosecutor," the habeas judge said. The warden, representing the State, then appealed to the Georgia Supreme Court.

"Joshi's conduct after Hopson's trial was unprofessional, and this Court has previously ordered that Joshi be publicly reprimanded for his ethical violation," **Justice David Nahmias** writes in today's unanimous opinion. "However, we reverse the habeas court's order, primarily because the factual findings underlying the habeas court's conclusions that constitutional violations occurred at Hopson's trial are clearly erroneous."

The habeas court was wrong in finding that Joshi "prosecuted Mr. Hopson in spite of his *knowledge* that Mr. Hopson was innocent and in spite of his *knowledge* that the alleged victim was lying." It incorrectly concluded that Joshi "let a man he knew to be innocent be convicted of rape."

"If Joshi had, in fact, done these things, he would have violated Hopson's due process rights," today's opinion says. But as the trial court found, and the Court of Appeals affirmed, "Joshi did not *know* that the victim and her friend testified falsely at Hopson's trial; he at most *believed* that, and his opinion was based solely on information that was available to the defense and the jury." Hopson "presented no new evidence on this issue to the habeas court."

"Thus, the habeas court's factual findings that Joshi *knew* that the victim was lying, presented testimony he *knew* to be false at trial, and failed to disclose evidence he *knew* to be exculpatory were clearly erroneous, because they were not supported by the evidence before the court," the opinion says.

The habeas court also erred in stating that Joshi "had a duty to stop the trial where he *believe[d]* that the main witness was lying," and Hopson's constitutional rights were violated because Joshi "proceeded with his prosecution of Mr. Hopson where he did not *believe* that the main prosecuting witness was truthful in her claim."

"But the relevant constitutional doctrines and ethical rules are framed in terms of *knowledge* and *evidence*, not mere subjective belief," the opinion says. The habeas court and Hopson "cite no authority requiring a prosecutor to dismiss a case based solely on personal doubts about the credibility of a witness that arise from the same evidence available to the defense, the court, and the jury."

In Georgia, the credibility of a witness is to be determined by the jury, and the prosecutor's opinion of a witness's credibility is not even admissible evidence, the opinion says. "Accordingly, even if Joshi really doubted the truthfulness of the victim's testimony at the time of Hopson's trial – rather than only in retrospect or only when asserting that belief served his attempt to extract money from Hopson's family – that would not amount to a constitutional violation."

That said, the state's high court points out in its opinion that Joshi's attempt to parlay his prior work as a State prosecutor into getting hired by the man he had once prosecuted "did constitute a blatant violation of his ethical responsibility as a lawyer."

"This Court and the Court of Appeals have previously indicated our agreement with the habeas court's condemnation of Joshi's conduct in this respect, and we reiterate that it was unscrupulous." However, Joshi's misconduct occurred long after Hopson's trial ended.

"The problem with the habeas court's reasoning is that there is no evidence in the record that Joshi was even considering leaving the district attorney's office at the time of Hopson's trial, much less that he had at that time contemplated the situation creating the conflict of interest he proposed to Hopson's family some 20 months later," the opinion says. "Accordingly, the habeas court also erred in concluding that Joshi violated Hopson's constitutional rights by unethically soliciting his business long after his conviction."

**Attorneys for Appellant (State/Warden):** Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Vicki Bass, Asst. A.G.

**Attorney for Appellee (Hopson):** J. Scott Key

**SMART V. THE STATE (S16A0393)**

A man sentenced in **Chatham County** to life in prison with no chance of parole for brutally beating his wife and strangling her to death in the presence of her 6-year-old son has lost his appeal in the Georgia Supreme Court.

Norman Smart argued among other things that the evidence against him was insufficient to prove his guilt. But in today's unanimous opinion, **Justice Carol Hunstein** writes that the evidence at trial "was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that Appellant was guilty of the crimes of which he was convicted."

According to the facts of this high-profile case, on June 6, 2014, a man making a delivery to the home of Norman and Lauren Smart in Wilmington Island, GA witnessed the couple arguing and heard the husband say, "This B's going to make me F her up." Later that night, Lauren, called her friend, Maranda Self, to ask if she would buy her some vodka so she could relax. She told Self that Norman, had left to go out drinking with friends and had slashed her tires before he left, so she could not go to the store herself. Self took the liquor to her, but didn't stay long as Lauren asked her to leave, panicking when she thought she saw Norman's headlights coming down their street.

The morning of June 7, 2014, Savannah-Chatham Metropolitan Police Officer Ryan Smith responded to a 911 call on Walthour Road in Chatham County. Norman, who had placed the 911 call, led the officer to a back bedroom where the officer found a white female lying on her back on the floor. There was blood on both her pants legs and a puddle of blood beside her, and injuries were apparent on her face. The officer could tell she was dead. Norman told the officer he had returned home at about 1:30 a.m. and found his wife intoxicated. He said she had passed out on the floor and he left her there, covering her with a blanket. When he awoke the next morning, he found her unresponsive. He said he called 911, and while on the phone, attempted to perform CPR. Lauren's 6-year-old son later told a friend and family members that he had heard, "screaming, screaming, screaming," and had also heard Norman hitting his mother during the night. The little boy imitated punching, saying, "bam, bam, bam, bam," according to briefs filed in the case. Norman later told the child the noise he had heard was only thunder, but the boy said he knew it was Norman wearing his boxing gloves and hitting his mother as he always wore the gloves when he hit her. The child said his mother was screaming at Norman to "please stop."

The medical examiner who did the autopsy testified that Lauren died from multiple blunt force injuries, as well as strangulation. He described her numerous injuries as the result of "overkill." She had a left chest fracture and multiple rib fractures. Her tongue was bleeding from four areas, consistent with having been punched in the mouth and face. She had abrasions and bruises on her face, head, neck, back, right shoulder, knees, hips and buttocks. The internal examination revealed multiple bleeding injuries as well as swelling on the brain. She had multiple liver, kidney and spleen lacerations and injuries to her pancreas and adrenal glands. A significant amount of blood was found in her stomach. A round pattern injury found on her upper chest was later compared to Norman's shoes, and the medical examiner testified there was a "very high degree of similarity" between the injuries on Lauren's torso and the bottom of Norman's shoe. He testified he believed Norman had stomped on his wife, causing the fractured chest and ribs and injuries to her liver and other areas of her body.

At trial, there was testimony that Norman had beaten his first wife regularly and had a history of beating Lauren. The sister of his first wife, Katie Tucker, testified that once when her sister, Sarah, tried to climb through a window of their home after he had locked her out, Norman pushed her so hard that she fell out of the window and broke her tailbone. She was 8 months pregnant at the time. Two of Lauren's friends testified that once when they visited Norman and Lauren's home she was wearing sunglasses. When she took them off, she had two black eyes, they said. Another friend testified she recalled once when Lauren had a black eye and bruises down her left side, leg and arms. The friend said Lauren told her she had been trying to leave Norman when he stopped her and beat her with her suitcase. Lauren's own words were shown to the jury through text messages and letters she had written. In a text to Norman, she wrote, "I'm just not used to this type of violence. But I see the more I try to explain to you the worse it gets." "You're mentally, physically, verbally abusive." In a letter to "God," Lauren wrote, "I get man handled by Norman in front of the kids. I am battered and bruised a lot, all for speaking the truth about how I feel."

Following a three-day trial, in December 2014, a jury found Norman Smart guilty of murder, aggravated battery-family violence, aggravated assault-family violence, and cruelty to children in the first degree. He was sentenced to life without parole plus 20 years. Norman then appealed to the state Supreme Court.

Among his contentions, Smart argued the trial court abused its discretion in admitting the testimony of his first wife's sister. "We disagree," today's opinion says. Under Georgia's new Evidence Code, while evidence of other crimes or acts may not be admitted "for the sole purpose of proving the character of a person in order to show action in conformity therewith," the law says it may be admissible for other purposes, including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Here, the trial court correctly ruled that the testimony was admissible for the purposes of showing Smart's motive to control family members with violence and to harm his intimate partners. "Though Tucker's testimony referenced specific acts of domestic violence, her testimony also revealed the impetus behind that violence: control," the opinion says. "Accordingly, Tucker's testimony was relevant to the State addressing motive, namely that Appellant [Smart] used violence to control Lauren."

In admitting evidence of other crimes or acts, a court must also address whether "the probative value of the other acts evidence is substantially outweighed by its unfair prejudice."

"While the evidence against Appellant was prejudicial – as almost all evidence presented by the State will be – on balance, we agree with the trial court that the probative nature of Tucker's testimony outweighed that prejudice," the opinion says. "As discussed above, Tucker's testimony was not elicited merely to show that Appellant had engaged in prior acts of domestic violence, but instead, it demonstrated that the violence was a mechanism for control of his intimate partners."

The high court has rejected all of Smart's other arguments. "Judgment affirmed," the opinion says. "All the Justices concur."

**Attorney for Appellant (Smart):** Tanya Miller

**Attorneys for Appellee (State):** Margaret Heap, District Attorney, Christine Barker, Asst. D.A., Lyndsey Rudder, Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Scott Teague, Asst. A.G.

**SMITH V. THE STATE (S16A0398)**

A man convicted of killing his 2-month-old baby girl by violently shaking her, squeezing her, and slamming her head against a hard surface will remain in prison for life under a decision today by the Georgia Supreme Court.

With today's unanimous opinion, written by **Justice David Nahmias**, Deonte T'varis Smith has lost his appeal of his convictions for murder and child cruelty that he received in **Decatur County** for killing his daughter, Keymaya Smith.

"[W]e have reviewed the record and conclude that, when viewed in the light most favorable to the verdicts, the evidence presented at trial…was sufficient to authorize a rational jury to find Appellant [Smith] guilty beyond a reasonable doubt of felony murder," today's opinion says.

According to the facts of the case, on the evening of April 12, 2012, Smith was at his trailer with the baby and the baby's mother, Shamiah Rainey. Rainey's 1-year-old son and Smith's sister were also there. The baby had been fussy and throughout the night, mother and father tried to calm her. The last time Keymaya woke up crying, Smith went into her room alone. Rainey was in the living room with her son and Smith's sister was in another room the whole time. At some point, Rainey, who was watching TV, noticed she'd missed a call on her cell phone from Smith, so she went into the baby's room. Upon seeing Keymaya, she told Smith they needed to take her to the hospital immediately. When they reached Bainbridge Hospital, Rainey approached a nurse in the parking lot and told her the baby was not breathing. According to briefs filed in the case, the nurse called in a "Code 13" for cardiac arrest and began infant chest compressions on the 2-month old, noticing some fresh bruising on the infant's abdomen and right cheek. Medical staff were able to resuscitate Keymaya but she required life support, and the on-call pediatrician determined she needed to be in a neonatal intensive care unit. He then had her rushed by ambulance to nearby Tallahassee Memorial Hospital across the state border. Smith had told the pediatrician that Keymaya had been fussy and had not had a bowel movement all day so he had tried to facilitate a bowel movement by "squeezing" the baby around her abdomen. The physician later testified that he found Smith's explanation odd, Rainey testified the baby had had a bowel movement that day, and the medical examiner who performed the autopsy said there were no signs of constipation.

At the hospital in Tallahassee, Keymaya was treated by a neonatologist who, through a CT scan of the baby's head, found multiple areas of hemorrhaging, signs of brain death, and "tremendous injury" to her head that could not have been caused by being dropped or falling from a bed or chair, as the defense later suggested. Keymaya was pronounced dead the next night. The neonatologist also testified, saying that Smith's explanation of what had happened to the baby – that he had held her up so she could have a bowel movement, that he had fed her, and that she had vomited and quit breathing – did not explain her severe injuries.

The medical examiner, Dr. Anthony Clark, concluded the cause of death was abusive head and neck trauma. His autopsy revealed injuries over the baby's entire body, including many bruises on her face, chest and head; hemorrhages on her head and in her brain, and on her leg and spinal cord; fractured ribs, leg and arm that had been broken at various times; swelling and detachment of her brain inside the skull; and internal severance of her neck. Dr. Clark testified that the baby's severe brain injuries and rib fractures resulted from her being grabbed around the chest and squeezed and violently shaken, and that her injuries could not have been caused by being dropped or falling off a bed. He said the baby's brain had been jostled inside the skull so violently that her blood vessels were torn, and she had massive hemorrhaging around the brain and shifting brain tissue. She also had a neck injury, which resulted from the process of grabbing the baby, shaking her and slamming her head, which severed her neck. Dr. Clark testified that the infant's broken ribs were caused by someone putting his hands around the baby's chest and viciously squeezing. The hemorrhaging along her left femur was caused by gripping the baby's leg and swinging her. He said her forearm had a fracture that had already healed and had been caused by shaking or violently snatching her.

At trial, Dr. Clark used a baby doll to demonstrate to the jury the force and violence required to cause the baby's injuries. He vigorously shook the baby doll and slammed its head into a podium or railing.

Following a two-day trial in February 2014, the jury convicted Smith of all charges: felony murder, child cruelty, aggravated assault and aggravated battery. He was sentenced to life in prison. Smith then appealed, arguing that his convictions should be reversed because the trial judge erred in allowing the medical examiner to use the baby doll in such a provocative and damaging way, and in overruling his attorney's objection to questioning about his tattoos, which had nothing to do with his trial.

As to use of the baby doll, "We see no error," today's 24-page opinion says. Dr. Clark testified before the jury "that using the baby doll would be helpful in explaining his opinions to the jury and that the doll used was substantially similar to the victim with respect to the characteristics relevant to the points that his testimony covered. Dr. Clark noted that he had used dolls in similar cases because 'the baby doll helps show what the mechanism is that resulted in these types of injuries…[and] also will show what kind of force could be involved in these injuries.'"

But the trial court did err in allowing in a long line of questioning by the prosecutor about Smith's arm tattoos, the high court concludes. "Nevertheless, we are confident that any such error was harmless."

Georgia's new Evidence Code states that, "Evidence which is not relevant shall not be admissible." Here, "The state concedes that the tattoos were not relevant to the determination of the perpetrator's identity, as tattoos are in some cases." Once Smith's attorney objected to the

line of questioning, "without the prosecutor at that point articulating any potential relevance to the tattoos, it would have been appropriate for the trial court to sustain the objection," the opinion says. The "handful of questions that turned to why and where Appellant got tattoos was rather obviously irrelevant."

"Thus, the trial court abused its discretion by allowing at least some of the questioning regarding Appellant's tattoos," today's opinion says. However, "there is little indication that any evidence about Appellant's tattoos that was improperly admitted caused him prejudice, and indeed aspects of the evidence appear to have aided his defense." today's opinion says. The improperly admitted evidence didn't affect the verdict because the "properly admitted evidence proving Appellant's guilt was overwhelming."

"Considering the trial record as a whole, we conclude that it is highly probable that any erroneous evidentiary ruling by the trial court with regard to Appellant's tattoos did not contribute to the jury's verdict."

In conclusion, the high court has ruled that Smith is not entitled to a new trial and the judgment against him is affirmed.

**Attorney for Appellant (Smith):** Ronald Parker

**Attorneys for Appellant (State):** Joseph Mulholland, District Attorney, Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Elizabeth Haase, Asst. A.G.

**WILLIAMS V. THE STATE**

Another father convicted of killing his baby girl also has had his murder conviction and life prison sentence upheld by the Georgia Supreme Court.

Travis Williams appealed his convictions for the death of his 7-month-old daughter, Syikiria Williams, arguing the evidence was insufficient to convict him.

But in today's opinion, **Justice Robert Benham** writes for a unanimous court that, "The evidence was sufficient to authorize a rational jury to find Appellant [i.e. Williams] guilty beyond a reasonable doubt of felony murder and the other crimes for which he was convicted."

According to briefs filed in the case, Williams lived in a trailer park in Hinesville, GA in **Liberty County** with his girlfriend and the baby's mother, Casey Nicole Shuman, and two other children, ages 7 and 4. Syikiria had been born almost four months premature and had apnea and bradycardia, which periodically caused her to stop breathing and her heart to stop. She came home from the hospital with a heart monitor, although her parents did not consistently use it on the baby as instructed. When Williams became unemployed, Shuman started working as a cab driver, working at night and sleeping during the day. Williams maintained the household and took care of the children. On Sept. 27, 2008, Shuman got off work at about 5:00 a.m., returned to the trailer and went to sleep, according to briefs filed in the case. When she saw Syikiria that morning, the baby seemed fine. Shuman later got up, asked Williams if the children had eaten, and hearing they had not, began to cook some butter beans on the stove. But she fell asleep and the beans burned. The couple argued over the burned food, and Shuman left. When she later returned, she checked on Syikiria. Shuman noticed the baby was lying in her bassinet in a peculiar position and that her toe, that Williams said had previously been burned while he was bathing her, was bleeding. When she picked the baby up, the infant was unresponsive and her eyes were off to the side. Shuman told Williams something was wrong and they should take the baby to the hospital. According to prosecutors, Williams objected but after a lengthy delay,

Shuman took Syikiria to a local hospital. That day, she was transported by life flight to a trauma center in Savannah. Two days later, Syikiria was pronounced dead.

Dr. James Downs, a medical examiner for the Georgia Bureau of Investigation, conducted the autopsy and found multiple bruises and abrasions, including some healing injuries and older scars distributed across the baby's body. Her burned toe suggested her foot had been immersed in hot water. Neither parent had gotten help for her toe. The baby had three skull fractures and there were seven different sites on her skull with fresh scalp blood. Subdural blood was found in the back of her brain and between the hemispheres of her brain. Dr. Downs further found bruising and swelling of the baby's brain, hemorrhages inside her right eyeball, and fresh blood in her spinal cord. Her leg was broken, and he saw no evidence that any treatment had been administered; the injury looked like it had been there for a while. The medical examiner concluded that the spiral fracture of her leg had been caused by pulling and twisting the leg with significant force. She had crescent-shaped scabs on her chin consistent with an adult's fingernail being gouged into her skin. The medical examiner concluded the baby had been the victim of battered child syndrome and her death was caused by blunt force trauma.

Both Williams and Shuman were charged in the baby's death, but Shuman pleaded guilty and agreed to testify for the State against Williams at his trial. In July 2010, a jury convicted Williams of felony murder, aggravated assault, cruelty to children, and deprivation of a minor. He was sentenced to life in prison. Williams then appealed to the state Supreme Court, arguing not only that the evidence against him was insufficient to prove guilt, but also that the trial judge gave an improper instruction to jurors about the crime of criminal negligence.

In today's opinion, however, the high court has rejected both of Williams' arguments. "Judgment affirmed," the opinion concludes. "All the Justices concur."

**Attorney Appellant (Williams):** Richard Allen

**Attorneys for Appellee (State):** Tom Durden, District Attorney, Hugh Ridgway, III, Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Crowder, Asst. A.G.

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**IN OTHER CASES,** the Supreme Court of Georgia has reinstated the murder conviction and life prison sentence given to:

* Kealy Williams (Richmond Co.) **SHEPARD, WARDEN V. WILLIAMS (S16A0405)**

(In 2011, Williams pleaded guilty in Fulton County to the murder and armed robbery of Terrance Harris, but once in prison, he filed a petition for a Writ of Habeas Corpus against the warden of the Augusta State Medical Prison, Stan Shepard. The habeas court in Richmond County, where Williams was incarcerated, granted him relief and threw out his convictions, finding that Williams had not entered his guilty plea knowingly and voluntarily, and that he had received "ineffective assistance of counsel" from his trial attorney in violation of his constitutional rights. In today's opinion, the state Supreme Court has reversed the habeas court's

decision and reinstated Williams' convictions.)

The state Supreme Court also has upheld **murder** convictions and life prison sentences for:

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| * Milton Blackledge (Cobb Co.) | **BLACKLEDGE V. THE STATE (S16A0354)** |
| * Stephen James Green (Gwinnett Co.) | **GREEN V. THE STATE (S16A0066)** |
| * Quinton Jones (Fulton Co.) | **JONES V. THE STATE (S16A0314)** |
| * Dwayne Tavares Myers (Clarke Co.) | **MYERS V. THE STATE (S16A0377)** |
| * Dag Rhodes (Columbia Co.) | **RHODES V. THE STATE (S16A0208)** |
| * Jermichael Simmons (Emanuel Co.) | **SIMMONS V. THE STATE (S16A0253)** |