



**Supreme Court of Georgia**  
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## **CASES DUE FOR ORAL ARGUMENT**

### **Summaries of Facts and Issues**

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

**Monday, February 13, 2017**

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

#### **THE MERCHANT LAW FIRM, P.C. V. EMERSON, JUDGE ET AL. (S17A0039)**

The appeal in this case stems from a lawsuit filed against a **Douglas County** judge by a defense attorney who argued she was entitled to audio recordings made by a court reporter during open court proceedings.

**FACTS:** In October 2015, attorney Ashleigh Merchant sent an email to Melinda Cantrell, a court reporter in Superior Court Judge David T. Emerson's courtroom in Douglas County, requesting copies of audio tapes Cantrell had made during three preliminary hearings involving two criminal defendants Merchant was representing. The State Attorney General's office, representing the judge, refers to the recordings as "back-up" tapes made by the court reporter in her preparation of a certified transcript of the proceedings. The next day, Cantrell emailed Merchant and said she "ran this by Judge Emerson since this is not going to be a certified transcript from me. Judge Emerson said he would like for you to file a motion so this can be a formal request regarding a tape versus a certified transcript of a court proceeding." John Merchant, Ashleigh's law partner, responded the same day to Cantrell's email, stating that "no such motion is needed, and any instruction that these tapes be withheld until a motion is filed (and presumably ruled upon) is contrary to the Court's rules and the long-established black-letter law in Georgia regarding the public's access to court records." On Oct. 11, 2015, Judge Emerson

signed an order denying Ashleigh Merchant's request for copies of the tapes but making the tapes available for her inspection. In the order, Emerson noted that "the court specifically will not require that Ms. Cantrell provide a copy of her recordings, and the court expressly orders that counsel is not allowed to record Ms. Cantrell's recordings." Two months later, the Merchants sued Emerson, Cantrell and her court reporting firm, Ca-Bo Enterprises, Ltd. in Fulton County Court. In their complaint, the Merchants sought "mandamus" relief, to require Emerson to order the court reporter to turn over copies of the tapes; a "declaratory" judgment, or a declaration by the court that the Merchants were entitled to copies of the audio recordings; and "injunctive" relief, also to compel the court reporter to provide copies of the tapes. Emerson and Cantrell filed motions asking the Fulton County Superior Court judge to dismiss the Merchants' lawsuit. Following a hearing, in May 2016, the Fulton judge entered a final order dismissing all the Merchants' claims. They now appeal to the state Supreme Court.

**ARGUMENTS:** "This case involves important public policy questions about the transparency of Georgia's courts and the right of the public to have full access to court records where no privacy interest or other privileged information is involved," Ashleigh and John Merchant argue in briefs. "This Court has the opportunity to clarify that a Georgia court cannot cloak its otherwise public proceedings in a veil of secrecy by refusing to provide members of the public with a copy of the tape of the court's recorded statements." These particular court proceedings were not sealed and no one requested they be sealed. The trial court erred in dismissing the Merchants' request for mandamus relief. Mandamus is considered an "extraordinary remedy," which is allowed only when there is no other legal remedy available to get the kind of relief that is sought. Here, "mere inspection of the tapes does not constitute an adequate legal remedy," and the Merchants have a "clear legal right to *copies* of the tapes," the Merchants argue in briefs. Uniform Superior Court Rule 21 state that all court records "are to be available for public inspection," and, "An order limiting access shall not be granted except upon a finding that the harm otherwise resulting to the privacy of a person in interest clearly outweighs the public interest." In 1992, the state Supreme Court ruled in *Green v. Drinnon* that, "An official court reporter's *tape* of a judge's remarks in open court is a court record." The trial court also erred in dismissing the Merchants' request for a declaratory judgment. The judge did so finding that the Merchant Law Firm "does not face any risk of injury pending a final resolution of its claims because the requested recordings are being preserved." But this determination ignores the obvious dispute between the Merchants and Judge Emerson as to whether the law firm is entitled to copies of the recordings. In its 1975 decision in *Pilgrim v. First National Bank of Rome*, this Court stated that, "For a controversy to justify the making of a declaration, it must include ***a right claimed by one party and denied by the other...***" Here such a controversy exists and it should be resolved by the courts. Finally the trial court erred in dismissing their complaint seeking injunctive relief because Emerson and Cantrell "failed to comply with their public duties," the Merchants argue. "An injunction is the appropriate remedy to prevent a wrongful act by a public official even when acting under color of his office but without lawful authority, and beyond the scope of his official power." Emerson and Cantrell had a duty under Georgia law and Rule 21 to provide copies of the tapes, and after they failed to do so, the Merchants correctly asked the court to intervene to force Emerson and Cantrell to comply with their public duties and provide the Merchants with copies of the tapes.

The State Attorney General's office, representing Judge Emerson, argues the trial court correctly dismissed the Merchants' mandamus claim because "1) Judge Emerson provided Appellant [i.e. the Merchants] with an adequate legal remedy by making the requested tapes available for inspection, and 2) Appellant has not established that it has a 'clear legal right' to copies of the requested tapes." Judge Emerson argued that the Merchants had an adequate legal remedy because they could have appealed his Oct. 11, 2015 order. The trial court also correctly dismissed the Merchants' claims for injunctive and declaratory relief because both claims are barred by the doctrine of sovereign immunity, a legal document that protects the government or its departments from being sued without consent. "Nothing in Rule 21 or *Green* entitles Appellant to copies of a court reporter's back-up tapes," the State argues. Based on Rule 21, the Supreme Court in *Green* ruled that "the tape *or its transcript* must be made available *for public inspection* under Rule 21." In this case, the judge declined to provide copies of the tapes but made them available for inspection. The Merchants have not cited any Georgia case that required him to provide copies of the court reporter's back-up tapes rather than making them available for inspection. Furthermore, they cite no legal authority that shows that Emerson's order allowing inspection of the tapes does not constitute an adequate legal remedy, the State argues.

**Attorneys for Appellants (Merchants):** John and Ashleigh Merchant

**Attorneys for Appellees (Emerson):** Samuel Olens, Attorney General, Dennis Dunn, Dep. A.G., Russell Willard, Sr. Asst. A.G., Julia Anderson, Sr. Asst. A.G.

### **MARTIN V. SIX FLAGS OVER GEORGIA II, L.P., ET AL. (S16G0743)**

### **SIX FLAGS OVER GEORGIA II, L.P., ET AL. V. MARTIN (S16G0750)**

In this high-profile **Cobb County** case, lawyers for a young man left permanently brain-damaged by gang members who beat him while he waited for a bus after visiting Six Flags Over Georgia are appealing a ruling by the Georgia Court of Appeals that threw out his jury award of \$35 million.

**FACTS:** On July 3, 2007, Joshua Martin, 19, went to Six Flags amusement park to celebrate a friend's acceptance to college. Earlier that day, unknown to Martin, a group of gang members, who included at least one Six Flags employee, had accosted and threatened two young families inside the Six Flags park and its parking lot. The families alerted Six Flags security. Shortly before 9:00 p.m., the park's closing time, Martin and his friends walked down Six Flags Parkway, past the bus stop, then down South Service Road to a nearby hotel so Martin could use the restroom. By the time they returned to the bus stop, they had missed the 9:00 bus. To wait for the next bus, Martin and his friends walked back toward the park and sat on a rail near the park entrance. After seeing a large group of about 40 men, all wearing similar t-shirts, Martin's group left the rail and walked away from the park back down Six Flags Parkway to the Cobb County Transit bus stop. As they waited for a bus, the group of gang members, including those who had earlier accosted the two families, turned their sights on Martin and his friends. With no provocation, various gang members beat Martin with brass knuckles, knocked him to the ground and repeatedly stomped on him. The attack left Martin in a coma for seven days with severe and permanent brain damage.

Martin's attorneys filed a lawsuit against Six Flags, alleging it was liable for his injuries under Georgia Code § 51-3-1 for failing to exercise ordinary care to keep the park premises and approaches safe for him as its "invitee." Specifically, the statute says: "Where an owner or

occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries caused by his failure to exercise ordinary care in keeping the premises and approaches safe.” They also filed civil assault and battery claims against four of his assailants and additional “John Doe” defendants. Martin’s attorneys argued that Six Flags was well aware its park was located in a high-crime area and there had been criminal gang activity in the past in the park itself, including with the involvement of some of its employees. Prior to the attack on Martin, criminal activity inside the park had occasionally spilled over to the areas outside the park, which was of particular concern at the park’s closing time, as park goers were funneled into parking lots and nearby bus stops, Martin’s attorneys argued.

Six years after the attack, a Cobb County jury awarded Martin \$35 million. The jury apportioned 8 percent of the fault to the four men who were convicted of the assault on Martin for a total of \$2.8 million. It apportioned the remaining 92 percent of the fault to Six Flags, entering a judgment of \$32 million, plus \$541,093.12 for pre-judgment interest, as well as court costs and post-judgment interest. Six Flags appealed to the Georgia Court of Appeals, which in November 2015 reversed the jury’s verdict and ordered a new trial, finding that not all of Martin’s assailants were listed on the verdict form and at least two individuals therefore were not included in the apportionment of damages. The Court of Appeals, however, rejected Six Flags’ argument that it owed no “duty of ordinary care because the bus stop where Martin was attacked was not, as a matter of law, part of its ‘premises or approaches’ within the meaning of Georgia Code § 51-3-1.” Martin and Six Flags both now appeal to the state Supreme Court, which has agreed to review the case to determine whether the Court of Appeals erred in determining that the jury was authorized to find Six Flags liable for damages resulting from Martin’s injuries and in determining that an error in the apportionment of damages requires a full retrial of the case.

**ARGUMENTS (S16G0743 – Martin appeal):** Martin’s seven attorneys argue that the Court of Appeals erred in determining that an error in the apportionment of damages requires a full retrial of the case, and they urge the Supreme Court to reinstate the jury’s verdict. There was no apportionment error because Six Flags improperly relies on speculation, not evidence, the attorneys argue. Six Flags presented no “competent evidence” that the two additional parties caused Martin’s injuries. One of the parties, Ander Cowart, saw the attack but unlike the four convicted of his assault, never touched Martin, the attorneys contend. The other alleged party – a “Mr. Black” – is not even an actual person, but rather an alias or nickname possibly used by one of the four already on the verdict form. Six Flags also “waived,” or gave up, any right to seek a full retrial of the case based on an alleged apportionment error. After the jury announced its verdict, Six Flags chose not to object to the verdict form, which did not have Cowart or Black listed on it. “Had Six Flags timely objected that the verdict form did not include Cowart or Black, the trial court could have sent the jury back for deliberations and instructed them to re-assign percentages of fault, if any, to Cowart or Black,” the attorneys argue. Even if there were an apportionment error that Six Flags did not waive, “it still would not require a full retrial,” Martin’s attorneys argue. The jury’s special verdict included three separate findings: that Martin suffered \$35 million in damages; that the defendants listed on the verdict form were liable; and that Six Flags was 92 percent at fault and four individual defendants were each 2 percent at fault. “The first two express jury findings are simply unaffected by any error as to apportionment,” they argue. “This Court’s long-stated policy strongly favoring jury verdicts requires that, even

where there is an error affecting some of the jury's findings, courts in Georgia must preserve the rest of the jury's findings." If any retrial is needed, both Georgia's apportionment statute and the state Supreme Court's precedent requires a limited retrial, Martin's attorneys argue. The high court "should reverse the Court of Appeals and reinstate the jury verdict in full or, at the very least, limit any retrial."

Six Flags' two attorneys argue that a full Court of Appeals of 12 judges agreed that the verdict must be reversed because Six Flags did not receive a fair trial. The judges' only disagreement involved whether Martin is entitled to an entire new trial as the majority held, whether the new trial should be limited to the damages, as the three concurring judges held, or whether Six Flags is entitled to a "judgment notwithstanding the verdict" in its favor because Martin was not attacked on Six Flags' "premises or approaches," as the two dissenting judges wrote. "Thus, if this Court does not hold that Six Flags is entitled to judgment as a matter of law, it should affirm the Court of Appeals on the apportionment issue because, contrary to Martin's assertions, (1) the record reveals apportionment error; (2) Six Flags did not waive that error; and (3) a partial retrial would contravene the plain language of the controlling statute, would not cure the harm, and would make little sense in this context," the attorneys argue. "Ample evidence supported the apportionment request." First, though a few of the attackers were "off-duty Six Flags employees," the evidence shows that a crowd of 20 persons attacked Martin, and most were never identified or linked to Six Flags. Second, "the attack did not occur as Martin left the park." Rather it happened at the bus stop on South Service Road. The evidence "fully supports Six Flags' apportionment request to include *all* the assailants on the verdict form, not just 'Coward and Black,'" the attorneys argue. Also, Six Flags did not waive its right to seek a retrial on the apportionment issue, challenging the damages both in the trial court and on appeal. It stressed the verdict was "patently excessive" – the largest in Georgia history for a non-fatal brain injury, and 10 times higher than the national average. Six Flags' apportionment notice stated that "numerous individuals involved in the attack on Martin should be included on the verdict form..." Six Flags informed the court that "a special verdict form should be provided so that percentages of fault can be assessed amongst the named parties and designated non-parties." In its motion requesting a new trial, Six Flags argued it was error to preclude the jury from apportioning any amount of liability to "the other individuals shown to have been involved in starting or expanding the attack on the Martin party." Finally, a full retrial is required. Georgia's apportionment statute does not permit a partial retrial. With this statute, "the General Assembly expressed its intention that apportionment must be considered *at the same time* as the determination of the total amount of damages." An entire new trial is required in this case "because the liability and damage issues are inextricably intertwined." If this Court does not rule that Six Flags is entitled to a "judgment notwithstanding the verdict," it should at least require an entire new trial," Six Flags' attorneys conclude.

**ARGUMENTS (S16G0750 – Six Flags appeal):** Attorneys for Six Flags argue that "the Court of Appeals has expanded premises liability in Georgia beyond recognition – and beyond knowable limits – to uphold an extraordinary \$35 million verdict arising from an incident at a public bus stop on a public road that does not even go to the defendant's property." Six Flags is "entitled to judgment as a matter of law because... Martin was not injured on Six Flags' 'premises and approaches' within the established meaning of Georgia Code § 51-3-1." This decision is out-of-line with courts in other states, the attorneys argue. It "conflicts with binding

precedent, contravenes public policy, and runs afoul of bedrock principles of premises liability law in this and other states.”

Martin’s attorneys argue that the Court of Appeals correctly upheld the jury’s finding that the bus stop was “an approach to Six Flags’ premises.” Under the plain language of the statute, the evidence more than authorized the jury to find that the bus stop was an “approach,” the attorneys contend, as the statute requires “ordinary care in keeping the **premises and approaches** safe.” As the Court of Appeals noted about the bus stop in its opinion, Six Flags “took positive steps to exert control over that area, invited its customers to use the bus stop, and appropriated the bus stop solely for its benefit.” Six Flags’ president referenced the bus stop in her testimony as being within the corridor that is the final approach to the park.

**Attorneys for Appellant (Martin):** Michael Terry, Naveen Ramachandrappa, Benjamin Thorpe, Gilbert Deitch, Andrew Rogers, Michael Neff, T. Shane Peagler

**Attorneys for Appellee (Six Flags):** Laurie Daniel, Vernon Strickland

### **BRYANT V. THE STATE (S17A0388)**

A young man is appealing his **Fulton County** murder conviction and life prison sentence for randomly shooting and killing a man who was lost and asking for directions.

**FACTS:** According to state prosecutors, on July 5, 2008, Avery Bryant – then 17 years old – was sitting with friends on a wall after playing basketball at a local recreation center in East Point, GA. Meanwhile Newton Gordon was driving in the area looking for a funeral home when he got lost. He pulled up near Bryant and his friends at the intersection of Harris Street and Washington Ave. to ask for directions. Prosecutors claimed that Bryant pulled a gun out of his waistband and for no apparent reason, shot the stranger five to seven times. Bryant and the others ran from the scene. Gordon, severely injured, slumped over as his foot jammed the accelerator, propelling the car into a telephone pole. The vehicle caught fire. According to some of the young men who were at the scene and who later asked Bryant why he’d shot the man, Bryant said, “I got my body. I got my first body.” Following a jury trial in 2010, Bryant was convicted of murder, aggravated assault with a deadly weapon, possession of a firearm during commission of a felony, and possession of a pistol by a person under 18. He was sentenced to life plus five years in prison and now appeals to the state Supreme Court.

**ARGUMENTS:** Bryant’s attorney argues that four errors were made during trial. He argues that Bryant’s trial attorney rendered “ineffective assistance of counsel” in violation of Bryant’s constitutional right to effective legal assistance. It is true that his attorney filed a motion to suppress what investigators found as a result of the search warrant, arguing that the affidavit submitted by the police officer to secure the warrant failed to name the time and date of the murder or a detailed description of the alleged murderer. But she failed to file a motion to suppress the evidence on “particularity” grounds, based on the warrant’s failure to list the particular items investigators hoped to seize. “In this case, the warrant indicated where the authorities could search, but not what they could look for,” the attorney argues in briefs. As a result of the trial attorney’s failure to mention this issue, it was automatically “waived,” meaning it couldn’t be brought up for the first time when the case was appealed to a higher court. Even assuming that the issue was preserved for his appeal, the introduction of the box of ammunition was not harmless beyond a reasonable doubt, particularly since the State called it “smoking gun” evidence. Bryant’s trial attorney also failed to provide competent evidence that one of Bryant’s

friends had been threatened into naming Bryant as the shooter. And the trial judge erred in instructing the jury that the testimony of a single witness, if believed is sufficient to prove a fact. “But that instruction was not accurate in this case,” the attorney argues in briefs. An adequate attorney “would have objected to telling the jury that the testimony of a single witness was sufficient to convict when each of the boys who testified could have been charged as murderers in this case.” Bryant deserves a new trial, his attorney contends.

The State, represented by the District Attorney’s and Attorney General’s offices, argues that Bryant received effective legal representation during his trial. The search warrant and affidavit were specific, listing the location of Bryant’s home, stating that there was probable cause he’d been involved in a homicide, and stating they were looking for items connected to that homicide. Also, the trial attorney was not ineffective for failing to show that one of the young men with Bryant at the time of the shooting had allegedly been threatened into naming Bryant as the shooter. At no time did the young man say he’d been threatened. And it was not a box of ammunition that caused the jury to convict Bryant. “It was the testimony of his friends along with his behavior that ultimately led to his conviction.”

**Attorney for Appellant (Bryant):** Andrew Fleischman

**Attorneys for Appellee (State):** Paul Howard, Jr., District Attorney, Paige Whitaker, Dep. D.A., Joshua Morrison, Sr. Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Youn, Asst. A.G.

## **2:00 P.M. Session**

### **MITCHELL V. THE STATE (S17A0459)**

A man arrested and charged in **Fayette County** with driving under the influence (DUI) is appealing a trial court’s denial of a number of pre-trial motions he filed, including one that challenges the constitutionality of a Georgia statute.

**FACTS:** On Oct. 5, 2014, Quinton Kiere Mitchell was driving on Highway 54 when he was stopped by Deputy J. Bradley of the Fayette County Sheriff’s Office for alleged failure to stay in his lane. Bradley approached, and while speaking with Mitchell, smelled alcohol and asked Mitchell if he would submit to sobriety tests. Mitchell said no. When Officer J. Hartley of the Fayetteville Police Department arrived at the scene, Hartley and Bradley approached Mitchell’s vehicle together. Bradley again asked Mitchell to get out of his car and Mitchell refused. Hartley intervened and told Mitchell, “You either get out of the vehicle or you will be removed from the vehicle.” Mitchell got out. Hartley asked him again to submit to field sobriety tests and again Mitchell said he did not want to. On Bradley’s dashcam video, Hartley is seen talking to Mitchell and can be heard saying, “it would behoove you to cooperate because if you didn’t...” Hartley didn’t finish the sentence because Mitchell cut him off saying he knew certain politicians and was aware of his Fifth Amendment rights. Hartley can be heard telling him that all that mattered was whether he was a safe driver. Mitchell argued he was, and Hartley responded that Mitchell had bloodshot, watery eyes and the odor of alcohol surrounding him. Hartley then asked Mitchell if would blow into a portable breath test. Mitchell refused. After pausing however, Mitchell apparently changed his mind, telling Hartley he would agree to the field sobriety testing because, “I like you.” Mitchell then performed the tests after which Hartley

walked away from Mitchell, leaving him unrestrained, while he shared the test results with Bradley. A little more than 18 minutes into the video, Bradley placed Mitchell under arrest.

Hartley's testimony at trial differed from what the video showed. At trial, Hartley testified he told Mitchell that based on all he had observed, "I believed that he was an impaired driver and that if he did not perform field sobriety, I had no option but to arrest him for DUI; or he could perform field sobriety, and maybe he would, maybe he wouldn't" pass, but he had no choice, "so he submitted to field sobriety." But at no point on the video is Hartley heard making that statement to Mitchell. The closest he got was, "it would behoove you to cooperate because if you didn't...."

Among the tests Mitchell was given that day were a horizontal gaze nystagmus test, the walk-and-turn test, the one-leg-stand test, and the "Romberg" test. During the Romberg test, Mitchell was told to tilt his head backward, close his eyes and estimate the passage of 30 seconds. Hartley testified that the purpose of that test is "to gauge a person's internal clock, to figure out if their internal clock is correct or accurate, given that certain drugs, alcohol being one of them, could impair your ability to interpret the passage of time or perceive it."

Prior to going to trial, Mitchell's attorney filed a number of motions, including one asking the court to suppress the results of the field sobriety tests, another to exclude that he had initially refused to submit to the tests, a third to exclude the Romberg test evidence, and a fourth to declare as unconstitutional a statute that says expert opinion in criminal proceedings of any question of science "shall always be admissible." The trial court denied all of Mitchell's pretrial motions, and he now appeals to the Georgia Supreme Court.

**ARGUMENTS:** Mitchell's attorney argues the trial court erred in denying his motion to suppress the evidence from the field sobriety tests on the ground that Mitchell was told he'd be arrested if he did not submit to them, but he was not read his *Miranda* rights prior to the administration of the tests. (*Miranda* rights include the right to remain silent and the right to an attorney.) In *Price v. State*, a 1998 decision by the Georgia Supreme Court, the defendant agreed to perform field sobriety tests after a police officer informed her he strongly believed she was intoxicated and she would be going to jail whether or not she performed the tests. "This Court held that the failure of the officer to provide the defendant with *Miranda* warnings rendered the field sobriety test evidence inadmissible," Mitchell's attorney argues in briefs. Similarly, Mitchell's sobriety test evidence should be suppressed when his case goes to trial. Among other errors, the trial court erred in refusing to agree to exclude evidence of Mitchell's initial refusal to submit to the tests. Under its 2005 decision in *Miley v. State*, the state Supreme Court stated that a suspect's decision to exercise his constitutionally protected right to refuse a warrantless search may not be used against him to suggest his guilt. The trial court's ruling denying Mitchell's motion to exclude the evidence "conflicts with the ruling of this Honorable Court and prior rulings by the Court of Appeals which disapproved of the use of a suspect's refusal to consent to a warrantless search," Mitchell's attorney argues. Other errors include the trial court's ruling that the Romberg test is not a scientific test and therefore the State did not need to meet certain requirements set out in the high court's 1982 decision in *Harper v. State* before the test results could be admitted. And the trial court erred in denying Mitchell's challenge to the constitutionality of Georgia Code § 24-7-707 on both equal protection and separation of powers grounds, the attorney contends.

The Fayette County Solicitor General's office, representing the State, argues the trial court did not err in determining that Mitchell was not in custody at the time he agreed to submit to field sobriety tests and therefore there was no need to read him his *Miranda* rights at that time. The *Price* case differs from this case in that Hartley never actually informed Mitchell he had no option but to arrest Mitchell for DUI if he didn't perform the field sobriety tests, according to the video. "Unlike *Price*, at no time was Appellant [i.e. Mitchell] advised that regardless of if he took the tests he was going to jail," the State argues in briefs. The trial court also did not err when it concluded that the Romberg test was not subject to the requirements in *Harper*. Hartley, who was trained to perform the Romberg test, used the evaluation not for a scientific purpose but only "for the purpose of trying to make a determination as to whether Appellant was impaired by alcohol to the extent he was a less safe driver," the State argues. And the trial court did not err in declining to exclude evidence of Mitchell's initial refusal to submit to field sobriety testing. This Court has ruled that failure to undergo a field sobriety test prior to being placed under arrest does not violate an offender's right to remain silent or his Fifth Amendment right against self-incrimination, the State argues. Finally, the trial court did not err in rejecting Mitchell's argument that § 24-7-707 is unconstitutional on equal protection or separation of powers grounds, the State contends.

**Attorney for Appellant (Mitchell):** D. Benjamin Sessions

**Attorneys for Appellee (State):** Jamie Inagawa, Solicitor General, Joseph Myers, Jr., Chief Asst. Sol. Gen., Audrey Cruzan, Asst. Sol. Gen.

### **THE STATE V. CLARK (S17A0350)**

The **Fulton County** District Attorney is appealing a judge's ruling that incriminating statements a man made about his girlfriend's murder must be suppressed when his case goes to trial because his statement was not "voluntary."

**FACTS:** According to state prosecutors, at 1:17 the afternoon of March 4, 2008, William Clark called 911 and said that a woman had been killed and that he was "no longer armed." When responding officers arrived, they saw Clark coming out of an apartment on Angier Avenue, covered in blood and bleeding from the hand. Officers handcuffed Clark and placed him in the back of a police vehicle. After receiving a request from the responding officers for a homicide unit, Atlanta Police Detective J. D. Stephens arrived at the scene where inside the apartment, he found the body of Deborah Anne Jeffries with about 25 stab wounds to her chest. The murder weapon, a kitchen knife, was at the scene. Clark had cut his fingers, presumably on the knife, and was bleeding. Inside the vehicle, Stephens read Clark his *Miranda* rights from the back of a card the detective kept around his neck. Those rights include: "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be appointed for you." Stephens asked Clark if he understood his rights and Clark said that he did, according to prosecutors. Stephens asked if he lived in the apartment, who the dead woman was, and who had killed her. Clark replied that he lived in the apartment, what the victim's name was and that she was his girlfriend. He said he didn't remember who killed her because he had blacked out. Stephens told Clark that he was being taken to Grady hospital in Atlanta for treatment of his injuries and that he would like to talk to him afterward. Clark replied he would like to talk to Clark.

After Clark was treated for the injuries to his fingers, he was brought to the Atlanta Police Department's homicide office at about 5:00 p.m. Stephens walked into the interrogation room and Clark began talking continuously for seven minutes. Stephens later said that police training encourages officers to let suspects talk. But after seven minutes, Stephens said he interrupted Clark and reminded him that he'd been read his *Miranda* rights earlier and that what he said could be used against him. Clark said he understood and kept talking. Stephens then briefly left the room to begin recording the conversation. Stephens' reminder that he had previously read Clark his *Miranda* rights was not recorded. After Stephens turned on the "record" button, Clark said that what he was about to say was "off the record." Stephens said, "Yeah," and Clark proceeded to tell a story about an unrelated event involving the victim's – Jeffries' – possible criminal behavior. For most of the recorded statement, he disparaged her character, claiming she sold drugs, worked as a prostitute, and stole guns from houses she cleaned. He also claimed she used her relationships with white men to antagonize him. At about 20 minutes into the recorded conversation, Stephens reminded Clark again that he had been read his *Miranda* rights and Clark agreed, explaining why he was talking to Stephens. Stephens asked him how his argument with Jeffries had escalated into a murderous fight. "It was just a rage that I couldn't restrain anymore," Clark said. "And I was sitting here thinking, and I figured it's better for me to tell the truth." "Well you remember I read you your rights and everything," Stephens said. "Yeah. Yeah. I'm gonna tell you the God honest truth." Toward the end of the interview, Clark said he was starting to feel faint and put his head on the table. Stephens asked if he was OK and said they were taking him back to the hospital "right now." Clark said, "Nah, but what I'm trying to say... I mean this, I guess, because it's better to tell the truth than not. When I hit her over the head with that golf club... I was intending to hurt her, bad." Clark then admitted he had killed Jeffries, striking her with a golf club and then stabbing her. After saying he "knew she was gone" upon seeing blood gush from her body, Clark put his head on the table again. When Clark said his stomach was hurting, Stephens stopped the tape and called an ambulance at 5:50 p.m. Paramedics arrived, took Clark's blood pressure and pronounced him fine. Stephens then continued the interview at 6:11 p.m. but did not record it. According to Stephens, Clark told him "it all had just sunk in and he almost fainted." Clark also said he wouldn't change anything, that Jeffries was better off dead than stealing or doing drugs, and that it was a miracle he had not killed her sooner. Stephens ended the interview at 6:49 p.m.

A grand jury indicted Stephens for murder, aggravated assault and possession of a knife during the commission of a felony. In June 2016, his attorney filed a motion to suppress the statement he gave while in custody at the Atlanta Police Department's homicide office. Following a hearing, in August 2016, the trial court entered an order suppressing Clark's custodial statement, finding that Clark should have been re-read the *Miranda* warnings before he was questioned at the homicide office. The trial court also suppressed the statement for the reason that Clark believed it would be kept confidential when he said he was speaking "off the record" and Stephens replied, "Yeah," and let him continue. Stephens "made little or no effort to ensure that [Clark] understood his rights and that his waiver of rights was knowing and intelligent," the judge said. The State now appeals to the Georgia Supreme Court.

**ARGUMENTS:** Representing the State, the District Attorney's office argues the trial court erred because the "totality of the circumstances indicates that Appellee's [i.e. Clark's] statement to police was voluntary and his statements should not have been suppressed." Clark's

isolated assertion that a particular comment was “off the record” does not indicate that he did not understand his rights. Stephens testified that right before he made that statement, which was at the very beginning of the recording, Stephens had reminded him of his *Miranda* rights and Clark had indicated he understood that anything he said could be used against him. Also, the context of Clark’s statement at that point demonstrates Clark was referring to a particular incident about his girlfriend that he was about to tell that had nothing to do with her murder. The video shows that Clark agreed he’d been read his rights and indicated he nevertheless wanted to talk. “As he sat in the interview room, having been reminded of his rights and considering his options, Appellee tells Stephens that it’s ‘better’ if he tells the truth. His reason: ‘since it will probably come out,’” the State argues. This was not from some “noble instinct toward truth” but rather because Clark understood his situation. Clark insisted on confessing even after being reminded of his rights and Stephens offered to stop the interview. The trial court relied on the state Supreme Court’s 2007 decision in *Spence v. State*, yet that case does not apply here, the State argues. In *Spence*, police officers egregiously undercut *Miranda* warnings by promising confidentiality to compel statements from reluctant suspects. Here, Stephens’ quick “yeah” in response to Clark’s, “Now this is just off the record,” was hardly what the trial court called “an unqualified statement that what [Clark] told [Stephens] would be kept confidential...and...would not be disclosed to anyone else.” “The situation in *Spence* is not analogous to the casual, off the cuff, conversational exchange here,” the State argues. The trial court also overemphasized Clark’s brief episode of faintness as indicative that his statement was not voluntary. “However, nothing about the Appellee’s demeanor or medical condition made it less likely that his confession was knowing and voluntary,” the State argues. Rather, Clark’s “physical reaction toward the end of the statement, as his decision to confess loomed, seems much more likely to be a product of overwhelming guilt when viewed in the context of the video.” The trial court also erred in finding that Clark’s *Miranda* warnings should have been re-read to him prior to his recorded statement at the police station. The court found that the video showed no re-reading of his rights, “and the court finds that the warnings were not re-read to Mr. Clark.” The court found that the warnings “should have been repeated to Mr. Clark prior to the interview some four hours later.” “However, this finding would subject the State to a standard more restrictive than the standard applicable under well-established Georgia law,” the State argues. “Once Detective Stephens properly *Mirandized* Appellee at the time of his arrest, a full, separate, second warning was not necessary. The record indicates that Detective Stephens in fact reminded Appellee of his *Miranda* warnings, noting specifically that anything Appellee said could be used against him. Appellee said that he understood.” “The State asks that the trial court’s ruling be reversed and Appellee’s statement be admitted into evidence in its entirety,” the State concludes. “Alternatively, the State asks this Court to allow into evidence the portions of the statement made after Detective Stephens’ on-camera reminder to Appellee of his rights...and all recorded statements made subsequent to that.”

The State has the burden of proving by a preponderance of the evidence that a defendant “knowingly and intelligently” waived his privilege against self-incrimination. And an appellate court “will not disturb the trial court’s factual and credibility determinations unless they are clearly erroneous,” Clark’s attorneys argue in briefs. Stephens made it clear that not only did he never re-read the *Miranda* warnings to Clark, which he had read four hours earlier when Clark was bleeding and on his way to the hospital, but Stephens also did not remind Clark of the earlier

warnings until Clark had already spoken for seven minutes. As for the recorded portion of the statement, Stephens did not remind Clark of the prior *Miranda* warnings until about 21 minutes into the statement. The trial court was clearly skeptical of Stephens' testimony, finding that he had "made little or no effort" to ensure that Clark understood his rights. The trial judge did not err in finding that "under the specific circumstances of this case," Stephens should have re-read Clark his rights. "Appellee was handcuffed and bleeding so badly that he required hospitalization (and stitches) when Stephens read him the warnings," the attorneys argue. Finally, the trial court did not err in applying the rationale of *Spence* in suppressing the recorded portion of the statement, based on Clark's belief that the interview was confidential.

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