



## Supreme Court of Georgia

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## CASES DUE FOR ORAL ARGUMENT

### Summaries of Facts and Issues

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**Monday, March 6, 2017**

### 10:00 A.M. Session

#### **HEATHERLY V. THE STATE (S16G1498)**

A man is appealing a Georgia Court of Appeals ruling that upheld his conviction in **Whitfield County** for theft by taking.

**FACTS:** At issue in this case is whether a Georgia statute which says that, “where the only witness is an accomplice, the testimony of a single witness shall not be sufficient” in prosecuting a felony, although “corroborating circumstances may dispense with the necessity for the testimony of a second witness.” (Georgia Code § 24-14-8)

In May 2012, Robert Wayne Heatherly, Jr. worked nights as shift supervisor for Dalton Paper Products, Inc. where he had worked for about 15 years. Donald Malone, who had been at the company for two years, worked the first shift from 6 a.m. to 3 p.m. In June 2012, the maintenance manager learned from a now deceased employee that brass machine parts, including brake fingers, crank arms, adjusting screws and valves, were missing from the company. About the same time, the plant manager, Stan Duncan, received an anonymous phone call informing him that Malone was stealing from the plant. Duncan also had been informed that certain parts were missing from a secured area of the plant. He called police, who interviewed Malone. Malone eventually admitted to police that he had sold the brass parts as scrap to recycling plants

and that Heatherly had provided him with the parts. He said the agreement between the two was he would sell the parts for scrap and he and Heatherly would split the money 50/50.

Malone and Heatherly were charged with felony theft by taking of property with a value exceeding \$500. Malone was also charged with theft by receiving stolen property with a value exceeding \$500. Heatherly pleaded not guilty and waived his right to a jury trial. Malone pleaded guilty in a plea deal in which he agreed to testify against Heatherly. Following an October 2014 “bench trial” – before a judge with no jury – Heatherly was found guilty of felony theft by taking. The judge orally sentenced him to eight years with the first 90 days in jail and the balance to be served on probation, and Heatherly was taken to jail to begin his sentence. Following a restitution hearing, at which the judge determined that based on the value of the stolen items, Heatherly owed only \$254.24 in restitution, in a December 2014 order, the trial judge amended the judgment and sentence and found Heatherly guilty of misdemeanor theft by taking. Heatherly’s attorney then filed a motion requesting a new trial, arguing that there was no corroborating evidence to support Heatherly’s conviction as required under § 24-14-8, and the only witness against him was his co-defendant. The trial judge denied his motion, and Heatherly appealed to the Court of Appeals. In April 2016, the Court of Appeals upheld the trial court’s denial, finding that corroboration of the accomplice’s testimony was not necessary because the trial court had corrected Heatherly’s conviction to a misdemeanor, and the statute only applied to felonies. Specifically, the Court of Appeals stated that, “Here, Heatherly was prosecuted for and initially convicted of a felony, and under our state’s law, corroborating evidence would be required to sustain that conviction. But this is not the posture in which this case greets us, because the trial court corrected Heatherly’s conviction to be a misdemeanor.” Heatherly now appeals to the state Supreme Court, which has agreed to review the case to determine whether the Court of Appeals erred in affirming Heatherly’s misdemeanor theft conviction.

**ARGUMENTS:** Heatherly’s attorney argues the Court of Appeals made the wrong decision under the statute. “The total lack of any corroboration of Malone’s story demanded an acquittal at trial and a reversal by the Court of Appeals,” the attorney argues in briefs. Other than Malone, who had two prior felony convictions, there was “no other witness nor other slight evidence to corroborate Malone’s testimony implicating Appellant [i.e. Heatherly] in this alleged plot to steal from their employer.” Heatherly, who testified he loved his job and denied stealing from the company, had never been disciplined by the company, laid off, or fired prior to this incident. He had never been convicted of any crime involving stealing, nor had he ever been arrested for any such offense. The foundation of the rule that a person cannot be convicted by the uncorroborated testimony of an accomplice is “to safeguard against one person falsely maintaining that he and the defendant were accomplices to commit the crime,” Heatherly’s attorney argues. The Court of Appeals has held that this statutory corroboration standard also applies in the context of juvenile court delinquency cases. The Court of Appeals erred in applying § 24-14-8 to Heatherly’s case because “1) Co-defendant Malone implicated him as his accomplice without corroboration; and 2) This is a felony case, as contemplated by that statute.” The anonymous tip was about Malone; the scrap yard receipts identified Malone as the seller; no one saw Heatherly take any parts or tools from the workplace without permission, and Heatherly consistently denied any involvement. “All of the evidence pointed to Malone as the lone thief of parts from his employer, Dalton Paper Products, Inc.,” Heatherly’s attorney argues. Furthermore, the statute applies to “prosecutions for...felony cases.” The appellate court has construed “felony

cases” in § 24-14-8 to mean only felony *convictions*, as opposed to felony *prosecutions*. Under Georgia law, prosecution is defined as all legal proceedings by which a person’s liability for a crime is determined, from the return of an indictment to final disposition of the case. It is clear that “felony cases” in this statute “means a case where one is accused/indicted for a felony and goes to trial for that felony, and is convicted or acquitted of that felony.” Heatherly went through all those steps and the statute applied to him. Ironically, had his felony conviction and original sentence remained in place, corroborating evidence would have been required to sustain his conviction.

The State disputes that there is “a total lack of corroborating evidence” supporting Heatherly’s guilt. Only two people, one of them Heatherly, had access during the night shift to the secured area where the stolen parts were stored. And he was in and out of the secured areas, often alone. Malone never entered those areas alone or without others who had authorized access to the area. “Although not required to support the misdemeanor conviction, and not addressed by the Court of Appeals, there was sufficient corroboration of Mr. Malone’s testimony to support the trial court’s verdict,” the State argues in briefs. The Court of Appeals correctly decided that Heatherly’s misdemeanor conviction did not require corroboration of the testimony of an accomplice. “The Court of Appeals correctly noted that this case is not in the posture of a felony conviction, and held no corroboration of the testimony of an accomplice is required to sustain a misdemeanor conviction,” the State argues. “Appellant argues now that the Court of Appeals misinterpreted the words ‘felony cases’ as set out in § 24-14-8 and failed to apply this corroboration standard in Appellant’s case. Appellant tries to create a term of art from the words ‘felony case’ and create an ambiguity where none exists.” “In the present case, the trial court found that Appellant committed the theft alleged, but that it was a misdemeanor and the Court of Appeals correctly affirmed the conviction.”

**Attorney for Appellant (Heatherly):** Michael McCarthy, Circuit Public Defender

**Attorneys for Appellee (State):** Bert Poston, District Attorney, Dixon Lackey, Asst. D.A.

### **LE V. SHERBONDY (S17A0558)**

In this **Fulton County** case, a woman is appealing a judge’s denial of her petition asking the court to hold her ex-husband in contempt for failing to pay child support. The judge denied the contempt petition because by the time she filed it, the divorce action had already been dismissed.\*

**FACTS:** In May 2015, Thi Le filed for divorce from her estranged husband, Matt Sherbondy. In September 2015, the trial court entered a Temporary Order which incorporated the Temporary Mediated Agreement entered into by the parties, as well as the Parenting Plan to which they agreed. Under the Temporary Order, Sherbondy agreed to pay Temporary Child Support to Le in the amount of \$800 per month, beginning Oct. 1, 2015. He owed a prorated \$350 for the remainder of September. The Temporary Order incorporated the terms of the Parenting Plan and also required the parties to share equally the cost of their child to attend preschool, with Sherbondy paying Le \$150 per month.

On April 21, 2016, Le filed a Petition for Contempt in the Fulton County court, claiming that Sherbondy had failed to pay any child support payments for September 2015 through December 2015 and for January through April 2016 as ordered, putting him \$5,600 in arrears. She also claimed he failed to contribute the \$150 monthly payment toward their child’s

education from September 2015 to May 2016 as ordered by the court. In her petition, Le asked that Sherbondy be held in contempt of the court's Temporary Order and fined and/or incarcerated until he paid what was due. However, by the time she filed the petition, the court had already, on Feb. 11, 2016, dismissed the divorce action due to the parties' failure to attend a 120-day status conference. In a "Final Order of Dismissal," the trial judge wrote that neither party appeared for the scheduled hearing for an uncontested divorce, nor did they file a "Motion for Judgment on the pleadings," which would have prevented their needing to appear. "A Motion for Judgment on the pleadings has not been filed and no one appeared so the instant case must be dismissed," the judge wrote in the order. "It also appears that neither party has taken the families in transition class nor is there a child support addendum." Le then filed a motion asking the court to reconsider the dismissal, or in the alternative, to set aside the alleged default. The trial court dismissed her motion, stating: "The Petitioner is attempting to claim that the Respondent is in Contempt for his failure to comply with the Temporary Order the court entered on Sept. 17, 2015. Unfortunately, once the case was dismissed the Petitioner cannot attempt to file a Contempt after the dismissal." Le now appeals to the Georgia Supreme Court.

**ARGUMENTS:** Le's attorney argues the trial court erred in dismissing her contempt petition because a Temporary Order of Support is a court judgment entitled to be enforced, and Sherbondy's failure to comply was in contempt of that order. Georgia Code § 19-6-17 (e) states that any payment due under a child support order is "a judgment by operation of law with the full force and effect and attributes of a judgment of this state, including the ability to be enforced," the attorney argues in briefs. "Accordingly, each monthly installment payment due and payable from Mr. Sherbondy to the Appellant [i.e. Le] pursuant to the specific terms of the temporary order constituted a valid judgment by operation of the law with full force and effect and attributes of judgments of this state." Georgia Code § 19-6-28 (a) specifically states that "the court shall have the power to subject the respondent to such terms and conditions as the court may deem proper to assure compliance with its orders and, in particular, shall have the power to punish the respondent who violates any order of the court to the same extent as is provided by law for contempt of the court in any other action or proceeding cognizable by the court...." "Respectfully, the court below erred in refusing to find Sherbondy in contempt but instead, dismissed the petition for the faulty and erroneous reason that the dismissal of the divorce action foreclosed consideration of the contempt motion," Le's attorney argues. Sherbondy "willfully and intentionally disobeyed and disregarded the same order he participated in framing....Significantly, notwithstanding that he remained gainfully employed without interruption on a full-time basis at a national bank as a financial/investment advisor and was consistently earning in excess of \$100,000 annually, he utterly failed to make even a single payment to the wife as ordered by the court." Although Sherbondy claims that his "financial condition has deteriorated and due to a recent illness declined sharply from when the case was open," Sherbondy has "provided no evidence, whatsoever, in court to substantiate any alleged anticipated decline in his income." The dismissal of the divorce action between the parties did not foreclose Le's right to pursue a contempt action against Sherbondy for non-payment of child support and other payments as ordered by the court, and the trial court's holding to the contrary is error and should be reversed, the attorney argues. "An unambiguous line of cases clearly establishes that in domestic relations matters, the failure to initiate a contempt action during the pendency of the underlying divorce or alimony action does not bar an aggrieved party from filing

a contempt petition after verdict or termination of the underlying action,” Le’s attorney argues. The trial court’s ruling denying Le’s contempt action solely because it was filed after dismissal of the divorce action “flies in the face of the foregoing well-settled line of cases that stand for the contrary view; that the contempt action was preserved even after dismissal of the divorce action,” the attorney argues.

(Because Matt Sherbondy, had not filed a brief by Feb. 27, 2017, as ordered by this Court, he is precluded from participating March 7 in oral arguments.)

**Attorney for Appellant (Le):** Bobby Aniekwu

### **CROY V. WHITFIELD COUNTY ET AL. (S16G1452)**

The daughter of an elderly man who sued **Whitfield County** after he was injured while riding a county van is appealing a ruling by the Georgia Court of Appeals that upholds a lower court’s ruling against her.

**FACTS:** On Jan. 30, 2012, Joe Leonard, Jr., then 82 years old, was being transferred in a Whitfield County Transit Service van driven by Melvin Cecil Cooper. Leonard used a motorized wheelchair and was traveling with an attendant. He had progressive dementia as a result of an earlier stroke. Once Leonard boarded the van, Cooper assisted him by securing his wheelchair with straps designed for that purpose. According to the subsequent lawsuit in this case, Cooper drove around a curve at a high rate of speed and the security straps detached, causing Leonard’s wheelchair to overturn. Leonard was thrown to the floor and sustained two broken legs, which required surgery. Soon after, and allegedly as a result of the van injury, Leonard had to be permanently confined at Ridgewood Manor, a nursing home, where he remained until his death in March 2014.

In June 2012, Leonard’s attorney sent an “ante litem” notice, which is the formal notice required by law of one’s intent to sue (ante litem is Latin for “before litigation”). Leonard’s attorney sent the ante litem notice to the designated attorney for Whitfield County, Robert Smalley, III, at the address of Smalley’s private law office. Less than two years later, on Jan. 21, 2014, Leonard’s attorney filed a lawsuit against Cooper and Whitfield County, claiming negligence and seeking to recover for his injuries. The County and Cooper filed a motion requesting “summary judgment” in their favor. (A judge grants summary judgment after determining that a jury trial is unnecessary because the facts are undisputed and the law falls squarely on the side of one of the parties.) In its motion, the County argued that Leonard failed to comply with the statute requiring ante litem notice (Georgia Code § 36-11-1) because he failed to give his notice to an agent authorized to accept the notice on the County’s behalf and therefore he missed the statute’s deadline of presenting the notice to the County within 12 months. The statute says that “All claims against counties must be presented within 12 months after they accrue... provided that minors or other persons laboring under disabilities shall be allowed 12 months after the removal of the disability to present their claims.” The trial judge denied the County’s motion. But the County filed a second motion raising the same argument and this time attaching an affidavit from Smalley who said the County Commission had never taken “formal action” to authorize him to accept the ante litem notice on the County’s behalf. Leonard’s attorney meanwhile filed his own motion for summary judgment, arguing that Leonard had “substantially complied” with § 36-11-1, and alleging that, regardless, his mental incapacity legally suspended, or “tolled,” the 12-month requirement for filing the ante litem notice. This

time, the trial court ruled in the County's favor, granting it summary judgment. Leonard then appealed to the Court of Appeals, which upheld the trial court's ruling. In May 2014, Leonard's daughter, Janice L. Croy, was appointed as executor of his estate. She now appeals the appellate court's pre-trial ruling to the Georgia Supreme Court, which has agreed to review the case to determine 1) whether Leonard substantially complied with the ante litem statute by sending the ante litem notice to Smalley, and 2) whether the Court of Appeals erred in upholding the summary judgment to the County regarding the issue of the suspension of the 12-month deadline due to Leonard's mental disability.

**ARGUMENTS:** Croy's attorneys argue that she complied, or at least "substantially complied" with the ante litem notice requirements of § 36-11-1. Smalley, who was the attorney for the County at all times relevant to this case, accepted written notice from Croy's attorney on June 7, 2012 and discussed it with the County Commissioners within one year of the date of the incident. Smalley also acknowledged service of the summons and complaint on the County's behalf. And when the County filed its formal answer to the lawsuit on Feb. 21, 2014, it "did not raise insufficient service of process as a defense," the attorneys argue in briefs. "The County cannot now be heard to argue that Smalley was not its authorized agent to accept the ante litem notice, or 'cherry pick' which items he can or cannot accept on behalf of the County." The County "admitted that Smalley was its authorized agent when it allowed him to acknowledge service of the complaint and then not include the defense of insufficiency of service of process in its answer." As further evidence of substantial compliance, Smalley discussed Leonard's case with the County Commissioners who investigated the claim and reprimanded the driver, Cooper, for negligence. The Court of Appeals also erred in disregarding Leonard's long-term physician who testified that Leonard suffered from severe dementia and was mentally incompetent under Georgia law. That raised a question of fact on the question of his mental incompetence which only a jury could decide, making summary judgment improper in this case. "The question of mental capacity is ordinarily a question of fact to be determined by a jury," the attorneys argue. Finding the physician's testimony was not sufficient to raise a genuine issue of fact about Leonard's mental incompetence is a "breathtaking holding" that "is at odds with the Georgia Code of Evidence, the Civil Practice Act, and decades of Georgia case law," the attorneys argue. The ruling misconstrues or misapplies another statute which provides that the 12-month ante litem notice requirement is "tolled" or postponed with respect to a person laboring under mental incompetence. "As the time period was tolled, it did not begin to run until at least such time as his daughter, Janice Croy, was appointed executor on May 12, 2014," her attorneys argue.

Attorneys for Whitfield County argue that Croy "did not comply, substantially or otherwise, with the ante litem notice requirement because Plaintiff did not present notice of his claim to the Whitfield County Board of Commissioners within 12 months after the alleged incident. The statute, § 36-11-1, "has been a part of Georgia law since 1863." Leonard's ante litem notice should have been presented to the Board of Commissioners. Prior to the Court of Appeals' 1992 decision in *Burton v. DeKalb County*, the law in Georgia was that an ante litem notice was to be presented to the county governing authority. In *Burton*, for the first time the Court of Appeals applied the "substantial compliance" standard to the ante litem notice requirement. In that case, the plaintiff sent the notice to the County's insurance manager rather than to the Board of Commissioners. The appellate court ruled that the plaintiff had "substantially complied" with the notice requirement because she had presented her notice to the

county official whose job was to adjust claims against the County. “However, *Burton’s* application of the substantial compliance standard to the County ante litem notice requirement was erroneous,” the County’s attorneys argue. “In upholding presentation of the ante litem notice to the insurance manager, the Court of Appeals overlooked the fact that it is the county governing authority which makes the final determination to compromise any claim against the County.” Case law – or law determined by court decisions as opposed to statutes passed by the legislature – concerning the county requirement has always required notice to be given to the county’s governing authority, the attorneys argue. Even if *Burton* was correctly decided the common thread running through a number of lower court rulings is that the ante litem notice was to be presented to the county officials who had the power to examine claims against the County. “There is no evidence that Smalley, as outside counsel, was a county official that had such authority,” the attorneys argue. “In this case, neither Smalley nor his firm was the County’s legal department, in-house county attorney, county employee, or department of the County. Accordingly...Plaintiff did not present the notice to the appropriate official or officials for the County.” There is also no evidence “that Smalley was ever *appointed* to accept service of process for the County,” as Georgia law requires. And the lower courts correctly ruled that the time for presenting the ante litem notice to the County was not tolled by Leonard’s alleged mental condition. Contrary to Croy’s claim, the determination of a plaintiff’s mental incapacity may be made by a trial judge, without a jury, as a matter of law. Here there was no evidence of Leonard’s incapacity. “No case of which the County is aware involves a plaintiff’s attorney who failed to properly present an ante litem notice to a county and then tries to use the plaintiff’s alleged mental incompetence to excuse his mistake.” The record shows that Leonard was mentally competent and able to handle his personal and legal affairs, including filing this lawsuit through his lawyer and without a guardian. “The undisputed facts are that before and during this litigation, no one ever asserted Leonard’s incapacity as a basis for tolling the limitation period,” until the County filed its first motion for summary judgment, and even then, Leonard’s words and conduct showed he had the requisite capacity, the County’s attorneys argue.

**Attorneys for Appellant (Croy):** R. Leslie Waycaster, Jr., Timothy Allred

**Attorneys for Appellees (County):** Ronald Womack, Steven Rodham

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

### **GEORGIA MOTOR TRUCKING ASSOCIATION ET AL. V. GEORGIA DEPARTMENT OF REVENUE ET AL. (S17A0430)**

In this **Fulton County** appeal, the Georgia Motor Trucking Association and other motor carriers are appealing the dismissal of their lawsuit challenging as unconstitutional a Georgia statute that allows revenue from local motor fuel taxes to be spent on things other than “public roads and bridges.”

**FACTS:** In September 2015, the Georgia Motor Trucking Association, J & M Tank Lines, Inc., F & W Transportation, and Prolan Logistics LLC filed a lawsuit against the Georgia Department of Revenue and Revenue Commissioner Lynette Riley, seeking to certify a class action consisting of “Georgia domiciled motor carriers who purchase motor fuel in the state of Georgia.” The motor carriers, which are generally freight shipping and trucking companies,

allege that legislation enacted in 2015 by the Georgia General Assembly (House Bill 170), provides for taxes on motor fuels, but improperly allows the proceeds of those taxes to be used for purposes other than the maintenance and construction of public road and bridges. They argue that Georgia's Constitution states: "An amount equal to all money derived from motor fuel taxes received by the state...is hereby appropriated...for all activities incident to providing and maintaining an adequate system of public roads and bridges in this state...." They argue that under House Bill 170, while the "Local Motor Fuel Taxes" are assessed at the local level, the tax revenue is collected by the State and distributed for "unconstitutional" purposes, including to fund capital outlay projects such as administrative buildings, bicycle paths, sidewalks and jails. In their lawsuit, the motor carriers sought a "declaratory judgment," asking the trial court to declare that the Revenue Department and Commissioner were spending motor fuel taxes on improper purposes based on House Bill 170, which they requested the trial court to find unconstitutional. They also sought a "writ of mandamus," to require officials to spend the motor fuel tax revenue in accordance with the Georgia Constitution. In the alternative, they requested that the tax revenue be returned to cities and counties with a "specific limitation and restriction that it be used only for roads and bridges." And they sought "extraordinary relief" and mandamus to preserve the "status quo," requiring the State to pay the disputed taxes, which would be *prospectively collected*, into an escrow account during the litigation. "Without interlocutory extraordinary relief, tens of millions of dollars has been and will continue to be collected in illegal taxes," the motor carriers argued in their complaint. Finally, the motor carriers requested payment for their attorneys' fees. In response, the Revenue Department filed a motion to dismiss the lawsuit, arguing 1) that sovereign immunity – a legal doctrine that protects state government and its agencies from being sued – barred all declaratory judgment actions against the State; 2) that mandamus was improper because the motor carriers had other legal remedies available; and 3) that House Bill 170 was constitutional. The trial court granted the State's motion and dismissed the case. Georgia Motor Trucking and the other motor carriers now appeal to the Georgia Supreme Court.

**ARGUMENTS:** Attorneys for the motor carriers argue that the trial court erred in ruling that sovereign immunity barred any declaratory action against the State to test the constitutionality of a statute. The Constitution itself states: "Legislative acts in violation of this Constitution or the Constitution of the United States are void, *and the judiciary shall so declare them.*" The Georgia Supreme Court "has held on multiple occasions that it is 'mandatory' and a 'duty of this court' to 'declare acts in contravention of the constitution void....,'" the attorneys argue in briefs. The state "Declaratory Judgments Act" provides that the state Supreme Court may address constitutional challenges to statutes against the State. Pending the outcome of the case, this Court also has the power to "preserve the status quo." The trial court erred in relying on this Court's 2014 decision in *Georgia Department of Natural Resources v. Center for a Sustainable Coast, Inc.* and its 2016 decision in *Olvera v. University System of Georgia's Board of Regents* in ruling that sovereign immunity bars all declaratory judgment actions against the State to determine the constitutionality of a statute. "But neither case is applicable here because neither dealt with constitutional challenges to a *state statute*, and neither dealt with the express waiver of sovereign immunity" contained within the Georgia Constitution, the attorneys argue. "Separation of powers demands that this Court be able to void unconstitutional statutes." The trial court also erred in dismissing the mandamus action. Under Georgia law, a writ of

mandamus may be issued to compel government officials to perform their duties *if* there is no other specific legal remedy for them. The trial court erred in ruling that the state's Refund Statute provided an adequate remedy. "The Appellants [i.e. motor carriers] seek no refund," the attorneys argue. "The Appellants seek a determination that an amount equal to the taxes 'prospectively collected' under these statutes must be spent on roads and bridges." This was never a suit to reclaim tax monies which the State has already collected. And the trial court erred in holding that House Bill 170 is constitutional. One of the issues in this case is whether "sales and use taxes" applied to motor fuel are "motor fuel taxes." "These taxes are paid due to the purchase of motor fuel," the attorneys argue. "It is illogical to contend these are not motor fuel taxes," as the State contends. The Constitution specifically refers to "all money derived from motor fuel taxes received by the State." "The Local Motor Fuel Taxes under House Bill 170 are 'received by the State,'" the motor carriers argue. The trial court erred in dismissing the lawsuit.

The Attorney General's office, representing the State, argues that the trial court ruled correctly that sovereign immunity bars the motor carriers' claims for a declaratory judgment because the Legislature has not provided a waiver of that immunity. "Any waiver of sovereign immunity 'is solely a matter of legislative grace,'" the State argues in briefs. The Constitution specifically states that sovereign immunity "can only be waived by an act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver." The state "Declaratory Judgments Act" does not establish a waiver of the State's sovereign immunity, the State contends. And the motor carriers are wrong that the state Supreme Court's decisions in *Sustainable Coast* and *Olvera* do not apply in cases seeking declaratory relief for constitutional challenges to statutes. Their claim for mandamus relief also fails as the Refund Statute provides an adequate legal remedy. "The writ of mandamus has been described by the Georgia Supreme Court as a 'harsh' remedy and a remedy of last resort, appropriate only in 'limited circumstances,'" the State argues. "This Court has long held that the Refund Statute, as opposed to mandamus, is the appropriate remedy to challenge taxes illegally assessed and collected, even if the taxes are alleged to be unconstitutional." And, "although the Commissioner is responsible for collecting and distributing Local Sales and Use Taxes to counties and municipalities, the Commissioner does *not* control or make decisions on *how* the distributed Local Sales and Use Tax proceeds are *spent*," the State argues. "Hence, the Commissioner has no legal duty or authority to use Local Sales and Use Tax revenue exclusively for roads and bridges, impose specific limitations or restrictions on the use of such revenue by counties and municipalities, or establish a methodology for monitoring the use of local revenue for roads and bridges." Finally, House Bill 170 is not unconstitutional because Local Sales and Use Taxes are not "Motor Fuel Taxes." If "the spending restrictions for 'motor fuel taxes' also applied to Sales and Use Taxes, the Constitution would have said so," the State contends. "Local Sales and Use Taxes are not *state* taxes. They are special district taxes specifically authorized for the provision of local government services and facilities within and for the benefit of the district."

**Attorneys for Appellants (Carriers):** W. Pitts Carr, Alex Weatherby

**Attorneys for Appellees (State):** Christopher Carr, Attorney General, W. Wright Banks, Jr., Dep. A.G., Alex Sponseller, Sr. Asst. A.G., J. Scott Forbes, Asst. A.G.

## **WILLIAMS V. THE STATE (S17A0543)**

A young man is appealing his **Fulton County** murder conviction and life prison sentence for his role in the shooting death of another man during a marijuana drug deal.

**FACTS:** On May 5, 2012, the three victims in this case – Antonias Williams and brothers Jamol and Daniel Alexander – drove in Jamol’s Crown Victoria car with Cimieon Riley and Andrew Morris to the Hickory Park Apartments in Fulton County to buy marijuana. Before leaving for Hickory Park, Daniel put in a call to Christian “Butta” Williams to let him know that he was coming to “score” some weed. Daniel had bought marijuana before from Butta Williams, who was around 19 or 20 years old and no relation to Antonias. Jamol drove, his brother Daniel sat in the front passenger seat and the other three rode in the back. Jamol brought his AK-47 firearm, which he put in the middle of the front seat, because he considered the apartment complex a “dangerous” area. Daniel’s 9mm Ruger was under the passenger seat where he sat. According to State prosecutors, when they arrived, Daniel got out of the car to talk to Butta Williams about making the deal. Butta directed them to drive to the back of the apartment complex, which they did. Everyone then got out of the car except Jamol and Antonias. While Butta left to supposedly get the marijuana, two associates of Butta’s – Harold Clements and Travon Menefee – approached the car. Daniel stood nearby waiting for Butta. As Butta approached the vehicle, Daniel got back into the passenger side leaving the car door open as he pulled out about \$300 to purchase the drugs. At that point, according to the State, Butta pulled out a gun and put it to Daniel’s head, yelling, “Give it up! Give it up!” According to Daniel’s testimony, the two struggled over the gun and Butta pulled the trigger, but it jammed. At some point during the transaction, Butta yelled, “They got a gun! Shoot, shoot, shoot!” Butta and Clements then opened fire on the vehicle and its occupants, Jamol and Antonias. Jamol later said he watched as Menefee pointed a gun at Antonias’ head and shot him. During the gunfire, Jamol was shot twice in the arm; Antonias later died at the hospital from the gunshot wound to his head. When Daniel ran to the other side of the vehicle and pulled out the assault rifle, Butta, Clements and Menefee ran. Daniel and Jamol never shot the assault rifle.

In 2013, a Fulton grand jury indicted Christian “Butta” Williams, Harold Clements and Travon Menefee for the murder of Antonias Williams, the attempted armed robbery of Daniel Alexander, the aggravated assault with a deadly weapon of Jamol Alexander and Antonias Williams, and possession of a firearm during the commission of a felony. Butta Williams, whose appeal this is, was found guilty on all charges. He was sentenced to life in prison plus five years on the gun possession charge, which was suspended. Williams now appeals to the state Supreme Court.

**ARGUMENTS:** Williams’ attorney argues that his trial attorney rendered “ineffective assistance of counsel,” in violation of his constitutional rights, for failing to do a number of things. She failed to object when the prosecutor told the jury that the witnesses against Williams “risked their lives to testify,” implying that they were threatened or intimidated by the defendants. “The prosecutor in this case committed misconduct when he insinuated that the defendants in this case somehow threatened the alleged victims in an effort to get them not to testify,” the attorney argues in briefs. “Trial counsel had a duty to object under the circumstances.” She failed to object when prosecutors asked the jury to place themselves in the position of the alleged victims in the case. “Such an argument is impermissible because ‘it encourages the jurors to depart from neutrality and to decide the case on the basis of personal

interest and bias rather than on the evidence,’” Williams’ attorney argues. The trial attorney also failed to object when the State vouched for the credibility of the alleged victims in the case. “It is well settled that a prosecutor may not express to the jury his or her personal belief about the veracity of a witness.” And she failed to object when the State “inflamed the passions and guilt of the jurors by arguing that crime is rampant in the community and that only white, suburban people get justice in our system.” She failed to object to the State’s misrepresentation of gun-related evidence. Among other mistakes, Williams’ trial attorney failed to challenge the credibility of the lead detective over the inconsistencies in the investigation and the prosecution of the case. And she failed to challenge the credibility of the witnesses by asking the court to use their arrest reports and instruct jurors that any of them might have testified against Williams in exchange for immunity or leniency. The trial court erred in failing to instruct jurors that instead of murder, they could consider Williams guilty of the less serious charge of voluntary manslaughter, Williams’ attorney argues. And his trial attorney was also ineffective for failing to request the instruction. “Such an instruction would have permitted the jury to properly consider Daniel Alexander’s testimony that he was reaching for the AK-47, while at the same time reaching for the money to conduct a drug transaction as sufficient provocation and justification for Mr. Williams to yell, ‘He’s got a gun! Shoot, shoot, shoot!’ and for others around the car to begin shooting out of the fear and stress of the situation,” Williams’ attorney contends.

The State, represented by the District Attorney’s office and Attorney General’s office, argues point-by-point in briefs that Williams has failed to meet his burden of proving that his trial attorney rendered ineffective assistance of counsel. Under the U.S. Supreme Court’s 1984 decision in *Strickland v. Washington*, to prove “ineffective assistance of counsel,” a defendant must show that his trial attorney provided deficient performance and that, except for that unprofessional performance, there is a reasonable probability that the outcome of the proceeding would have been different. “Appellant [i.e. Williams] has not shown deficient performance or prejudice, much less both, as he must to prevail,” the State argues. Also, the trial court did not err in failing to instruct the jury on the crime of voluntary manslaughter. Here, there was no evidence to support such a charge, as “there was no serious provocation or act that could have aroused passion in a reasonable person,” as that crime requires, the State argues.

**Attorney for Appellant (Williams):** Saraliene Durrett

**Attorneys for Appellee (State):** Paul Howard, Jr., District Attorney, Paige Whitaker, Dep. D.A., Arthur Walton, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Michael Oldham, Asst. A.G.

### **SULLIVAN V. THE STATE (S17A0664)**

A man convicted of murder in **Floyd County** and sentenced to life in prison with no chance of parole is appealing on the ground that his trial attorney was incompetent and ineffective in violation of his constitutional rights.

**FACTS:** According to prosecutors, the night of June 1, 2013, Kamineka Whatley went to visit Kevin Daniel at his home on Wheeler Street. As the two sat in the living room watching a basketball game on television, two men wearing black ski masks burst into the house and put guns to their heads. Whatley fell to the ground and begged for her life. One of the assailants told her to shut up and said he knew her. Facing the floor, she did not see what happened next, but she heard the men hollering at each other, then running out the door followed by a scuffle and

gunshots. Whatley ran outside to Daniel, who told her to get rid of whatever she could find in the house. In a panic, she threw some drugs out in the yard, jumped in her car and sped home. She did not tell anyone about what happened until the next morning when a friend called and said Daniel had died. Then she told her boyfriend, and together they went to the police.

Hours earlier, police had responded to shots fired in the early morning hours of June 2. They found Daniel lying on the front lawn, bleeding and groaning in pain. He was not able to identify his attackers but told police there had been two of them. Daniel was taken to the hospital where he died later that morning from two gunshot wounds to the abdomen. Inside his house, investigators found bags of marijuana and crack cocaine, along with \$2,409 in cash in the master bedroom. They had also found nearly \$1,000 on Daniel's person. A plastic baggie of marijuana was found in the yard next door.

According to testimony by Antonio Devon "Boobie" Jones, two days before the murder, Christopher Rayshun Smith had come to him and said he knew where they could find a lot of drugs. The night of the murder, Smith waited for Jones in his car outside Jones' home. As Jones got into Smith's car, he saw that Smith's brother-in-law, Jamarcus Sullivan, was in the back seat. Smith first drove back to his house to get a shotgun. The three then drove to Daniel's house. Smith said he could not go into the house because Daniel would recognize him, so he dropped off Sullivan and Jones down the street from Daniel's house and they walked the rest of the way. Jones recognized Whatley's Jeep in the driveway and told Sullivan she'd recognize him. So they decided Sullivan would go in first and "lay everybody down," then Jones would follow. Sullivan had a handgun and Smith's shotgun; Jones was unarmed, according to his testimony.

After they burst into the house and Whatley dropped to the ground, Sullivan started to hand Jones the shotgun when Daniel charged at them. As Daniel wrested the shotgun away from Sullivan, Jones ran outside and hid behind the Jeep. He said he heard gunshots and saw Daniel come out of the house and fall to the ground, holding the shotgun. Sullivan then came out of the house, stood over Daniel, and shot him with his handgun, according to Jones. Sullivan retrieved the shotgun and he and Daniel ran down the street where Smith picked them up.

A woman later testified that her cousin, Andreka Waddell, the mother of Sullivan's daughter, came to her house the morning of June 2, 2013 and burned some of Sullivan's clothes.

In August 2013, Sullivan, Jones and Smith were indicted for murder, armed robbery, aggravated assault, aggravated battery, false imprisonment, and possession of a firearm in connection with the death of Kevin Daniel. Sullivan was tried separately and in December 2014, found guilty on all counts. He was sentenced to life without parole plus 90 years in prison and another 20 years on probation. Sullivan now appeals to the state Supreme Court.

**ARGUMENTS:** Sullivan's attorney for his appeal argues that during his trial, Sullivan received "ineffective assistance of counsel" from his attorney, in violation of Sullivan's constitutional rights. The trial attorney failed to object to hearsay that heavily implied Sullivan was attempting to flee. "Here, trial counsel sat idly by while one of the lead investigators testified to conversations with unidentified 'relatives' of Jamarcus Sullivan," saying that two days after Daniel's murder, he had contacted them about coming to New York to visit. "Here, we do not know who the 'relatives' are or if they even exist," the attorney argues in briefs. "We do not know what the 'relatives' actually said, if anything... What we do know is that the jury heard what amounts to an admission of guilt, without the truth of that 'admission' ever being tested." The attorney also failed to object to incendiary photos taken four years before the trial of

Sullivan holding guns to show “that he had violent tendencies.” These photos were irrelevant and “prejudicial” – or extremely damaging – to his case. “Introducing the photos was designed to frighten and antagonize the jury, not to show identity, tattoos, gang affiliation, or to identify any weapon,” the attorney argues. And the attorney failed to expose the intent of Sullivan’s co-defendant, Jones, to obtain a plea deal as a motive behind Jones becoming a State’s witness against Sullivan. “Accomplice testimony is presumptively unreliable,” the attorney argues. “Testimony of an accomplice begging for a plea deal is even more unreliable.” The only witness that placed Sullivan at the crime scene was Jones, because the surviving witness, Whatley, was unable to identify the masked assailants. “Trial counsel’s failure to expose Mr. Jones’s motivations kept the jury from finding out why,” the attorney argues. The attorney also argues that, “Even if trial counsel’s errors were individually harmless, the cumulative effect of trial counsel’s errors substantially prejudiced Mr. Sullivan’s case.” Finally, trial counsel’s “bizarre” questioning of his client substantially harmed Sullivan’s case by strengthening, rather than diminishing, the State’s allegation that Sullivan was a member of the “9 Trey Billy Badass” gang, which was affiliated with the Bloods, Sullivan’s attorney argues.

The State, represented by the District Attorney’s office and the Attorney General’s office, argues that Sullivan failed to meet his burden of showing that his trial attorney was ineffective. Under the U.S. Supreme Court’s 1984 decision in *Strickland v. Washington*, to prove “ineffective assistance of counsel,” a defendant must show that his trial attorney provided deficient performance and that, except for that unprofessional performance, there is a reasonable probability that the outcome of the proceedings would have been different. His attorney did not object to the detective’s testimony that relatives had told him Sullivan planned to visit them “because he did not see the information as either advantageous or disadvantageous,” the State argues. Even if the trial attorney had succeeded in keeping out the evidence of Sullivan’s desire to visit New York, there was stronger evidence of his desire to evade police, including testimony that his girlfriend burned his clothes the morning after the murder. Sullivan also failed to show his attorney was ineffective for not objecting to showing pictures of Sullivan holding a gun several years before trial. At the hearing on his motion requesting a new trial, Sullivan’s trial attorney testified that he had advised Sullivan the photos would be “very harmful to him,” but Sullivan wanted them shown because he felt they would make him look tougher than he was. So the trial attorney did not object to their being shown. And Sullivan failed to prove his attorney was ineffective for not asking one more question that would have “exposed” Jones’ alleged intention to obtain a plea deal by testifying for the prosecution. The trial court found there was no evidence of any deal between Jones and prosecutors for his testimony. And, “The record supports the court’s findings,” the State argues. As to Sullivan’s claim that the cumulative effect of his trial attorney’s errors was severe damage to his case, the trial court properly found it was unlikely the verdict would have been any different. The evidence against Sullivan “was overwhelming, such that there is no reasonable probability that the outcome would have been different even if counsel had succeeded in excluding the testimony about the relatives in New York *and* the Facebook pictures *and* had not asked the deputy the two questions about Appellant’s falsely claiming membership in a gang,” the State argues. “In addition, counsel could not have shown the existence of a plea deal with Jones, as there was no evidence of one.”

**Attorney for Appellant (Sullivan):** Konrad Ziegler

**Attorneys for Appellee (State):** Leigh Patterson, District Attorney, Natalee Staats, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Jason Rea, Asst. A.G.

\* Under legislation passed in 2016 by the General Assembly, in the future the Georgia Court of Appeals, rather than the Supreme Court of Georgia, will be handling appeals in divorce-related cases.