



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Monday, April 17, 2017

10:00 A.M. Session

PIERCE V. THE STATE (S17A0828)

A man convicted of sexually molesting three boys when they were 13 and 14 years old is appealing his convictions and 30-year prison sentence.

FACTS: Matthew Caleb Pierce was indicted by a **Houston County** grand jury for six counts of aggravated child molestation, three counts of child molestation, two counts of sexual battery, one count of sexual exploitation of a child (“production”), one count of sexual exploitation of a child (possession), one count of distribution of Hydromorphone (an opioid pain medication), and one count of distribution of Alprazolam (an anti-anxiety medication available under the trade name, Xanax). The indictment alleged Pierce committed the offenses in the summer of 2011 against three boys, identified as B.M., M.T., and D.D. At the time, Pierce was 31; the boys were 13 and 14. According to testimony, B.M., who was 18 at the time of the trial, lived in the same apartment building as Pierce. During that summer, he, D.D. and M.T. “hung out” all the time and spent the night at B.M.’s apartment several times. The boys also hung out with “Caleb Pierce” at Pierce’s apartment where they would sit on the porch and drink beer together. Once, B.M. testified, D.D. became so intoxicated that B.M. had to carry him back to his apartment. B.M. testified he too felt poorly that night and passed out on a couch at Pierce’s apartment. According to the State, Pierce committed various sexual offenses against the boys

which included performing anal and oral sex on B.M., and having B.M. perform anal and oral sex on him; having oral sex with M.T., and having M.T. perform oral sex on him; and offering drugs to D.D. in exchange for a picture of D.D.'s penis. Following a November 2014 trial, the jury found Pierce guilty of 14 of the 15 counts against him and acquitted him of one count of child molestation involving D.D. Pierce was sentenced to 30 years in prison with no chance of parole followed by probation for the remainder of his life.

A key issue in the case is a videotaped interview of B.M. that was played at Pierce's trial. On July 9, 2011, the day the allegations against Pierce first arose, Investigator Keel Broom of the Houston County Sheriff's Office interviewed B.M. for an hour and a half. His mother was present for a portion of the interview. At the trial three years later, B.M. testified he did not remember talking to police or Investigator Broom. And after watching the video outside the presence of the jury, he said the video did not refresh his memory and he did not remember anything concerning acts of molestation. The court then called a recess for lunch. When court reconvened, the State submitted a motion to introduce the video under the state's statute on hearsay evidence (Georgia Code § 24-8-803 (5)) as a "past recollection recorded." Under the statute, among those things that may not be excluded by the hearsay rule, even when the alleged victim is available as a witness, are a "record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately...." After the lunch recess, State prosecutors put B.M. back on the stand and asked him a number of questions, including whether he remembered giving the video statement to Broom, and whether at the time, he knew what he was talking about, spoke truthfully, and talked about things that were fresh in his memory. B.M. answered "yes" to each question. The State then offered the video as evidence, and over the defense attorney's objection, the court admitted it. In the video, B.M. recounted the incident where D.D. got "messed up" from taking a pill Pierce had given him and drinking too much alcohol. He said Pierce had also given him a bunch of pills. Initially, B.M. stated that Pierce had never touched him but he had tried to watch B.M. urinate. At this point in the interview, Investigator Broom accused B.M. of being dishonest and mentioned obstruction and perjury. Broom then asked B.M.'s mother if he could interview B.M. alone and she left the room. Following her departure, B.M. tearfully told Broom he had spent the night at Pierce's apartment and, in between sobbing, had had oral and anal sex with Pierce. The defense attorney then moved for a mistrial based upon admission of the video. The trial court denied the motion, and the jury subsequently convicted Pierce. Pierce now appeals to the state Supreme Court.

ARGUMENTS: Pierce's attorneys argue the trial court made several errors, including admitting the videotaped interview of B.M. into evidence after B.M. refused to testify to the details of the alleged sexual offenses. The trial court improperly admitted the video under the "past recollection recorded" exception to the hearsay rule because "the State failed to prove all of the requisite elements for admissibility by a preponderance of the evidence." "This was a case of selective memory by a reluctant witness who did not want to testify to the things that the State needed him to testify to at trial," Pierce's attorneys argue in briefs. Georgia Code § 24-8-803 (5) "is not intended for use with a reluctant witness. Its purpose is to assist witnesses who genuinely cannot remember events that they recorded previously...." B.M. also failed to prove the prong of the test for admissibility under the statute that the statements he made in the recorded interview were true and accurately represented his knowledge at the time. "B.M. initially testified at trial

that he did not even remember talking to the police or being interviewed by Detective Broom for an hour and a half and that he had no independent memory of any abuse,” the attorneys argue. Pierce’s defense against all the charges “was irreparably harmed by the erroneous introduction of the videotaped interview. The State presented no other evidence at trial to prove the crimes allegedly committed against B.M. other than the disturbing video of the crying teenager that brought some of the jurors to tears. Mr. Pierce was denied his constitutional right to cross-examine B.M. about the sexual offenses.” “The evidence tainted the entire trial and its improper admission by the court warrants a reversal as to all counts of conviction.” Among other arguments, Pierce’s attorneys contend the trial court erred by admitting into evidence photographs of screen shots taken from D.D.’s phone the State alleged were between D.D. and Pierce. Georgia law requires “authentication or identification as a condition precedent to admissibility...” “In the instant case, the State failed sufficiently to link the text messages contained on the screen shots from D.D.’s phone to Caleb Pierce,” Pierce’s attorneys contend. Finally, Georgia’s sentencing for aggravated child molestation is unconstitutional because it violates Pierce’s due process rights, equal protection rights and rights against cruel and unusual punishment. The severity of Pierce’s sentence “is grossly out of proportion to the severity of the conduct,” his attorneys argue. “There is a shocking disparity between Georgia’s sentencing scheme for aggravated child molestation and the sentencing schemes of sister states in effect at the time of Mr. Pierce’s sentencing for similarly proscribed conduct....”

The District Attorney’s office, representing the State, argues the trial court did not err in admitting the videotaped interview of B.M. “Here, the State laid the foundation meticulously in admitting B.M.’s recorded interview with police under the past recollection recorded statute.” “Whether or not B.M. genuinely could not remember or was just reluctant to testify goes to credibility of the witness and weight of the evidence, which is a decision-making power that lies solely with the jury.” Pierce also argues that if B.M. could not remember details of the sexual offenses while on the stand at trial, then he could not verify that the things he said during the interview were true and accurate. “Here, there is ample evidence that B.M. was able to verify sufficiently the accuracy and truthfulness of the video and his statements made therein,” the attorneys argue. The interview took place about a week after the sexual offenses occurred, “when they would have been fresh in his mind.” Only after his mother left the interview room was B.M. comfortable enough to tell the detective details of the sexual acts with Pierce. And although B.M. initially testified that he could not remember giving a statement to police, he testified later that same day that he did remember giving a statement to police. The trial court did not err in admitting into evidence the screen shot photographs of the text messages found on D.D.’s cell phone. “There are no special rules under Georgia law governing the authentication of electronic documents or communications, such as text messages,” the State argues. “Instead, electronic records and communications are to be treated the same as ordinary writings for purposes of authentication and admission.” Finally, the trial court did not err in denying Pierce a new trial because his sentence “does not rise to the level of cruel and unusual punishment and was imposed within the range provided by statute,” the State argues. “Traditionally, it is the task of the legislature, not the courts, to define crimes and set the range of sentences.”

Attorneys for Appellant (Pierce): Laura Hogue, Susan Raymond

Attorneys for Appellee (State): George Hartwig, III, District Attorney, T. Clifton Woody, II, Alicia Gasset

O’CONNOR V. FULTON COUNTY ET AL. (S17A0880)

Fulton County’s former Chief Financial Officer and interim County Manager is appealing a court ruling in his lawsuit against the County for firing him.

FACTS: Patrick J. O’Connor was hired in 1996 to serve as the Chief Financial Officer/Finance Director of **Fulton County**, reporting directly to the County Manager. On Oct. 1, 2014, the County Board of Commissioners appointed him to serve as the interim County Manager when that position became vacant. At the same time, the Board appointed the Deputy Director of Finance, Sharon Whitmore, to the interim Finance Director position. According to O’Connor, at the time of his appointment to interim County Manager, he asked Fulton County Board of Commissioners Chairman John Eaves for a severance agreement in the event he was not selected as the permanent County Manager. But Eaves assured him he would not need such a package because if he were not given the permanent appointment, he would automatically return to his position as Finance Director. On Feb. 12, 2015, Eaves and the Board’s Vice Chairwoman, Liz Hausmann, called O’Connor and informed him that he was being suspended immediately as the interim County Manager. He was informed in a letter that Sharon Whitmore would become the new interim County Manager. According to O’Connor, Eaves and Hausmann told him they took this action because a co-worker had surreptitiously recorded O’Connor making critical comments about certain Board members. During a Feb. 16, 2015 meeting, the Board formally voted to end O’Connor’s service as interim County Manager and to appoint Whitmore to the position. During the same meeting, the Board also voted to replace O’Connor as Chief Financial Officer, effective immediately, although the County’s attorney later informed O’Connor that the Board would allow him to resign from the Finance Director position in lieu of termination.

In September 2015, O’Connor sued the County, alleging breach of contract against Fulton County and seeking a “writ of mandamus” against County Manager Richard Anderson, to force Anderson to provide O’Connor with back pay and reinstate him as Finance Director. He also asked for his costs of litigation to be paid by the County and Anderson. In May 2016, following a hearing, the trial court ruled in the County’s favor, concluding that O’Connor could not support a claim for breach of contract, or any entitlement to mandamus relief or litigation expenses. O’Connor now appeals to the state Supreme Court.

ARGUMENTS: O’Connor’s attorney argues the trial court erred in granting “summary judgment” on O’Connor’s breach of contract claim because the Fulton County Personnel Regulations gave O’Connor a contractual right to return to his Finance Director position. (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.) Under Personnel Regulation 300-4 (7), “an employee who is temporarily promoted to an interim position shall be returned to his or her former position upon the conclusion of the interim assignment,” the attorney argues in briefs. While the County argues O’Connor was not covered by the regulation, O’Connor claims it applies to all county employees, giving him the legal right to reinstatement to his position as Finance Director and to an award of all accrued back pay and benefits. Specifically, the regulation applies to any “permanent classified or permanent unclassified on-range employee.” (An “on-range” employee is one whose position is assigned to an established salary range within the Fulton County Pay Schedule and Compensation Plan. By contrast, a “set-rate” position is not assigned to an established salary range but instead has a salary specifically approved by either the County Manager or the Board of Commissioners.) Personnel Regulation

300-4 (7) states: “Once the employee is no longer performing the duties in the higher classification and position, he/she shall be returned to his/her former classification and position and to the salary at which he/she would have been entitled had he/she remained in the position.” The trial court therefore erred in ruling that the regulation did not apply to O’Connor and did not form a contract under the circumstances, his attorney argues. The trial court also erred in denying O’Connor mandamus relief in light of O’Connor’s clear legal right to return to his Finance Director position upon his removal as interim County Manager. Finally, the trial court erred in ruling that O’Connor was not entitled to litigation expenses.

The County’s attorneys argue that the trial court ruled correctly on O’Connor’s breach of contract claim because O’Connor “was admittedly an at-will employee, the Fulton County Personnel Regulations did not create a contract under these circumstances and, moreover, Personnel Regulation 300-4 (7) did not apply to his former position as Finance Director.” In April 2007, the position of Finance Director position was converted from an “on-range” position to a “set-rate” position, specifically to increase O’Connor’s salary from \$156,000 to \$181,373, the attorneys contend. Therefore, “At all relevant times, O’Connor was an unclassified, at-will employee and, as such, could be dismissed with or without cause,” the attorneys argue. When he was terminated in 2015, “he did not occupy or have claim to the position of Finance Director.” The trial court also correctly denied O’Connor mandamus relief given that he was an at-will employee with no legal interest in his former position as Finance Director. He therefore has no legal right to compel the County to reinstate him. Finally, given that O’Connor failed in his claims for breach of contract and mandamus relief, the trial court correctly found he was not entitled to litigation expenses, the County’s attorneys argue. Under Georgia law, a prerequisite to any award of legal expenses is the award of damages or other relief in response to the underlying claim. “As a matter of law, the award of attorney fees and expenses is barred when the underlying claims fail,” the attorneys argue.

Attorney for Appellant (O’Connor): J. Matthew Maguire, Jr.

Attorneys for Appellees (County): Kaye Burwell, Dominique Martinez

COLEMAN V. THE STATE (S17A0818)

A young man convicted of murder for his role in the stomping and beating death of a 19-year-old at a high school party is appealing his conviction and sentence to life in prison with no chance of parole.

FACTS: On Nov. 6, 2010, the parents of Alexis and Ariana Thompson hosted a party for their daughters at their home on Independence Drive in **Douglas County**. Each daughter was permitted to invite six friends to the party that was to be a celebration of the girls’ good grades at school. Among those invited to the party was Bobby Tillman, 19, a recent graduate of Chapel Hill High school. The party started out relatively tame, with dancing and no drugs or drinking. But news about the party spread on social media and eventually, more than 100 uninvited people showed up. Among them were **Horace Coleman**, also 19, and his friends, Emmanuel Boykins, Tracen Franklin, and Quantez Mallory. As the party grew out of control, the parents shut it down, called police, and many of the partygoers spilled into the front yard and onto the street. A fight broke out among some of the girls who had crashed the party. As people congregated around the girls to watch the fight, Tillman, who had not been involved in any of the verbal or physical altercations, stood passively next to a car that was parked across the street. At one point,

Boykins tried to break up one of the fights between girls and was himself hit. Witnesses heard him say he wasn't about to hit a female, "but the next n----- I see, I'm going to swing on him."

According to State prosecutors, Boykins then headed toward Tillman and began hitting him over and over. Coleman, Franklin and Mallory joined in, punching and kicking the downed Tillman. "They just kept kicking him and kept kicking him," one witness said. As Tillman lay on the ground, the four stomped on him more than 10 times. After they finally stopped, Tillman lay on the ground foaming at the mouth. Witnesses described one of the attackers as having dreadlocks with gold tips and wearing a green hoodie, blue hat and two rosaries. When deputies from the Douglas County Sheriff's Office arrived, they blocked the roadway with their vehicles to prevent people from leaving the scene. They found Tillman lying unconscious in the grass but still alive with a weak pulse and gasping for air. Law enforcement and then paramedics performed CPR, but Tillman never regained consciousness. He was transported to the hospital but pronounced dead shortly after arrival. Meanwhile, law enforcement officers transported 57 partygoers to the sheriff's office for interviews. As they boarded the bus, one of the detectives noticed that Coleman matched the description of the young man with gold-tipped dreadlocks and a green hoody. At the sheriff's office, officers set up photo lineups, and at trial, several witnesses identified Coleman, Boykins, Franklin and Mallory as Tillman's attackers. In 2012, Boykins pleaded guilty and was sentenced to life in prison with the possibility of parole. The same year, Franklin was tried, convicted of murder and sentenced to life without the possibility of parole. At a joint trial in January 2013, Coleman and Mallory were both found guilty of malice murder. Both were sentenced to life without parole, and Coleman now appeals to the Georgia Supreme Court. (Mallory is due to argue his appeal before the Supreme Court one day after Coleman, on April 18, 2017.)

ARGUMENTS: Coleman's attorney argues the trial judge erred in not granting him a mistrial after a jailhouse informant testified that Coleman had sent people to beat him up in jail. Brian Corley, an inmate with Coleman at the Douglas County jail, testified that following a Bible study, Coleman had told him, "he didn't know that you can kill a man by kicking him." When asked at trial by prosecutors whether he was having trouble at the jail because of his decision to testify against Coleman, Corley said people had told him that Coleman wanted to beat him up. Coleman's attorney objected on hearsay grounds, but the judge sustained the objection. Corley then said he'd been in a fight, and that the man who started it had said, "Yeah, this is for Horace." Coleman's attorney then moved for a mistrial. The judge denied the motion for mistrial, stating he would issue a curative instruction and rebuke the prosecutor for eliciting testimony that Coleman had orchestrated an attack against Corley without any proof. But that was not enough, Coleman's attorney argues. "The snitch's testimony was so prejudicial that no curative instruction of admonishment of the jury was sufficient to undo the harm," the attorney argues. "The evidence was hearsay, and elicited without adequate notice to the defense. But the testimony, if believed, suggested that Mr. Coleman was capable of engaging in the kind of conduct for which he was on trial." "The trial court abused its discretion in failing to grant a mistrial." The judge also erroneously commented on the evidence through his extensive questioning of the State's forensic pathologist. "It is inappropriate for a court to comment on the evidence during trial," the attorney argues. "While a judge may question witnesses during a trial, a court may not 'take on the role of an advocate or otherwise use his judicial powers to advantage or disadvantage a party unfairly.'" Here, "the trial court intimated his opinion about

the cause and circumstances of Bobby Tillman's death based upon his extensive questioning of the State's forensic pathologist."

The District Attorney's office and Attorney General's office, representing the State, argue the trial court did not err when it gave a curative instruction and rebuked the prosecutor, rather than granting a mistrial, following Corley's inadmissible testimony. Coleman's attorney has failed to show that a mistrial was essential to the preservation of Coleman's right to a fair trial and therefore, he fails to show that he is entitled to a new trial, based on the corrective actions taken by the court. "The trial court instructed the jury not to give any consideration in their deliberations to what the witness just said, and the jurors affirmed on the record that they understood." Following his instruction to jurors, the defense attorney did not renew their motion for a mistrial. By not renewing the motion at that point, Coleman actually waived his right to bring the issue up on appeal. "Because the motion for mistrial was not renewed promptly following the court's curative instruction and rebuking of the prosecution, this alleged error was not preserved for appellate review," the State argues. Nevertheless, the "trial court acted within its discretion in selecting the remedial actions of a curative instruction and a rebuke of the prosecution." The trial judge also acted within his authority in asking "clarifying questions" during the trial of the State's medical examiner to develop the truth of the case. In doing so, the judge "never expressed an opinion or commented on the evidence." "It has long been part of Georgia jurisprudence that a trial judge may propound questions to any witness for the purpose of developing fully the truth of the case, and the extent of such an examination is a matter for the trial court's discretion."

Attorney for Appellant (Coleman): J. Scott Key

Attorneys for Appellee (State): Brian Fortner, District Attorney, Emily Richardson, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Aimee Sobhani, Asst. A.G.

CHRISTOPHER ALTMAN V. ANGELA ALTMAN (S17F0619)

A father is appealing a **DeKalb County** court ruling that gave primary custody of his two daughters to their mother.

FACTS: Christopher and Angela Altman married in 2004 and have two daughters, today about 9 and 11 years old. In early 2012, the mother filed motions for temporary protective orders alleging that the father had sexually molested the older child. Shortly after, on Feb. 6, 2012, Christopher filed for divorce. In the ensuing years, the trial court granted various protective orders, giving Angela temporary primary physical custody of the girls while Christopher was given supervised visitation of his children. The court eventually entered an Order for Psychological Custody Evaluation appointing Dr. Nancy McGarrah to assist the court in determining the issues of custody and parenting time. According to Angela, who is representing herself due to limited funds, Christopher's "team of attorneys" chose McGarrah, and Angela objected to being evaluated by his hand-picked psychologist. In 2013, McGarrah recommended to the court that the father have primary custody and all decision-making authority. In 2014, the court entered a fourth temporary order, reversing custody by granting the father temporary sole custody of the children with the mother having only supervised visitation. The court ordered the mother to receive therapeutic treatment, as recommended by McGarrah. The court later amended

its order and in 2015, following a hearing, the trial court removed the requirement that Angela's visitation with her children be supervised.

Throughout the five years of litigation, the parties have accused each other of behavior damaging to the children. In their brief, Christopher's attorneys write that McGarrah testified, "it is very difficult for [the mother] to inhibit what she says to the children and in the presence of the children," and "the mother has difficulty separating reality from fantasy" and "her belief system negatively impacts the children." Angela writes in her brief that Christopher, "stated in his diary that he was a self-proclaimed monster and he stated, throughout his diary, that he hated himself and that he abused the children and the mother on more than one occasion." She writes that his diary is available "in the court dockets in DeKalb County." Yet McGarrah "parades him as a prototype, a hero that has no blemish. Although, he admitted to her, he was also molested, he was involved in using every type of drug, extensive pornography from the age of 5, which he became addicted to, even growing up looking through a peep-hole at his stepmother, and lusting after her." Angela claims her husband wore her clothing "while masturbating in them. Mr. Altman also had a fetish with urinating in the marital bed and on the wife even after he was asked numerous times to stop such behavior by the family therapist and his wife."

One of the main issues in this appeal is the judge's eventual decision to interview the children in her chambers. At a final hearing in November 2015, the judge stated that her goal had always been to speak with the children. Christopher's attorneys objected to the judge speaking privately to the children "ex parte," or outside the presence of the parties or their attorneys. Ultimately, the judge allowed the court reporter Christopher had retained to be present, stating the transcript of the interview would be sealed. Following the hearing and the interview, on Dec. 31, 2015, the trial court entered a Final Order, granting the mother primary physical custody as of June 1, 2016 – the conclusion of the school year. The judge wrote in the Findings of Fact: "Considering [the] false reports related to the Mother's improper influence, the court decided lawfully to interview the girls." The judge wrote she "did not find frightened girls or girls overly influenced by their mother," as the therapist had reported. "If the mother was badgering the girls, they did not so represent during the interview. They were not overwhelmingly aligned with the mother. They indicated love for both parents and were prepared to stay with either parent." Christopher now appeals to the state Supreme Court.

ARGUMENTS: Christopher's attorneys argue the trial judge erred by ordering that the transcript of the judge's in-chambers interview with the children be sealed. The judge then improperly denied the parties access to the transcript while relying on information she received during the interview in making her final custody decision. "The trial court failed to follow the mandatory procedures for sealing materials within a record," as specified in Uniform Superior Court Rule 21, his attorneys argue. The rule requires the parties be given notice and hearing held, and neither was done. The trial court also violated Christopher's right to due process when it conducted an ex parte interview of the children and refused to allow Christopher access to the transcript. "This constitutional violation leaves the father without the ability to determine if there were any other errors by the trial court during its interview with the children, or any mischaracterization of the interview in the court's Final Order," his attorneys argue. And the trial court "improperly relied on an ex parte conversation with the parties' children in reaching its ultimate decision on custody and parenting time." The Supreme Court should reverse the trial

court's decision due to its improper communications with the children and its subsequent reliance on what they said, the attorneys argue.

Angela, representing herself, argues in her brief that the trial court did not err in interviewing the children and sealing the record. Christopher was not denied access to the transcript, she argues, as he only had to request it. During the hearing, the judge told the father's attorneys that some documents would be sealed but that "due process would allow parties to request any of the information." The judge accurately relied not only on information received during the interview of the children in making her final custody determination, but also on the past years of "court proceedings, supporting documents, eye witnesses, written statements and similar court cases." "The opposing party seemed consistently worried about the children speaking to the judge, which was a concern because the children's voice should be heard," Angela argues. "There is no reason whatsoever to change the court's decision based on all the unlawful and false accusations made against the mother by the father." The children are thriving with their mother, making good grades and are happy. The report by the therapist about Angela was "biased as she was hired directly by the father's legal team," Angela claims. "The court's conversation with the children was important and mandatory." "The opposing counsel is obviously disgruntled because the final decision did not move in their favor even with the ability to appoint all the doctors and all court appointed reporters and all evaluators."

Attorneys for Appellant (Christopher): Jeanney Kutner, Daniel Bloom, William Alexander
Attorney for Appellee (Angela): Angela Altman, pro se

2:00 P.M. Session

SMITH V. NORTHSIDE HOSPITAL, INC., ET AL. (S16G1463)

An attorney who filed an "open records" request for records pertaining to Northside Hospital's acquisition of four physician groups is appealing rulings by two lower courts that the records he seeks are not public records and therefore he is not entitled to them.

FACTS: The parties disagree on the characterization of the facts of this case. In 1966, the **Fulton County** Commission created the Fulton County Hospital Authority to address the community's need for healthcare facilities. According to attorneys for E. Kendrick Smith, a partner with Jones Day law firm, in 1991, as a result of restructuring its operations, the Authority created Northside Hospital, Inc. and leased and transferred to Northside "all of the millions of dollars worth of public healthcare assets the Authority had developed since 1966 with the help of public financing and funding..." According to attorneys for Northside Hospital, in 1991, the Authority decided to "privatize Northside Hospital by divesting itself of all control over and responsibility for hospital operations, and by transferring full control of hospital operations to Northside Hospital, Inc., a private, nonprofit corporation." Under the lease signed by the Authority and Hospital, the Authority transferred to Northside all "right, title and interest in and to" all operations, assets, and liabilities for 40 years. In return, Northside agreed to privately operate the hospital, pay all debts and assume all liabilities, and pay an annual rent of \$100,000.

In 2011 and 2012, Northside acquired four physician practice groups. According to Smith's attorneys, the hospital paid more than \$100 million for the groups. According to Northside's attorneys, what Northside paid is "unsupported and irrelevant," and the hospital

“competed for and entered four private transactions with privately-owned physician groups and other private parties.” In October 2013, attorney Smith sent an “Open Records Act request” to Northside requesting the records of the acquisitions. According to Northside’s attorneys, Smith requested the records “on behalf of an undisclosed competitor of Northside Hospital, Inc. to use the Georgia Open Records Act to gain an advantage in the private healthcare marketplace.” Northside declined to give Smith the records, claiming they were not subject to the Open Records Act and were exempt under the Act’s exemptions.

In November 2013, Smith sued Northside in Fulton County Superior Court to compel disclosure of the records. Three of the four physician groups intervened to protect their own documents which they argued were confidential and commercially sensitive. Following the three-day trial, the judge dismissed the case, finding that Smith had failed to show that “Northside entered into or performed any of the transactions for or on behalf of the Authority or exercised any of the Authority’s powers when doing so,” or that “the documents at issue were generated or maintained by Northside on behalf of the Authority.” Smith appealed to the Georgia Court of Appeals, arguing that “all of Northside’s records, including the requested records, are ‘public records’” because the hospital “was created by the Authority as a vehicle to act on the Authority’s behalf.” The Court of Appeals upheld the trial court’s ruling, finding there was “no evidence in this case that Northside entered the four specific transactions at issue on the Authority’s behalf.” The appellate court ruled that, “the trial court was authorized to conclude that the documents specifically requested by Smith were not ‘public documents’ within the meaning of the Georgia Open Records Act.” Smith now appeals to the Georgia Supreme Court.

ARGUMENTS: Jones Day attorneys who are representing Smith argue that as government has increasingly relied on private parties to act on its behalf, the General Assembly has granted public access to records generated by those parties too. Under Georgia Code § 50-18-70, “public records” include records prepared and maintained or received by “a private person or entity in the performance of a service or function for or on behalf of an agency.” The records in this case “were prepared and maintained or received by an entity (Northside) performing the very function for which a public agency created it – operating and expanding a healthcare system for the public’s benefit,” Smith’s attorneys argue in briefs. “Indeed, that agency (the Fulton County Hospital Authority) built that healthcare system with public funding, and under the controlling agreement, the entire system, including the physician practices that are the subject of the records request, reverts to the Authority upon termination or expiration of the agreement. Under any reasonable construction of the statute, Northside was performing a ‘service or function for or on behalf of an agency’ when it acquired those practices.” The Authority, a public agency, “created and empowered Northside to provide public healthcare on its behalf by operating and expanding the Authority’s healthcare system both within and outside Fulton County,” the attorneys contend. “The Court of Appeals erred in holding that records of Northside’s healthcare-related acquisitions made in furtherance of that function are not ‘public records.’” Settled case law establishes that records of a private entity acting in furtherance of a function an agency assigns to it are “public records.” The Court of Appeals failed to recognize the importance of an agency’s assignment of a set of responsibilities to a private entity in determining whether the records are public. Instead, the appellate court “zeroed in on a narrow litmus test: whether the agency itself had ‘control’ over or ‘involvement’ in the specific transactions at issue.” But the public records definition under the statute “encompasses

circumstances in which *someone else* – the private entity – carries out a function *in place of or for the benefit of* the agency,” the attorneys argue. “By requiring a showing that the agency itself is involved in the service or function the court effectively rewrote the statute.” The Court of Appeals’ “control or involvement” requirement also conflicts with the 30-years-long line of precedent-setting court decisions codified by the current statute, Smith’s attorneys contend. “Those decisions consistently hold that open-records coverage is triggered when a private entity carries out responsibilities assigned to it by an agency, without regard for whether the agency controlled or was involved in the specific acts at issue.” Records of nonprofit hospital corporations operating healthcare systems for public hospital authorities are public records. Public records must be disclosed unless “specifically exempted” by law, and the record makes clear “that no such exemption applies to the records of Northside’s acquisitions of physician practices.” Northside and the intervening physician practices it acquired argued in the trial court that even if the records are considered public records, they are exempt from disclosure under the Open Record Act’s “trade secrets” exemption because they are allegedly commercially valuable and disclosing them would allegedly cause competitive harm. “Even assuming the truth of these allegations, however, there is no colorable argument that Northside may rely on that narrow exemption to refuse disclosure.” “To preserve public access to all records of public business, as the legislature intended, this Court should hold that the requested records are ‘public records’ and now subject to disclosure.”

Both the trial court and the Court of Appeals correctly ruled that Smith failed to prove that the documents he requested met the statutory definition of “public records,” the hospital’s attorneys argue. “The four private transactions at issue in this case have nothing to do with government,” they write in briefs. “They involved no public funds, no public officials, no public agency, no public asset, and no ‘public health system.’ This case is not about ‘open government.’” Smith’s effort “hinges entirely on the fact that Northside, a private corporation, leases one of its three hospitals from a government authority that got out of the healthcare business more than 25 years ago – a fact that Smith contends transforms *all* of Northside’s private documents into ‘public records.’” Smith’s expansive interpretation of the Open Records Act is not supported by facts or law and misrepresents the facts of Northside’s relationship with the Fulton County Hospital Authority, which is merely one of landlord/tenant. Smith argues that all records of all private entities that perform a service that “furthers” a government function are necessarily “public records.” “There is no such rule in Georgia,” the attorneys argue. “To the contrary, both the Georgia Open Records Act and the settled case law applying it require courts to conduct a fact-based inquiry to determine whether the specific documents requested were prepared, maintained, or received by a private entity in the performance of a discrete function or service for or on behalf of a public agency, and therefore meet the statutory definition of a ‘public record.’” The evidence showed that Northside was not created as a “vehicle” or “management tool” to provide services for the Hospital Authority, but rather it was created “as a private, independent corporation to provide services for itself and on its own behalf.” The Authority did not “assign” any public health responsibilities to Northside. Rather, as the Hospital Authorities Law authorized it to do, the Authority privatized the hospital and got out of the healthcare business altogether – removing politics and itself from hospital operations – and allowed Northside to independently conduct its private operations without interference, input, oversight, direction or control.” “Because the decisions of the trial court and Court of Appeals

are supported by the evidence and consistent with Georgia law, they should be affirmed,” the hospital’s attorneys argue.

Attorneys for Appellant (Smith): Peter Canfield, Lucas Andrews, Andrew Pinson

Attorneys for Appellees (Northside): J. Randolph Evans, Thurbert Baker, Bryan Bates, James Rawls, S. Derek Bauer, Ian Byrnside

WILSON V. DELGADO (S17A0797)

A woman who gave birth to twins through in vitro fertilization, using donor eggs and her now ex-husband’s sperm, is appealing a **Peach County** court ruling that awards to her former husband three remaining embryos which he may choose to destroy or donate to someone else.

FACTS: Wendy Wilson and Rommel Delgado met in 2010 through a Christian dating service. At the time, Delgado, a Mexican national and legal resident of Georgia, was staying with his family in Mexico. The parties subsequently married in September 2010. Wilson owned a bakery in Warner Robins, and when Delgado returned to the United States, he went to work at her bakery. Because she could not conceive naturally, the parties worked with Oregon Reproductive Medicine to have eggs from a donor fertilized in vitro with Delgado’s sperm and then implanted into her womb. The two signed a consent form stating that the embryos were joint property and that upon dissolution of marriage a court would control the fate of the embryos. The clinic was able to create five viable embryos, two of which were transferred into Wilson’s womb. In May 2013, she gave birth to twins, a boy and a girl. The couple subsequently separated and in 2014, Wilson filed for divorce.

One of the issues during the divorce was who would have custody of the three remaining embryos. She claimed she had always intended to give birth to them, that they are her children’s siblings, and that she views them as her “children.” He, however, said he wanted no more children, even if she released him from any financial or other responsibility. The trial court ruled in Delgado’s favor, both because he was the “progenitor,” or the only party who contributed biological material to the embryos, and because there was no agreement or contract between the parties as to the disposition of the embryos were they to divorce. The court relied on the reasoning of a 1992 decision by the Tennessee Supreme Court, citing it as one of the most important cases in deciding what becomes of embryos upon disagreement by the parties. In that decision, *Davis v. Davis*, the Tennessee high court noted that the disposition of such embryos should be decided by the preferences of the progenitors first, and then by any prior agreement between the parties. The *Davis* decision cited the U.S. Supreme Court in stating that an individual has a constitutional right to procreate or not procreate. Similarly, the trial court relied on a 2002 Washington Supreme Court decision, *Litowitz v. Litowitz*, in which the facts were similar to these – the man contributed the sperm but the woman did not contribute the eggs. The Washington high court held that since she “did not produce the eggs used to create the pre-embryos and is not a progenitor,” any “right that she may have must be based solely upon contract.” Because in this case the trial court ruled there was no contract, it ruled that Delgado had the legal right to the embryos. Wilson now appeals to the Georgia Supreme Court.

ARGUMENTS: The trial court erred in finding that statutes related to the adoption of embryos don’t apply to this case because the embryos here are “ex utero,” or living in storage and outside a uterus. Georgia Code § 19-8-40 (3) clearly defines the “embryo transfer” referred to in the statute as “the medical procedure of physically placing an embryo into the uterus of a

female.” That language “implies that the embryo to be transferred is ex utero and will be transferred to the uterus, making it inherently applicable to the embryos in this case,” Wilson’s attorney argues. Georgia statutes that speak to the “option of adoption” for embryos, also provide Delgado an avenue to forfeit his parental rights and responsibilities. The trial court also erred by failing to define the legal status of preserved embryos because that is a key first step toward determining how they will be distributed. Some states designate frozen embryos as neither property nor persons but instead as a hybrid of property and person that “occupy an interim category that entitles them to special respect because of their potential for human life,” the attorney argues. Absent evidence of an agreement between the parties in the event of divorce, courts have used a number of factors to balance the parties’ interests, including the personal history of the parties, their religious views, the emotional burden on the outcome to the parties, the legal burden to the parties, and the use to which each party intends to put the embryos. Her interests “were based on the entirely reasonable expectation, deeply grounded in her religious beliefs, that she would be able to use the embryos and thereby carry and birth the children born of these embryos, not be ordered to destroy the budding lives whose existence she orchestrated,” her attorney argues. Surely her interests outweigh Delgado’s protests, “which are centered on his personal dislike of [Wilson] and concern regarding legal responsibility that could be surrendered.” Here, rather than “using a broad spectrum of factors and analyzing the parties’ personal histories, emotional investment in this particular reproductive opportunity, relative burdens, fertility issues, and motivations, the trial court used only the antiquated factor of genetic relation,” her attorney argues. The trial court found that Wilson had no right in the embryos, referring to the assertion in *Davis* that no one bears the consequences of procreation as much as the “gamete” contributor, or the one who contributes sperm or eggs. But this assertion no longer rings true given technology, the nature of modern families, “and considering that statutes now allow gamete-contributors to relinquish their responsibilities to an embryo.” “The trial court trivialized Ms. Wilson’s claim to the embryos simply and dismissively because she was not a gamete contributor,” the attorney argues. “Gamete contribution should not garner him an insurmountable interest in any equitable division of the embryos.” Among other arguments, Wilson’s attorney argues that the *Davis* and *Litowitz* are “outdated,” given the rapid advance of science, medicine, and modern reproductive technologies, as well as changing family structures. “Accordingly, the emerging common law should move beyond the antiquated views of genetic exceptionalism and recognize that genetic connection should not be the controlling factor in determining parenthood for cases involving the use of assistive reproductive technology.” Wilson concludes by asking this Court to build upon the Georgia Code, “which designates embryos as candidates for adoption,” and make a decision that “will allow assignment of custody based on a ‘best interests’ standard and afford these embryos every opportunity at full and fruitful lives alongside their genetic siblings, in the care of a loving, supportive mother.”

Delgado’s attorney argues that contrary to Wilson’s argument, the trial court did not rule that the Georgia statute did not apply to the preserved embryos based on whether they were ex utero or in utero. Rather, the trial court ruled the statute did not apply because no authority has been cited which would allow the court to force Delgado to give away his rights to the pre-embryos. The judge did not make a ruling as to whether the statute applied “as there was no need to,” the attorney argues. The trial court rejected using the statute “by noting the constitutional right to not procreate.” The trial court awarded the embryos to Delgado, based on the reasoning

of *Davis v. Davis*. “The criteria set out in *Davis* and *Litowitz*, which the trial court has used to reach a decision in this case, relies on two specific and particular facts of this case.” First, Wilson “is not a progenitor, gamete provider of these eggs and has no biological connection nor made any biological contribution to these fertilized eggs,” whereas Delgado is a progenitor and gamete provider. Second, there “is no contract between the parties directing the disposition of these pre-embryos upon the dissolution of the party’s marriage.” Finally, the *Davis* and *Litowitz* decisions are not outdated, Delgado’s attorney argues. “Though this issue has not had to be addressed in Georgia before,” other states have addressed it. The Georgia Supreme Court should follow the reasoning in both these decisions and rule that Wilson, “having contributed no biological material and thus not being a progenitor for these pre-embryos has no right to them whatsoever as there is no contract addressing the disposition of these pre-embryos upon the dissolution of the marriage.”

Attorney for Appellant (Wilson): Connie Williford

Attorney for Appellee (Delgado): Charles Liipfert

ANDERSON V. THE STATE (S17A0894)

A man found guilty in **Wayne County** of killing his daughter-in-law’s boyfriend is appealing his conviction and sentence to life in prison with no chance of parole.

FACTS: Brittany Anderson and James Edwin Anderson, Jr., who went by “Little Edwin,” were married in 2006 and had one son together. Five years later, in 2011, the couple divorced. He then moved in with his parents, James Edwin Anderson, Sr. and Brenda Anderson, in Jesup, GA. As Brittany’s marriage with Little Edwin was ending, she began a new relationship with Franklin “Ron” Burch, who lived down the road from Brittany in Screven. Little Edwin knew she was seeing Ron. So did his father, and Anderson Sr. tried to convince Brittany to mend her marriage with his son for the sake of their son. According to State prosecutors, in May 2011, Anderson Sr. left several drunken voicemails for Brittany, calling her a “slut,” Ron a “coward,” and threatening, “I will find Mr. Burch.” On June 29, 2011, Brittany and her son were at Ron’s home with his two daughters when Little Edwin came to pick up the couple’s child for their regular swap. Little Edwin told Brittany that Ron would wind up hurting her emotionally, and he asked Ron, who was standing by his garage, to come speak to him, but Ron declined. According to prosecutors, Little Edwin cussed and threatened Ron, then left with the child in his truck, spinning his wheels and making “donuts” in Ron’s yard. Ron then drove after him, eventually catching up to him and telling him he was not to come back to his property, and if he did, Ron would press charges. Ron later called the Wayne County Sheriff’s Office. Ron and Brittany then left for dinner.

Earlier that day, Anderson Sr. and his wife had driven to St. Simons Island for a few days’ vacation. After the incident between Little Edwin and Ron, Little Edwin called his mother and told her about it. About 7:15, Anderson Sr. and his wife walked from their hotel room at the Ocean Inn Suites to have dinner. According to prosecutors, Anderson Sr. consumed no alcohol but said he needed to go talk to Ron, telling his wife that “this has gone far enough that we don’t need no problems one way or the other and I need to go speak to the gentleman.” At about 8 that night, he left St. Simons Island and headed back to Wayne County. When he arrived home, he unlocked his safe and removed all his guns and ammunition, putting five weapons in the bed of his truck. While Anderson Sr. was not a hunter, he had served six years in the Army where he

received weapons training, and he liked to collect guns. He then headed to Screven where Ron lived. After arriving at Ron's home, Anderson Sr. removed a .308 rifle and .45 Colt revolver from the bed of his truck and waited for Ron and Brittany to return. When Ron's Chevrolet truck pulled into his driveway, Anderson Sr. pulled into the driveway behind him. Anderson Sr. claimed that as he got out of the truck, carrying his rifle but pointing it downward, Ron rushed toward him. The State claims Anderson stuck Ron in the stomach with the barrel of his weapon and the rifle went off. Anderson claims Ron tried to "tear" the gun out of Anderson's hands, the two struggled and the rifle fired accidentally. Anderson continues to maintain that he does not know who pulled the trigger, but if it was he, he did not intend to do it. Brittany heard the gun go off, then Burch "fell face forward, and he said, 'call somebody, Brittany, call somebody.'" Anderson Sr. drove away while Brittany called 911. Law enforcement and first responders arrived at the house to find Ron lying in the driveway with Brittany at his side. They tried to revitalize him with CPR, but he was pronounced dead shortly after. After talking to his wife and daughter, Anderson Sr. turned himself in.

Following a jury trial, in October 2012, Anderson Sr. was found guilty of the felony murder and aggravated assault of Franklin Ron Burch, and possession of a firearm during the commission of a crime. He was sentenced to life without parole plus five years for the weapons charge. Anderson now appeals to the state Supreme Court.

ARGUMENTS: The trial court made five errors, Anderson's attorneys argue, including allowing a man to serve on the jury who admittedly had personal relationships with almost everyone involved in the case. Yet Anderson's trial attorney asked very few questions about those relationships, rendering ineffective assistance of counsel, in violation of Anderson's constitutional rights. Juror Robert Harrison embalmed Ron's body, which gave him special knowledge of the evidence as it related to the question of whether there was a struggle over the gun. Anderson claimed there was; the State claimed there was not. Harrison knew the chief of police and lead detective in the case; he was friends with the Chief Assistant District Attorney for more than 40 years; he knew one of the people on the State's witness list and was friends with the Sheriff investigating the case. While Harrison admitted to knowing these people during jury selection, he failed to reveal – and the defense attorney failed to ask about – the close nature of these relationships. Harrison also knew the victim and the victim's family. "It is hard to imagine a case where there can be more personal connections between a juror and those involved in the case," the attorneys argue. "Not only did Juror Harrison clearly have a bias based on his close personal relationships, he had extra-judicial evidentiary information when he embalmed the body of the victim." Anderson's trial attorney was also ineffective for failing to investigate the case adequately and present expert testimony. "The crux of Anderson's defense was that there was a struggle and the gun accidentally fired, killing Burch," the attorneys argue. "The wounds in the case supported this theory, but inexplicably counsel failed to ask the State expert before or during the trial or present his own expert to explain this to the jury." And the attorney was ineffective for failing to request that jurors be instructed they could consider him guilty of involuntary manslaughter as opposed to the more serious charge of murder. Finally, the trial court erred by allowing testimony about unproven allegations of multiple domestic violence disputes between Anderson and his wife, Anderson's attorneys argue.

The District Attorney and Attorney General, representing the State, argue the trial court properly allowed Robert Harrison to serve on the jury. "Juror Harrison did not improperly

conceal any connections he had with the victim, the victim's family, state employees, defendant, defendant's family, or witnesses, nor did he conceal his employment or duties at Rhinehart and Sons Funeral Home which handled the funeral arrangements for Burch's body," they argue in briefs. "Neither did he display any bias which would have prevented him from serving on the jury." He truthfully answered all questions posed to him during jury selection about his relationships with people connected to the case. And he saw no evidence other jurors did not see from numerous photos they were shown that were taken prior to the embalming. Anderson also did not receive ineffective assistance of counsel from J. Pete Theodocian, who had been practicing law for 22 years and had tried more than 50 felony cases when he represented Anderson. The trial attorney made a strategic decision not to strike Juror Harrison for cause or exercise a challenge because Harrison revealed his connections during jury selection and showed he was not biased. The attorney also made a strategic decision not to retain an expert witness based on his theory of the case that Anderson's testimony of a struggle, combined with photographs of Burch's wounds, was straightforward and did not require an expert. Similarly, he was not required to request a jury charge on involuntary manslaughter because it would have been inconsistent with what Anderson claimed happened. Finally, even if the prosecutor made an improper statement during cross examination of a defense witness concerning past domestic disputes between Anderson and his wife, and further repeated it during closing argument, the judge subsequently instructed jurors that the statements by prosecutors were not evidence. Therefore, the trial court did not abuse its discretion in denying Anderson's motion for a mistrial, the State contends.

Attorneys for Appellant (Anderson): Marcia Shein, Elizabeth Brandenburg, Leigh Schrope
Attorneys for Appellee (State): Jackie Johnson, District Attorney, Andrew Ekonomou, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Elizabeth Haase, Asst. A.G.