



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Monday, May 15, 2017

10:00 A.M. Session

HENRY COUNTY BOARD OF EDUCATION V. S.G. (S16G1700)

The **Henry County** Board of Education is appealing a superior court and Georgia Court of Appeals ruling that the school board improperly expelled a high school senior for fighting with another girl. At issue in this case is whether Georgia statutes allowing self-defense apply to school fights or whether schools may maintain a “zero tolerance” rule against school fights and ignore self-defense as justification.

FACTS: On Jan. 24, 2014, S.G. and S.T. got into a fight at Locust Grove High School. The parties characterize the fight differently. The board's attorneys state that “rumors had been circulating” that S.G. and S.T. had a “history of not getting along as a result of jealousy and competition for friends, fueled by commentary on social media.” S.G.'s attorneys state that S.G. was a special education student, and that she and her mother, a school employee, “had reported and provided evidence of S.T.'s bullying to school administrators prior to S.T.'s assault of S.G.” According to the facts, after school on Jan. 24, S.G. went to her mother's car in the parking lot to retrieve some personal items and was on her way back to the school when she and S.T. got into a verbal confrontation. A video recording shows S.T. following behind S.G. at a clip, and the students' gestures and body language indicate they are in a heated verbal confrontation. A school secretary later testified that S.T. was “animated” and appeared to be the aggressor by taunting

S.G. and yelling, “If you want to do something, do it now,” or “We’ll do it now.” The video shows S.T. coming very close to touching S.G. before stepping back. S.G. then punched S.T., knocked her down and started punching her until S.G.’s mother pulled her off the girl. S.T. got up, again moved toward S.G., who again threw S.T. to the ground and sat on her before being pulled off a final time.

The school charged S.G. with violating Section-2, Rule #4 (physically abusing others) and Section-2, Rule #11 (violations that constitute a criminal misdemeanor) of the school district’s Secondary Student and Parent Handbook. Following a hearing, the hearing officer expelled S.G. for the remainder of the school year with the opportunity to attend the alternative school, Patrick Henry Academy. S.G. appealed to the local school board, arguing that S.T. was the aggressor and she had acted in self-defense. The local board upheld the hearing officer’s findings and the expulsion. She then appealed to the State Board of Education, which affirmed the local board’s decision, finding that the video and other evidence supported the local board’s decision that S.G. had not acted in self-defense because, although she’d had the opportunity to retreat, she had thrown the first punch. S.G. then appealed to the superior court which reversed the decision, concluding that the State Board had misapplied the law regarding self-defense by requiring S.G. to show that she had no ability to retreat before using force. The superior court concluded that S.G.’s actions were justified because the other student had “lunged” at S.G. before S.G. responded with force. S.G. then appealed to the Court of Appeals which upheld the superior court’s ruling, concluding that, “The local board, through its actions and arguments, has demonstrated a policy of expelling students for fighting on school grounds regardless of whether the student was acting in self-defense. The local board’s rejection of S.G.’s justification defense is consistent with that zero tolerance policy, is inconsistent with the requirements of Georgia Code § 16-3-21 (c), is not supported by the record, and therefore, amounted to an abuse of discretion.” Georgia Code § 16-3-21 states that “A person is justified in threatening or using force against another when...he or she reasonably believes that such threat or force is necessary to defend himself or herself or a third person against such other’s imminent use of unlawful force....” Subsection (c) of that statute says any rule or policy of any state or county agency “which is in conflict with this Code section shall be null, void, and of no force and effect.” The Henry County School Board now appeals to the state Supreme Court.

ARGUMENTS: Attorneys for the school board argue that the Court of Appeals erred in determining that the local board must disprove a claim of self-defense when raised by a student in the *civil* process of disciplinary hearings. The state Supreme Court has acknowledged “that student disciplinary matters are civil rather than criminal,” the attorneys argue in briefs. And while the school board agrees that the burden does shift to the State in a criminal case to disprove a defendant’s self-defense claim, “such is simply not the law as applied in the civil context,” the attorneys argue. “The law in Georgia was clear until this case: In non-criminal matters, the defendant bears the burden of proving a self-defense claim.” Furthermore, the evidence does not even support a claim of self-defense in this case. “In addition to improperly shifting the burden of proof to the local board, the Court of Appeals failed to confine its review of the matter to the evidence as established by the local board.” Here, the only relevant evidence is the videotape and the transcript of the disciplinary hearing. “A review of both items, and particularly the disciplinary hearing transcript, shows that self-defense was not raised by the student at the disciplinary hearing.” S.G. stated that she was pushed before she punched S.T., but the video

does not bear this out. The State Board also agreed that “the videotape does not show the other student lunge at the student.” “Any fact-finder could reasonably believe that mutual combat occurred between S.G. and the victim based on the evidence in the record,” the attorneys contend. Finally, it is the role of the local board, “not the reviewing body, ‘to weigh the evidence and determine the credibility of the witnesses,’” the school board’s attorneys argue. As recently as 2014, the Court of Appeals stated in a ruling why a court should not substitute its judgment for that of a local school system. “Our review is deferential because states and local authorities have a compelling, legitimate interest and broad discretion in the management of school affairs,” the appellate court wrote in *C.P.R. v. Henry County Board of Education*.

“The local board’s pursuit of this case shows how much it desires to continue enforcing zero tolerance policies to expel children in violation of Georgia law,” S.G.’s attorneys argue in briefs. S.G. has since graduated from high school and merely wants to correct her school records. The Court of Appeals did not err by stating that the local board must disprove S.G.’s credible evidence of self-defense. This is not a civil action between two equal parties to determine damages and who is at fault. Nor is it a criminal case in which the state is prosecuting a citizen for an assault of another. Rather it is a case about a public institution – a school – that has a “duty to educate, not expel, children while providing a safe setting that respects the fundamental right of self-defense,” S.G.’s attorneys argue. S.G. does not argue that she should have been entitled to all of the protections of a criminal proceeding in her school disciplinary hearing, but “she does have constitutional and statutory interests at stake which are critically important to the Georgia General Assembly and warrant protection from the unfettered discretion of the local board that cast aside those rights through the enforcement of a zero tolerance fighting policy.” “Particularly important to this case is the recognition of and prohibition against bullying – an increasingly serious problem plaguing Georgia schools and threatening the safety of children.” One Georgia juvenile judge has warned that zero tolerance fighting policies make children less safe because they cause “systemic blindness” resulting in victims being punished while bullying is ignored. “Unfortunately, because the local board did not protect S.G. after her reported cyber-bullying, she had to act in self-defense.” “By expelling S.G. in disregard of the evidence that S.T. was the aggressor, the local board compounded the problem by punishing the lawfully protected victim and thereby failed in its duty to create a safer school,” the attorneys argue. The Court of Appeals “arrived at the correct judgment regardless of whether this Court decides that it erred in pronouncing that the local board had to disprove the credible evidence supporting S.G.’s justification defense.” Based upon the videotape and eyewitness testimony, the evidence in this case “only supports a finding of self-defense,” the attorneys contend. Finally, the local board fails to offer any evidence that S.G.’s use of force was excessive or that S.G. was “a mutual combatant,” or equally at fault for the encounter. “The local board’s enforcement of a zero tolerance policy against S.G., in this case, was an abuse of discretion,” the attorneys conclude.

Attorneys for Appellant (local board): A.J. “Buddy” Welch, Jr., Megan Pearson

Attorneys for Appellee (S.G.): Michael Tafelski, Lisa Krisher, Phyllis Holmen, Robert Ashe III

FREEMAN V. THE STATE (S17A1040)

A man representing himself is appealing his conviction in **Hall County** for disorderly conduct, arguing that his outburst in church was free and protected speech, and the disorderly conduct statute is unconstitutional.

FACTS: On Aug. 3, 2014, David Justin Freeman attended church with his family at the Flowery Branch campus of “12Stone” Church, a large church with multiple locations in Gwinnett, Hall and Barrow counties. Pastor Jason Berry was conducting the service, and as it came to a close, the pastor asked any teachers present to stand and be recognized so he could pray for them. Freeman, a homeschooling father who says he is a volunteer minister at the church, stood up in the back, raised his middle finger in the air, and stared angrily at Berry. The pastor, who observed this, finished his prayer, after which Freeman began yelling. According to Berry, who later testified at Freeman’s trial, Freeman shouted, “Don’t send your kids to the evil public schools. Don’t let Satan or the devil raise your kids.” According to prosecutors, Freeman was so loud the music director had to turn up the music. Berry testified that Freeman’s behavior frightened him, and he was afraid both for himself and for the more than 250 people attending church that day. A sheriff’s deputy came to the church and Freeman eventually was charged with misdemeanor disorderly conduct under Georgia Code § 16-11-39 (a) (1), which states that, “A person commits the offense of disorderly conduct when such person commits any of the following: (1) Acts in a violent or tumultuous manner toward another person whereby such person is placed in reasonable fear of the safety of such person’s life, limb, or health.” At trial, Freeman stated, “I believe that I would have been failing in my duty as a minister to the church and God if I had not confronted Jason for what he said, and I believe that I did so in the most appropriate way possible.” The jury convicted him, and Freeman now appeals to the Georgia Supreme Court.

ARGUMENTS: Freeman argues the trial court erred by not directing a verdict of acquittal. “The Appellant’s [i.e. Freeman’s] actions – displaying a middle finger, making an unpleasant facial expression, shouting a religiously-motivated political opinion, and responding to provocation by talking to Mr. Berry in the lobby or parking lot of the church – are acts of constitutionally protected religious and political speech under the first amendment to the United States Constitution,” Freeman writes in briefs. (Freeman claims Berry confronted him following church, calling Freeman a “coward.”) “The state does not have a right or an interest to enter churches and stop ministers from addressing their congregations in compliance with the rules of the church, regardless of whether or not the church’s pastor is pleased by the message.” He said deputies were looking for a reason to charge him because of his political views and because he had called the sheriff’s office complaining about their speeding. “In this case, it is abundantly clear that the sheriff’s office conspired to suppress the free speech and political opinion of a political opponent.” Freeman also argues that § 16-11-39 (a) (1) is unconstitutionally “overbroad and vague.” In 2006, the Georgia Supreme Court stated in *State v. Fielden* that a statute is unconstitutionally vague “if it describes conduct in a manner so unclear that it leaves intelligent people uncertain as to the limits of its application.” “§ 16-11-39 (a) (1) does exactly that with the word tumultuous,” Freeman argues. “Lacking a clear definition of the word, an intelligent person is left unsure of its limits.” The statute is overly broad “as it could be used to prosecute a wide variety of normal and socially acceptable activities, resulting in absurdities manifestly not intended by the legislature.” At trial, Freeman stated that the statute “could even be used to prosecute offensive speech by Jesus Christ himself.” Freeman’s actions were not a violation of the statute. “Neither a raised middle finger nor an unpleasant expression is tumultuous,” he argues. His acts were not violent, nor were they directed at Berry but rather at the general crowd. The evidence shows that Berry was not afraid for his “life, limb or health.” “His response to

events in the sanctuary – following the Appellant out of the building, confronting him, and insulting him by calling him a coward – is not the response of a fearful person,” Freeman argues. Finally, Freeman claims that his requested jury charge should have been given and alleges that the trial court gave improper jury charges, although Freeman does not specify which charges he is challenging. “The failure to include the appropriate jury charge could very clearly have changed the outcome of this case,” Freeman argues.

The Hall County Solicitor’s Office, representing the State, states that Freeman’s actions were not protected speech under the Constitution, arguing that “not all speech or forms of expression are constitutionally protected.” As the Georgia Supreme Court stated in 1973 in *Breaux v. State*, “the right of free speech is not absolute at all times and under all circumstances.” The Court went on to state that “lewd, profane and obscene speech are not protected,” the State contends. Similarly the U.S. Supreme Court in its 1942 decision in *Chaplinsky v. New Hampshire* also declined to extend constitutional protection to speech “which could be construed as fighting words or that which would lead to an immediate breach of the peace. “In this case, Defendant threatened Pastor Berry with a raised middle finger and a crazed and angry facial expression,” the State argues in briefs. “In no way does either of those things communicate a political or religious message. Furthermore, Pastor Berry testified that the actions of Defendant caused the pastor to be both fearful for himself and the other hundreds of people in the room as well as angry at the manner in which the message was being communicated, qualifying Defendant’s actions as threatening and an immediate breach of the peace.” Georgia’s disorderly conduct statute also is not unconstitutional, the State argues. Even if this Court finds that Freeman’s speech was protected, the application of the disorderly conduct statute did not violate his rights, nor is it improperly vague or overbroad. The statute “very clearly describes the prohibited conduct – specifically acting in a violent or tumultuous manner toward another person whereby such person is placed in reasonable fear of the safety of such person’s life, limb, or health.” The statute is a restriction of behavior, not speech, and is appropriately applied here. The evidence presented at trial was sufficient to support Freeman’s conviction. Finally, the jury charge that was given was “not confusing, misleading or unauthorized by the evidence, and any jury charge requested but not given was inappropriate,” the State’s attorney argues.

Attorney for Appellant (Freeman): Justin Freeman, Pro Se (representing himself)

Attorney for Appellee (State): Daniel Sanmiguel, Assistant Solicitor

GEORGIA ASSOCIATION OF PROFESSIONAL PROCESS SERVERS ET AL. V. JACKSON, SHERIFF, ET AL. (S17A1079)

In a dispute with sheriffs, private “process servers,” whose job is to serve people with subpoenas and other legal documents, are appealing a **Fulton County** court ruling that gives sheriffs the final say on whether or not to allow certified process servers to work in a sheriff’s county, arguing that the statute on which the sheriffs rely is unconstitutional.

FACTS: In 2010, the Georgia General Assembly amended the law governing the service of legal documents by establishing rules and requirements for becoming a certified process server. Under Georgia Code § 9-11-4.1, “A person at least 18 years of age who files with a sheriff of any county of this state an application stating that the movant complies with this Code section and any procedures and requirements set forth in any rules or regulations promulgated by the Judicial Council of Georgia regarding this Code section shall, absent good cause shown, be

certified as a process server,” the statute says. Among the qualifications, the server must complete a 12-hour course, pass a competency test administered by the Administrative Office of the Courts, post a surety bond, be a U.S. citizen, and pass a criminal background check to receive statewide certification. The statute also states: “Such certified process server shall be entitled to serve in such capacity for any court of the state, anywhere within the state, **provided that the sheriff of the county for which process is to be served allows such servers to serve process in such county....**” And it says that before beginning work in a county, the certified process server must file with the local sheriff a written notice prescribed by the Georgia Sheriff’s Association of his or her intent to begin serving process in that county. The statute also says: “**Such notice shall only be accepted by a sheriff who allows certified process servers to serve process in his or her county.**” Since the legislation passed, there have been several attempts to amend the law and remove sheriffs’ discretion to determine the use of certified process servers in their counties, but none has passed. Today, all but two of the state’s 159 sheriffs have decided not to use the private process servers, using their deputies instead to serve papers. Some sheriffs have said publicly that they are concerned about the public safety of the servers and about their own liability if a server’s actions result in a lawsuit.

In 2013, the Georgia Association of Professional Process Servers sued the sheriffs of Fulton, DeKalb, Cobb, Gwinnett, Clayton, Forsyth and Paulding counties, contending that the sheriffs had “blatantly” and “unlawfully” banned them statewide from doing their jobs. They argued that the General Assembly wouldn’t have passed the 2010 statute detailing the requirements for certification if they intended to allow sheriffs to prohibit them from working in their counties. The servers asked the court for a “declaratory judgment” – a declaration that the sheriffs’ interpretation that the statute gave them “unbridled discretion” to deny certified servers the right to work in their county without considering their individual qualifications rendered the statute meaningless in violation of Georgia law and unconstitutional through the unauthorized delegation of legislative power to the sheriffs. They also sought a “writ of mandamus” from the court, to require sheriffs to permit a certified server to work in their county if the server met the qualifications for certification. Both sides in the lawsuit asked the court for “summary judgment” – a ruling a judge makes only after deciding that a jury trial is not needed because the facts are undisputed and the law falls squarely on the side of one of the parties. During a hearing, the judge asked the sheriffs’ attorneys whether there weren’t legitimate due process concerns in denying servers the right to work, but in 2015, the trial court ruled in favor of the sheriffs, upholding their interpretation of the statute. The process servers’ association now appeals to the state Supreme Court.

ARGUMENTS: “This case resulted from the admitted conspiracy of the Appellee Sheriffs, acting in concert with all but two of the other 159 Georgia sheriffs and the Georgia Sheriff’s Association,” attorneys for the process servers argue in briefs. They contend that the purpose of the “conspiracy” was “to nullify Georgia Code § 9-11-4.1...and to thwart the intention of the General Assembly to establish a uniform, statewide licensing process for private process servers in Georgia by implementing a wholesale ban on such servers.” If the ruling is left to stand, the statute will be rendered meaningless “because it precludes those process servers who paid for statewide certification, passed rigorous statewide certification standards, and actually obtained certification under the statute from using that same statewide certification to work in Georgia.” The conspiracy has worked, the attorneys argue. “The number of certified

servers who have been able to actually use their supposed statewide certification obtained pursuant to the statute on a statewide basis is zero. As a result of the sheriffs' conspiracy, at the time the case was filed, Georgia's 'statewide' certification process was ignored in 157 of 159 counties." The trial court erred in seven ways, the attorneys argue. Among them: The court erred in finding that the process servers had failed to provide the Attorney General with a copy of their petition challenging the constitutionality of the statute, as required by Georgia law. "This holding is factually inaccurate," the attorneys argue, as they served the Attorney General with a copy of their petition two weeks before they filed it. The trial court erred in finding that § 9-11-4.1 gives the sheriffs absolute discretion to permit or deny servers the right to serve process in their respective county without rendering the statute meaningless or unconstitutional. "That could not have been the intention of the General Assembly in passing the complex and far-reaching statute and delegating rule-making responsibility to the Judicial Counsel of Georgia," the attorneys argue. And, "While it is patently clear the General Assembly did not intend to provide the sheriffs with discretion to effectively repeal the statute, the trial court should have stricken the contested portion of § 9-11-4.1 (a) from the statute as unconstitutional." Instead, the court erroneously reached the opposite conclusion. "If the General Assembly intended to delegate legislative authority to non-legislative branch officers like the sheriffs..., such a delegation is unconstitutional" without sufficient guidelines from the General Assembly for exercising that authority. The trial court erred in finding that the process servers' petition did not provide a sufficient basis for a declaratory judgment. Here, the servers are "uncertain as to whether the sheriffs may ban them from a county despite their possession of statewide certification and prevent their actual efforts to serve process in those counties using their certification." They requested a declaratory judgment to make the purpose and intent of the statute clear. Likewise, their claim for mandamus is appropriate and the trial court was wrong to deny it, as they have no other legal remedy to get relief, as required for mandamus. Finally, the trial court erred by denying their claim that the sheriffs should be responsible for paying their legal costs, attorneys for the process servers argue.

Attorneys for the sheriffs argue the trial court correctly dismissed the servers' petition for a declaratory judgment. Although they argue that the Attorney General was given a copy of their petition, they failed to "file proof that service was effected," as the law requires. Georgia Code § 9-11-4.1, as correctly construed by the trial court, is constitutional and the trial court did not need to "blue pencil" the statute by removing the part of the statute giving sheriffs the discretion to decide not to use private servers. "Because the language of § 9-11-4.1 is clear in providing sheriffs with discretion to decide whether certified process servers are allowed to serve process in their respective counties, the trial court correctly interpreted that statute," the attorneys argue. "Further, contrary to Petitioners' contentions, the requirement that sheriffs decide whether private process service in their respective counties will be permitted under § 9-11-4.1 does not constitute an unconstitutional delegation of legislative authority." The plain and clear language of the statute compelled the trial court's conclusion. Had the General Assembly intended to restrict the sheriffs' discretion, for example by requiring all certified process servers to be allowed to serve in a sheriff's county "absent demonstrable just cause," "the legislators would have added the appropriate provisions saying so...." "Petitioners refuse to accept the clear scheme adopted by the General Assembly – which positions Georgia sheriffs as gatekeepers – despite the fact that the General Assembly recently revisited § 9-11-4.1 and left undisturbed the

role of sheriffs,” the sheriffs’ attorneys argue. The trial court also correctly entered summary judgment with respect to the process servers’ mandamus claim. And the trial court correctly denied petitioners’ claim for attorney’s fees.

Attorneys for Appellants (Servers): A. Lee Parks, M. Travis Foust

Attorneys for Appellees (Sheriffs): Steven Rosenberg, Attorney for Sheriff Theodore Jackson, et al. (attorneys for other six sheriffs)

2:00 P.M. Session

THE STATE V. JEFFERSON ET AL. (S17A1085)

The **DeKalb County** District Attorney is appealing a Superior Court judge’s pre-trial ruling that when an attempted murder case goes to trial against a number of alleged gang members, the former convictions of other alleged gang members can’t be admitted as evidence because the statute the prosecutors are using is unconstitutional.

FACTS: According to the State, Larry Travis was a member of the “GKB set” of the Bloods street gang. In the spring of 2015, Travis became a target of members of the rival gang, “2100,” which the State contends is also known as the “Black Mob” or the “Hoe Haters.” (The defendants contest that all three gangs are a single entity.) The alleged members of the 2100 gang included **Brenton Jefferson** (also known as “Lil B”), his brother Santez Jefferson (a.k.a. “Tez”), Demarcus Cawthorne (a.k.a. “Westside”), Jamal Arnold (a.k.a. “Lil C”), and Lee Davis (a.k.a. “Unc”). According to the State, discord between the two groups had simmered for a while and seemed to focus on disputes over territory for selling drugs. Travis was friendly with rival gang member Arnold, and when Arnold called him to arrange a meeting at an abandoned apartment where Travis often sold drugs, Travis agreed. On April 5, 2015, Travis went to the apartment complex but when he arrived, his car was immediately surrounded by rival gang members armed with AK-47s. Among them were the Jefferson brothers, Santez, Cawthorne and another man, Cheyenne Phillips (a.k.a. “Big Boy”). According to prosecutors, they dragged Travis into an abandoned apartment, stripped off his clothes, and held him at gunpoint. Davis lived in the complex and soon joined the other 2100 gang members in the attack. After Santez Jefferson retrieved a knife from a nearby apartment, the men took turns trying to saw off Travis’ fingers until three were almost severed. Brenton Jefferson then twisted the appendages until they separated from Travis’ hand. While the others held Travis down, Davis then attempted to cut off Travis’ right leg. After multiple attempts resulting in bone-deep wounds to his leg, the men concluded that the massively bleeding Travis was either dead or rapidly dying. They wrapped him in a carpet and left him to die before leaving the scene.

But Travis did not die. Bleeding heavily, he managed to free himself from the rolled-up carpet and crawled across the parking lot to get help. Police were called, and Travis immediately identified Phillips and the 2100 gang members as his attackers. On June 4, 2015, the Jefferson brothers and the others were indicted for a number of crimes including attempted murder, aggravated battery, aggravated assault, kidnapping, and violations of the Street Gang and Prevention Act.

In its efforts to build a case that the defendants were part of a gang, the State sought under Georgia Code § 16-15-9 to introduce four certified copies of convictions related to various

gang members, including Cawthorne and some third parties who were not involved in this case. Georgia Code § 16-15-9 states: “For the purpose of proving the existence of a criminal street gang,” convictions of any offenses listed in Code Section 16-15-3 (criminal gang activity) “by any member or associate of a criminal street gang shall be admissible in any trial or proceeding.” In August and September 2016, the defendants filed a motion asking the court to declare the statute unconstitutional and to bar the introduction of third party convictions. Following a hearing, the trial court entered an order declaring § 16-15-9 unconstitutional, finding that the admission of the third party convictions and the prior conviction of Cawthorne to prove the defendants’ connection to gang activity would violate their Sixth Amendment rights under the U.S. Constitution to confront the witnesses against them. Therefore, neither Cawthorne’s prior conviction nor the other convictions would be admissible at trial. The State now appeals to the Georgia Supreme Court.

ARGUMENTS: The District Attorney’s office, representing the State, argues the trial court erred in finding that § 16-15-9 violates the Confrontation Clause of the U.S. Constitution. “The Confrontation Clause bars only those statements that are testimonial,” the attorneys argue in briefs. And “testimonial” is defined as “those statements that were created with the primary purpose of use in a future prosecution.” But certified records of prior convictions and guilty pleas like those permitted by § 16-15-9 are public records created to document the resolution of particular criminal charges – and not in contemplation of any future criminal case. Therefore, these routinely created record-keeping documents are not testimonial. “In other words, prior convictions are admissible absent confrontation because they are routinely created to document the fact of conviction, and not for the purpose of establishing or proving some fact at trial.” The trial court erred in its analysis. The ruling by the DeKalb County Superior Court “disregards the primary purpose test adopted by this Court, misinterprets the Confrontation Clause law as defined by the United States Supreme Court, and frustrates the plain intent of the Legislature,” the State contends. “The trial court’s order is erroneous and should be reversed.”

Attorneys for the Jeffersons and the others argue the trial court correctly ruled that § 16-15-9 is unconstitutional. As the U.S. Supreme Court ruled in 1899 in *Kirby v. United States*, “One of the fundamental guaranties of life and liberty is found in the Sixth Amendment of the Constitution of the United States, which provides that ‘in all criminal prosecutions the accused shall be confronted with the witnesses against him.’” The Georgia legislature is “powerless to diminish the protections guaranteed by the Confrontation Clause by simply excising gang defendants” from the requirements of Georgia Code § 24-8-803, a statute that lays out hearsay rule exceptions and specifically prohibits the use of third party convictions by the State in criminal prosecutions. In this case, “the convictions are testimonial,” the attorneys argue, and “the Sixth Amendment ‘prohibits the introduction of testimonial statements by a nontestifying witness, unless the witness is unavailable to testify, and the defendant had a prior opportunity for cross examination.’” A conviction “is not a mere piece of paper,” the attorneys argue. “It is a formalization that sufficient evidence has been received to enter a judgment of guilt. It is a product of the underlying testimony and cannot be produced without that testimony.” Here, the State “seeks an end-run around the Confrontation Clause,” the attorney argues. “It seeks to use the product of testimony as a substitute for that testimony. And the State seeks to do this by distraction with whether testimony is testimonial.” One of the factors to consider in determining whether something is testimonial is “whether the primary purpose of the statement is to prove

facts potentially relevant to a prosecution.” And in this case, that is the primary purpose of admitting the past convictions.

Attorneys for Appellant (State): Sherry Boston, District Attorney, Anna Cross, Dep. Chief D.A., C. Lance Cross, Dep. Chief D.A., Dwayne Asst. D.A.

Attorneys for Appellee (Jefferson et al.): Bryan Henderson et al.

ARNOLD V. THE STATE (S17A1041)

A young man is appealing his murder conviction in **DeKalb County** for killing a man, arguing that he shot the man in self-defense and that the State failed to prove otherwise.

FACTS: In 2014, **Joseph Arnold** was living at his mother’s home on Misty Valley Drive in Decatur. In the early morning hours of July 10, 2014, he and his friend, Ms. Shuntavius Chandler, left a gathering of friends to buy beer at a nearby gas station. While there, they ran into Gerald Osborne who was with a young woman named Ira. Initially, Arnold and Osborne had a friendly exchange. But according to both prosecutors and the defense attorney, the two had had a disagreement about Ira a month earlier, and at the gas station Osborne increasingly became agitated. As Arnold and Chandler returned to their car, Osborne threatened to “wet the car up,” meaning he would shoot Arnold and his car. Less than five minutes after Arnold and Chandler arrived back home, Osborne arrived, driving his girlfriend’s car. Osborne got out of the car and started yelling and cursing at Arnold. Arnold ordered Osborne to leave, but Osborne refused. While they were arguing, Arnold’s brother, Jamal Arnold, came outside and stood behind Joseph brandishing a shotgun. Osborne then turned toward the car and, according to Arnold who later testified in his own defense, grabbed a gun from the car. Osborne’s girlfriend later testified she kept a .380 semi-automatic pistol between the seat and armrest or in the door. Upon seeing the gun, Arnold said he pulled two handguns from his back pockets and shot Osborne, hitting him three times. Arnold testified that Osborne never shot back. Osborne drove away quickly after Arnold shot him, crashing into a ditch nearby, where he was found dead. The medical examiner who responded to the scene found a .380 caliber pistol in the car underneath Osborne’s right thigh. According to Arnold’s attorney, Osborne had a blood alcohol level of .176 – more than twice the legal limit – and cocaine metabolites in his system.

Following Arnold’s indictment for malice murder, felony murder, aggravated assault and possession of a firearm during commission of a felony, Arnold’s attorney filed a Motion for Immunity from Prosecution on the ground that Arnold had shot Osborne in self-defense. The trial judge denied his motion and the case proceeded to jury trial. At trial, Chandler testified she was 20 feet away when the shooting occurred and she could not see if Osborne had a gun. She said Osborne returned to the car two or three times. Another woman testified she had seen Osborne sitting in his car when he was shot, but she could not see what he was doing nor did she see Osborne in possession of a gun. The jury acquitted Arnold of malice murder, but found him guilty of felony murder and the other charges, and he was sentenced to life in prison plus five years. Arnold now appeals to the state Supreme Court.

ARGUMENTS: Arnold’s attorney argues that, “No rational finder of fact could have found beyond a reasonable doubt that the homicide was unlawful, as the State failed to disprove beyond a reasonable doubt that Mr. Arnold acted in self-defense when he shot the decedent.” “The fact that the decedent had a firearm within arm’s reach when Mr. Arnold shot him is uncontroverted,” the attorney argues. “The only physical possibility for the gun to have ended up

on the seat underneath the decedent's leg is for the decedent to have taken it out at some point prior to the crash." The fact that the only two eyewitnesses testified they were unable to see Osborne's gun from where they were standing did not contradict Arnold's testimony. The State's theory of motive is contradicted by its own evidence. Although prosecutors argued that Arnold was angry about Osborne's behavior at the gas station and in the front yard of his house, "there was no evidence that Mr. Arnold was angry," his attorney argues. "On the contrary, there was plenty of evidence that the decedent was angry, threatening and confrontational," including security footage from the gas station. As to the State's argument that "common sense" dictates Osborne would not have grabbed a gun while Arnold's brother pointed a shotgun at him is also contrary to the evidence, given Osborne's blood alcohol level and evidence of cocaine in his system. "When a defendant raises an affirmative defense and offers evidence in support thereof, the State has the burden of disproving that defense beyond a reasonable doubt." Here it has failed to do so and the convictions must be reversed. The trial court also erred by denying Arnold's motion for immunity because no evidence countered Arnold's testimony that he acted in self-defense, and because the trial judge unlawfully held that Arnold had a duty to attempt to retreat in order for his shooting of Osborne to be reasonable. "This is not the law," Arnold's attorney argues. "The law in this state is that a person 'has no duty to retreat and has the right to stand his or her ground and use force as provided in said Code sections, including deadly force. The fact that Mr. Arnold did not retreat when the decedent began to act aggressively should have had no bearing whatsoever on the trial court's determination of the reasonableness of his actions.'" Arnold shot Osborne because Osborne reached for the gun inside the car, and both eyewitnesses testified that Osborne returned to the car at the time he was shot. The trial judge also unlawfully restricted Arnold's attorney from questioning prospective jurors during jury selection about any biases they might have regarding "stand your ground" laws. It was error for the judge to, on his own, restrict the attorney's line of questioning about the jurors' familiarity with, and attitudes toward, "stand your ground" laws, particularly in light of the Trayvon Martin case and other high-profile cases covered in the news. Not only was the evidence against Arnold for the crimes insufficient, "the evidence that he acted in self-defense was overwhelming," the attorney argues, and his convictions and sentence must be reversed.

The State, represented by the District Attorney, argues that the "evidence was sufficient to enable a rational trier of fact to find Arnold guilty beyond a reasonable doubt of the crimes for which he was convicted." "The determination of whether the State met its burden to disprove Arnold's self-defense claim was for the jury to decide," the State argues in briefs. "If a defendant cannot meet his burden of proving immunity before trial, he may still pursue an affirmative defense at trial. . . ." Two witnesses testified they never saw the victim with a gun. "Conflicts in the evidence, questions about the credibility of witnesses, and questions about the existence of justification are for the jury to decide." Likewise, the trial court properly denied Arnold's motion for immunity because he did not establish by a preponderance of the evidence that he shot the victim in self-defense. Arnold was the only witness who testified that he saw the victim with a gun. The trial judge "further explained that other witnesses testified that they never saw the victim with a gun, they never heard the victim shoot, and that the victim never returned fire," the State contends. The trial judge did not impermissibly restrict Arnold's question concerning "stand your ground" laws to the jury panel during voir dire. Here, the judge "legitimately had

concerns that the question could stray into impermissible legal areas on which the trial court would instruct the jury at the end of the trial.”

Attorney for Appellant (Arnold): Michael Tarleton

Attorneys for Appellee (State): Sherry Boston, District Attorney, Harry Ruth, Dep. Chief Asst. D.A., Lenny Krick, Asst. D.A.

THE STATE V. CASH ET AL. (S17A1059)

The State is appealing a **Paulding County** judge’s decision that retrying a mother and daughter for murder would constitute double jeopardy in violation of their constitutional rights. This is the second time this case has been before the state’s high court.

FACTS: According to the facts, on Memorial Day weekend, 2011, Lennis Donovan “Donny” Jones was at the home of Elgerie Mary Cash in Dallas, mowing the grass. Jones, 44, was friends with Cash, 45, and according to prosecutors, had recently become romantically involved with Cash’s daughter, 20-year-old Jennifer Weathington. The afternoon of May 20, 2011, neighbors heard an outcry from the house and said Cash ran out of the house shouting that “Donny” had been shot. Deputies from the Paulding County Sheriff’s Office arrived within minutes and found Cash standing on the front porch crying, screaming for help, and saying that it was an accident. They found Jones in the upstairs bedroom lying on the floor, with a single gunshot wound to the head. Weathington was crouched by Jones and holding a towel to his head, crying and begging for help, and telling Jones to “hang on.” Jones, who was still alive at that point, was transported to Kennestone Hospital where he died later that day. Cash told officers that she and Jones had been examining her new gun when it went off, firing a round through the wall. Taking the gun from her, Jones pulled the slide several times to empty out the live rounds and then noted that it was no longer loaded. Cash disputed this, so Jones pointed the gun at his head and pulled the trigger, at which point the gun fired. Officers later testified that at that point, they did not suspect foul play. Jones’ body was transferred to the Georgia Bureau of Investigation where medical examiner Dr. Jonathan Eisenstat conducted an autopsy. He found no stippling or powder tattooing at the site of Jones’ wound and concluded the fatal shot was fired from at least 18 inches from the point of entry and it was not possible the wound was self-inflicted. According to prosecutors, while Cash told officers that Jones had held the pistol “against his right temple,” the bullet had entered behind and below his right ear and exited at the top left of his forehead. On June 6, 2011, investigators used a search warrant to go through Cash’s home where they found Jones’ baseball cap in the laundry room, which had Jones’ blood on it. According to the women’s attorneys, Jones had been wearing the hat at the time of his death, which could explain the finding that the wound appeared to have been inflicted from at least 18 inches away.

More than six months later, in December 2011, Cash and her daughter were arrested and charged with Jones’ murder. In October 2013, a jury convicted both of them of malice murder, felony murder, two counts of aggravated assault and possession of a firearm during the commission of a felony. Each was sentenced to life in prison plus five years on the gun charge. They filed a motion requesting a new trial, and a hearing was set for May 12, 2014. Four days before the hearing, the State filed a motion asking the judge to recuse himself. The trial judge dismissed the motion and denied the State’s request for a “Certificate of Immediate Review,” which would have allowed the State to appeal his refusal to recuse himself and allow another

judge to hear the motion. Following a two-day hearing, the trial judge granted the women a new trial, finding that the jury's verdict went against the weight of the evidence and that the women's attorneys had rendered ineffective assistance of counsel based on a number of deficiencies, including their failure to secure expert testimony at trial. In his ruling on the motion for new trial, the judge noted that both women had immediately called for help; that investigators failed initially to take the hat; that the medical examiner did not have the hat when he conducted his initial autopsy; and that the hat had Jones' blood on it.

The State appealed to the Georgia Supreme Court, arguing the trial judge had erred in granting a new trial and in refusing to recuse himself.

In November 2015, this Court ruled against the State and upheld the judge's order granting Cash and her daughter a new trial and dismissing the State's appeal of the trial judge's refusal to recuse himself. The high court ruled that under Georgia Code § 5-7-1, the State may appeal an order denying a motion to recuse or disqualify a judge only if that order is made "prior to the defendant being put in jeopardy," or prior to the jury being impaneled and sworn. "Here, because the State did not file its motion to recuse until after appellees' convictions and shortly before the hearing on their motions for new trial, jeopardy had attached, and the State thus does not have a right to appeal under § 5-7-1," the 2015 opinion said.

In January and February 2016, attorneys for Weathington and Cash each filed a special "Double Jeopardy Plea in Bar," seeking the dismissal of their case on the grounds that putting the women again on trial would subject them to "double jeopardy." Under the U.S. Constitution, a defendant may not be tried, convicted and sentenced for the same crime twice. Following a hearing, another trial judge granted their plea and entered judgments of acquittal for both women. The State again appeals to the state Supreme Court.

ARGUMENTS: Represented by the District Attorney, the State argues the trial court plainly erred by dismissing the charges against the women based on a lack of evidence. For one thing, the women abandoned the issue in previous court proceedings and therefore cannot bring it up at this stage of the proceedings. In addition, however, the evidence is more than sufficient for a jury to find them guilty. They were the only people in the home with Jones at the time he was shot; the fatal gunshot entered behind and below his right ear and exited at the top left of his forehead, yet both defendants told officers Jones had placed the muzzle to his right temple which was inconsistent with the bullet's trajectory; the fatal shot was fired by another person at least 18 inches away from Jones; at the time he was shot, he was not wearing a baseball cap, contrary to the women's claim that he was; and Jones was left-handed, yet the shot was in the area of his right ear. Furthermore, the original judge (not the one whose order is being appealed) explicitly stated at the hearing on the motion for new trial that after reviewing the evidence, he found "that a rational trier of fact could find beyond a reasonable doubt from the evidence adduced that they were guilty of the crimes." "That statement *on the record* by the trial court should have put an end to any further inquiry by the lower court," the State argues. The trial court also erred by making no findings whatsoever as to the credibility of the witnesses.

Attorneys for Cash and Weathington argue the State's appeal should be dismissed. The Georgia Supreme Court already ruled in 2015 that "**jeopardy had attached**" when Weathington was tried in October 2013. That meant the State could not pursue its appeal from the denial of a recusal motion because § 5-7-1 only allowed the State to appeal from rulings made before jeopardy attached. The State is now appealing the trial court's 20-page order finding there was

insufficient evidence to convict. “But under § 5-7-1 (a) (3), the State may only appeal the grant of a plea in bar ‘when the defendant **has not been put in jeopardy,**’” the attorneys argue. That statutory provision is “almost identical to the one this Court relied on” in its previous ruling in this case, “and this Court’s previous ruling that jeopardy had attached is the law of the case.” “Because the version of § 5-7-1 (a) (3) in effect at the time of the offense requires strict construction against the State, and because the statute does not authorize this post-jeopardy appeal, this case should be dismissed,” the women’s attorneys argue.

Attorney for Appellant (State): Donald Donovan, District Attorney

Attorneys for Appellees (Cash): Aaron Henrickson, Andrew Fleischman