



## Supreme Court of Georgia

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## CASES DUE FOR ORAL ARGUMENT

### Summaries of Facts and Issues

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**Monday, June 26, 2017**

### 10:00 A.M. Session

#### **WOMEN'S SURGICAL CENTER, LLC ET AL. V. BERRY ET AL. (S17A1317)**

#### **BERRY ET AL. V. WOMEN'S SURGICAL CENTER, LLC ET AL. (S17X1318)**

Owners of a women's surgical center are appealing a **Fulton County** court ruling that rejects their constitutional challenges of Georgia laws that require them to obtain a "certificate of need" from the State before making an addition to their facility.

**FACTS:** Drs. Hugo D. Ribot, Jr., and Malcolm Barfield are the co-owners of Women's Surgical Center, LLC, which is known as The Georgia Advanced Surgery Center for Women. The Center provides outpatient surgical services in Cartersville, GA. In 2014, the owners decided to add a second operating room to its premises and contract with other surgeons who could then use the Women's Surgical Center in connection with their medical practices. Under Georgia's certificate of need statutes and regulations, to add to its facility, the Center first had to apply for, and be granted, a certificate of need by the Georgia Department of Community Health. The Georgia General Assembly enacted the statute in 1979 to "ensure that health care services and facilities are developed in an orderly and economical manner and are made available to all citizens" and that they "be provided in a manner that avoids unnecessary duplication of services, that is cost effective, that provides quality health care services, and that is compatible with the health care needs of the various areas and populations of the state." The Center's owners,

however, believed the Center should not be subject to the certificate of need requirements. (They had previously been denied a certificate of need, although that denial is not at issue in the current appeal.) On June 30, 2015, the Center and its owners sued the Commissioner of the Department of Community Health (today Frank Berry) and the Department's Health Planning Director, Rachel King. In their lawsuit, they sought "declaratory" relief – asking that the trial court declare as unconstitutional the state's statutes and regulations that govern the certificate of need program because they restrain competition, economic liberty, and consumer choice. They also sought "injunctive" relief to prevent the State from requiring the Center to get a certificate of need before expanding its facility.

In August 2015, the Department filed a motion to dismiss the Center's complaint, arguing among other things that the Center had failed to exhaust administrative remedies before filing a lawsuit in court. The trial court denied the Department's motion. In September 2016, the Center and the Department each filed motions requesting that the court grant "summary judgment" to them. (A court grants summary judgment when it determines there is no need for a jury trial because the facts are undisputed and the law falls squarely on the side of one of the parties.) In an October 2016 order, the trial court rejected all of the Center's constitutional challenges and granted summary judgment to the Department. The Center and its owners now appeal to the state Supreme Court. And in a cross-appeal, the Department appeals the trial court's denial of its motion asking the court to dismiss the Center's suit.

**ARGUMENTS (S17A1317):** The Center's attorneys argue that the certificate of need laws violate the Georgia Constitution's Anti-Monopoly Clause because they "forbid Plaintiffs from contracting with qualified doctors to allow them to use Plaintiffs' state-of-the-art surgery center and to serve more patients, unless Plaintiffs effectively get permission from their own competitors." This is the very definition of a monopoly, and it is forbidden by the Georgia Constitution. The state Supreme Court has struck down laws that impose anti-competitive contract terms similar to the certificate of need laws, the attorneys argue. The State's enforcement of these laws "has caused a life-saving medical facility to sit idle, and has deprived patients of access to medical services, for no reason other than to protect existing medical providers from economic competition. That is a moral travesty, and it is unconstitutional." The laws forbid them from adding a second operating room or from contracting with other doctors to use their facility. Doing either without a certificate of need "is punishable by ruinous fines of \$5,000-\$25,000 *per day*, based on the duration of the violation," the Center's attorneys argue. "Defendants enforce those penalties through offensive legal action." The trial court erred, the attorneys contend, (1) in granting summary judgment to the Department and denying the Center's motion for summary judgment; (2) in ruling that the certificate of need laws do not authorize any contracts or agreements and that the Georgia Constitution is limited to contracts and agreements; (3) in ruling that the Constitution's Privileges and Immunities Clause is not intended to protect citizens from state-granted monopolies; (4) in ruling that the Center's claims under the Constitution are subject to "the traditional rational basis test," and that the "affected with a public interest" test is inapplicable, that "there is no evidence that the laws engage in price fixing or controls," and that the laws survive scrutiny under the Georgia Constitution; and (5) that the laws survive rational basis review based on the Due Process Clause of the Fourteenth Amendment.

The State argues the certificate of need laws do not authorize anti-competitive contracts

or agreements, and the superior court correctly granted the Department summary judgment on the Center's claim on this issue. The Anti-Competitive Contracts Clause (which the Center erroneously refers to as the Anti-Monopoly Clause) states that the "General Assembly shall not have the power to authorize any *contract or agreement* which may have the effect of or which is intended to have the effect of encouraging a monopoly . . . [or] defeating or lessening competition." This language is clear and unambiguous: It only prohibits the General Assembly from authorizing any anti-competitive *contract or agreement*. The Center's erroneous reading of the Anti-Competitive Contracts Clause would transform a restriction on the authorization of anti-competitive contracts into a broad limitation of the General Assembly's power to regulate commerce within the state. The certificate of need program is not an unreasonable restraint of trade because the General Assembly could reasonably conclude that a review-and approval process for new institutional health services helps to ensure access to quality health care services and control health care costs, the State argues. Also, the laws do not violate due process as they are rationally related to the legitimate purpose of making health care affordable and accessible. The principles of competition do not apply to the provision of health care services in the same manner as they do in other markets because there is limited competition between providers over price and quality. This lack of competition, combined with the presence of supplier-induced demand, leads to unnecessary duplication of services and rising health care costs. Certificate of need programs like Georgia's address these concerns by requiring new providers to demonstrate, among other things, a genuine need for the services they intend to offer. Contrary to the Center's claims, the due process arguments that it has advanced about these laws have been consistently rejected by the 11<sup>th</sup> Circuit and other courts across the country.

**ARGUMENTS (S17X1318):** In this cross-appeal, the State challenges the trial court's failure to dismiss the case based on procedural grounds. The Center may not seek a declaratory judgment because there is no "actual controversy" between the parties and "the ends of justice" do not require a declaratory judgment. The Center does not have standing to challenge the constitutionality of the certificate of need laws because it has not shown it has suffered any injury. Also, because the Center is attempting to challenge an entire chapter of the Georgia Code and all of the regulations promulgated under that Chapter, it would have to have standing for *each* of the statutes and regulations challenged, which it cannot show. Indeed, many of the statutes and regulations involved in the certificate of need process do not even apply to the Center, e.g. specific review considerations for open heart services or psychiatric inpatient programs. Finally, to the extent that the Center is in fact challenging the denial of its own certificate of need application, under the Georgia Code, a person is not entitled to judicial review unless he has "exhausted all administrative remedies available within the agency and . . . is aggrieved by a final decision in a contested case." "The fact that one basis, or even the sole basis, of a respondent's complaint . . . is a constitutional attack, does not eliminate the necessity for agency review as a prerequisite to judicial review," the State argues. The Center and its owners had 30 days to appeal the Department's decision to deny their application, and they could have raised any constitutional objections they had in an administrative appeal hearing. They did not.

The Center's attorneys argue that the Department's ongoing enforcement of the certificate of need laws creates a controversy that is eligible for judicial review. "In order to challenge a statute or an administrative action taken pursuant to a statute, the plaintiff must normally show that it has interests or rights which are or *will be affected* by the statute or the

action.” Here, the Center has specific plans to contract with other doctors to use its facilities and to add an operating room, but the Department’s enforcement of the certificate of need laws prevents the Center from doing this. The Center has standing to bring its claims because it is suffering an injury each day that these laws are enforced. Finally, the Center was not required to exhaust its administrative remedies because it is not challenging the denial of its own certificate of need application.

**Attorneys for Appellants (Center):** James Manley, Veronica Thorson, Glenn Delk

**Attorneys for Appellees (State):** Christopher Carr, Attorney General, Isaac Byrd, Dep. A.G., Daniel Walsh, Sr. Asst. A.G., Monica Sullivan, Asst. A.G., Forrest Pearce, Asst. A.G.

### **TANNER V. THE STATE (S17A1024)**

A man is appealing his convictions for murder and conspiracy to commit robbery for the shooting death of a man in **Hall County** who regularly sold him marijuana.

**FACTS:** According to the evidence at trial, Leshan Tremiele Tanner and Cedric Huff were friends who had grown up together and recently reconnected when Tanner returned to the Gainesville area from Alabama. In addition to being friends, Tanner regularly purchased small amounts of marijuana from Huff who lived in an apartment complex on West Avenue in Oakwood, according to State prosecutors. On June 5, 2014, Tanner was in the market to purchase a larger amount of marijuana – a half pound worth \$500 – instead of his usual quarter of an ounce for his personal use. That day, Tanner went to Huff’s apartment with Rodnie Stokes, who also sold marijuana. Tanner alone was invited into Huff’s home, so initially Stokes remained behind in Tanner’s white pick-up truck. Huff was exceedingly cautious, always keeping his door locked, only allowing in people he knew, and re-locking the door after anyone entered. After being invited into Huff’s home, Tanner waited in the living room while Huff went to the back of the apartment to get Tanner’s order. When he returned, Stokes walked into the living room with a gun. According to the State, in their attempt to rob Huff of his money and marijuana, Tanner and Stokes struggled with Cedric and during the struggle, Huff was shot in the abdomen. Tanner and Stokes then fled. After he was shot, Huff called his girlfriend and his mother, Mary Huff. Both were in the area and rushed over. Meanwhile, a woman whose office was across the street from Huff’s apartment complex called 911 after she heard a loud “smack” and saw two men run out of the same building, followed by a man in yellow shorts with “red” on them who said he’d been shot.

Huff, 41, remained in intensive care for more than two weeks, mostly in an induced coma. When he awoke, his mother was by his side. She asked what had happened, and he replied, “They tried to rob me.” She asked who, and he said, “Leshan Tanner...Denny’s...Oakwood.” She then drew out of her son that Tanner worked at Denny’s and lived in Oakwood. Huff also mentioned “Little Monster,” which was Stokes’ street name. Huff died the next day from his gunshot wound.

Tanner was interviewed twice by police. He first said he had gone to Huff’s place to buy marijuana but denied any participation or involvement in his death. During the second interview, he admitted being in the apartment during the robbery but denied any knowledge or affiliation with the robber.

Tanner and Stokes were indicted for Huff’s murder and several other charges. The week before trial, Stokes pleaded guilty to voluntary manslaughter, attempted armed robbery, attempt

to purchase marijuana and gun charges in exchange for a lighter sentence. As part of the plea bargain, Stokes swore under oath the evidence he could offer at trial against Tanner, describing Tanner's involvement in the planning and execution of the robbery, and stating that Tanner had fired the shot that had killed Huff. Following a September 2015 trial, Tanner was convicted of felony murder based on conspiracy to commit robbery, conspiracy to commit robbery, and attempt to purchase marijuana. Tanner was sentenced to life in prison, and he now appeals to the state Supreme Court.

**ARGUMENTS:** Tanner's attorneys argue the trial court made three errors and his convictions should be reversed. The trial court was wrong to admit Huff's hearsay statements to his mother because they were "not sufficiently reliable, and were far less probative than the testimony of another eyewitness, Rodnie Stokes, whose testimony the State had procured but chose not to present," the attorneys argue in briefs. The court committed reversible error by admitting the hearsay statements under the new "residual hearsay" provision which the Georgia legislature enacted in 2013. The exception to the rule excluding hearsay was "designed to be used very rarely and only in exceptional circumstances." It applies "only when certain exceptional guarantees of trustworthiness exist and when high degrees of probativeness and necessity are present." ("Probativeness" is a legal term meaning tending to prove or disprove.) In this case, the "State failed to establish that the hearsay statements were necessary, highly probative, or exceptionally trustworthy," the attorneys argue. The State created the "necessity" by choosing not to put Stokes on the stand, yet Stokes had direct knowledge of the events surrounding Huff's murder. "Mr. Stokes' statement was complete and detailed, implicating himself as well as Mr. Tanner. It was far more probative than the truncated conversation between Cedric Huff and his mother in the hospital. The 'residual hearsay' rule does not permit a party to forego in-court testimony because the cross-examination of a live witness may expose a lack of credibility, and then claim that it needs to offer hearsay that is insulated from the truth-seeking function of cross-examination." Huff was a drug dealer who faced possible prosecution for his role in the incident. He lied about his knowledge of the shooting when questioned by police. "Under the circumstances, including the felony exposure that Cedric Huff faced if he told the truth about the incident, his previous lies to the police, and his medical condition, these statements are inherently unreliable and lack probative value," the attorneys argue. "Furthermore, Georgia appellate courts have routinely excluded statements where an aspect of self-interest renders them unreliable." The admission of Huff's hearsay statements also violated Tanner's rights under the Confrontation Clause of the Constitution. Finally, the evidence to support Tanner's convictions for conspiracy to commit robbery and felony murder based on conspiracy to commit robbery was insufficient and entirely circumstantial. "The only direct evidence was the erroneously admitted hearsay statements from Cedric Huff."

The State, represented by the District Attorney's and Attorney General's offices, argues that the trial court properly admitted the victim's statements to his mother under the "residual hearsay" exception. The State argues the trial court did not abuse its discretion in admitting this testimony "because, under the totality of the circumstances, sufficient guarantees of trustworthiness were established." The statements at issue "were more probative than any other potentially available evidence as they came directly from the victim," the State contends. "The victim had no apparent motive to lie about who shot him, and even less of a motive to lie to his mother, with whom he had a close relationship." Even if the trial court erred by admitting the

hearsay, any alleged error was harmless, the State argues. Numerous pieces of circumstantial evidence tied Tanner to Huff's death, and the evidence is constitutionally sufficient to support his felony murder conviction. Tanner admitted to being in Huff's apartment to buy marijuana when Huff was shot; phone evidence showed he and Stokes spoke and texted numerous times, including during the minutes surrounding Huff's death, conflicting with Tanner's denial of any affiliation with Stokes; an eyewitness saw Tanner and Stokes leaving the scene; and the evidence suggested that Tanner must have let Stokes into Huff's locked apartment when Huff went to get the large amount of marijuana from his bedroom. In addition, Tanner's behavior after the crime – "his search history, deletions to his phone, concealment of his phone and truck, and continued communications with Stokes – further supported his conviction for felony murder predicated on conspiracy to commit robbery," the State argues. Finally, the trial court properly found that Huff's statements to his mother did not violate the Constitution's confrontation clause.

**Attorneys for Appellant (Tanner):** H. Bradford Morris, Jr., Dawn Seibert

**Attorneys for Appellee (State):** Lee Darragh, District Attorney, Juliet Aldridge, Sr. Asst. D.A., Laura Lukert, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Elizabeth Haase, Asst. A.G.

### **SHELLEY V. TYRONE (S17A1064)**

A man is appealing a **Fayette County** court ruling that validates the town of Tyrone's zoning ordinances, which the man claims have devastated the value of his commercial property.

**FACTS:** This complex zoning case deals with a long-running battle Richard E. Shelley has been waging against Tyrone's zoning ordinances that began in 1999 when Shelley purchased commercial property with four rental units on Senoia Road in Tyrone. A new zoning ordinance had been passed two years earlier in 1997 that amended the 1989 zoning ordinance. In 2003, he purchased another commercial property on Senoia Rd that had eight rental units. Both properties include industrial-type buildings that at the time of each purchase were zoned "C-2" commercial. The tenants when Shelley purchased the properties included an automobile repair shop, a landscaper, and a furniture upholsterer. In 2004, Tyrone amended its zoning ordinance and eliminated some of the permitted uses under C-2, including the businesses of his preexisting tenants, which Shelley claimed were grandfathered in under the 1989 ordinance. Shelley sent several letters to Tyrone, claiming that the 2004 changes deprived him of all economically feasible uses of his properties and requesting that the town either add in a number of uses that had been deleted or pay him almost \$2 million to make up for lost rents. The town council considered his requests and denied both of them. In 2007, Shelley sued Tyrone in state court, arguing that the 2004 amendments violated his U.S. and state constitutional due process rights because it deleted all economically feasible uses of his property and because it was passed without proper notice or investigation. He asked the court for a "declaratory judgment," or declaration that the 1989 zoning ordinance remained in effect, and the 1997 and 2004 amendments were invalid. Shelley also asked the court for "injunctive relief" to prevent the town from refusing to issue legal business use licenses to him, and he requested damages. Because he raised a federal constitutional issue, the Town of Tyrone had the case transferred to federal court. Subsequently, in a series of rulings, the federal court ruled against him. In 2011, the town of Tyrone adopted zoning Ordinance 2011-13, which the town council said was intended to streamline the zoning ordinance enacted in 1997. The town council felt the town was too small

for the high number of different designations that it had. As pertains to Shelley, the new ordinance merged the three commercial designations into two – C-1 (downtown commercial) and C-2 (highway commercial). Under the new ordinance, Shelley’s properties were zoned C-1, which had more than 10 conditional uses. Shelley’s attorney spoke at one of the two public meetings, objecting to the new ordinance and claiming it would cost Shelley \$1-2 million to change his building to fit the new zoning restrictions. The attorney also submitted a statement of opposition on behalf of Shelley. In September 2013, Shelley sent a letter to the town of Tyrone saying he planned to sue based on the loss of rent from two potential tenants who decided to rent elsewhere due to the zoning Ordinance 2011-13. In March 2014, Shelley filed suit. In a subsequent deposition, Shelley asserted that even though his property was 70 percent occupied, he was losing money due to the zoning ordinances. Both parties filed motions asking the court for “summary judgment,” which a court grants after determining that a jury trial is unnecessary because the facts are undisputed and that the law falls squarely on the side of one of the parties.

On Oct. 1, 2015, Tyrone adopted a completely new zoning ordinance – Ordinance 2015-17 – and zoning map. Tyrone then filed a suggestion in court that as a result of the new zoning ordinance, at least some of Shelley’s claims were moot. Shelley responded that none of his complaints were moot. In June 2016, the superior court denied Shelley’s motion for summary judgment and granted Tyrone’s, ruling in the town’s favor. The trial court concluded that Tyrone did not violate Georgia’s Zoning Procedures Law when it enacted Ordinance 2011-13. The court also ruled that any challenges to zoning ordinances prior to Ordinance 2011-13 were barred because they had already been adjudicated in Shelley’s 2007 lawsuit which was ultimately dismissed. Finally the court ruled that his claims for damages were barred because he failed to provide notice to the town. Shelley now appeals to the Georgia Supreme Court.

**ARGUMENTS:** Shelley’s attorneys argue the trial court erred by finding Ordinance 2011-13 valid. Rather it is invalid for four reasons, including that no zoning map was attached to the ordinance. The trial court also erred by finding that Shelley’s “ante litem” notice – alerting the target of a lawsuit that one is about to be filed – was late. And the trial court erred in finding that Shelley was barred from filing a claim for declaratory relief on the 1997 ordinance on the ground that the issue had already been adjudicated with the dismissal of his 2007 case.

Attorneys for Tyrone argue that any challenge to zoning Ordinance 2011-13 is moot because in October 2015, Tyrone adopted an entirely new zoning ordinance and map through Ordinance 2015-17. Therefore, Ordinance 2011-13 was repealed and Shelley’s challenge to it is moot, the attorneys contend. The trial court did not err in finding that Shelley’s ante litem notice was late. Even if Shelley had not had to give notice at all, his damages claim is barred because he failed to exhaust administrative remedies within the required time frame before filing an action in court. Finally the trial court correctly ruled that Shelley’s claim for declaratory relief on the 1997 ordinance was barred because his claims in the 2007 lawsuit had already been adjudicated and dismissed.

**Attorneys for Appellant (Shelley):** Henry Quillian, III, Diane LaRoss

**Attorneys for Appellee (Tyrone):** Laurel Henderson, Theodore Meeker, III

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

### **BROWN V. THE STATE (S17A1141)**

A man is appealing his **Gwinnett County** murder conviction and prison sentence of life without parole, arguing he received inferior and ineffective legal counsel during his trial.

**FACTS:** According to the evidence at trial, on June 10, 2010, Deonta Moore obtained \$1,100 in counterfeit money from a friend, telling the friend he planned to trick someone with it and would share the proceeds (drugs) with his friend. Later that day, Moore contacted Andre Allen to buy three ounces of marijuana. Because Allen did not have that much marijuana on hand, he contacted Ahmad Edward Brown, who agreed to provide the drugs. Brown said he would meet Allen and Moore at the Bridgewater Apartments in Duluth. After Brown arrived, Allen waited by the car, while Moore got into Brown's parked car and gave Brown the counterfeit money in exchange for three bags of marijuana. Moore then got out of the car and walked away quickly with the drugs. Realizing right away that the money was not real, Brown yelled at Moore, who took off running through the breezeway of Building 1600 into a grassy field. Because Allen had arranged the drug deal and did not want Brown to think he was involved in the fraud, he chased after Moore. Eventually, Allen caught up with Moore, held him down, and told him to return Brown's "stuff." Brown, who was armed, soon caught up, told Allen to get out of the way, and started fighting with Moore. Brown then fired his gun once into Moore's head, killing him. Following the shooting, Allen ran back to his car and Brown left in his car.

Two witnesses testified about the shooting. The day after the shooting, one of the witnesses, with his mother accompanying him, discovered Moore's body in the bushes and called police. Near the body, investigators found a Winchester .40 caliber shell casing along with three bags of marijuana weighing 2.6 ounces. Information from a cell phone found in Moore's pocket led Gwinnett County police to Allen. In a videotaped interview, which was later played for the jury, Allen told the detective about Brown's role in the murder while downplaying his own role. Allen was arrested following the interview; Brown was arrested late the following month. Brown and Allen were both indicted for Moore's murder. Allen later pleaded guilty to the less serious charge of voluntary manslaughter and agreed to testify against Brown in exchange for a lighter sentence of 20 years, with the last 10 to be spent on probation. Allen had described the shooting to three people, who all testified at Brown's trial. A man who was jailed with Brown also testified that Brown had told him he had shot a man during a drug deal. Following a May 2014 trial, the jury convicted Brown of all charges, including malice murder, felony murder, aggravated assault with a deadly weapon, and drug and gun charges. He was sentenced to life without parole plus 15 years. Brown now appeals to the state Supreme Court.

**ARGUMENTS:** Brown's attorney argues that Brown received "ineffective assistance of counsel" in violation of his constitutional rights because his trial attorney failed to object to statements made by Allen, a material witness, that improperly bolstered Allen's credibility. Allen's statement to the mother of his children *after* he agreed to work with the State to receive a lesser sentence should have been objected to by Brown's attorney, his appeal attorney argues. The trial attorney also failed to object when the State called Allen's sister to testify that Allen had told her Brown had shot Moore, even though there was no evidence to show that Brown had talked to his sister before deciding to enter into a plea deal. These deficiencies by the trial

attorney prejudiced – or damaged – Brown’s defense to such a degree that there is a reasonable probability that had it not been for the attorney’s deficiencies, the outcome of Brown’s trial would have been different, his attorney argues, and his convictions therefore must be reversed. Brown was also denied effective trial assistance by his attorney’s failure to object to the lead detective’s and the prosecutor’s improper bolstering and vouching for the credibility of the witnesses. The detective, for instance, told jurors that Allen had told him the “ultimate truth” during his interview of Allen, and that, “I was confident Allen was telling the truth.” A witness’s credibility cannot be bolstered by anyone, not even an expert. This is a matter left solely for the jury, Brown’s attorney argues. Finally, the judge violated state law by improperly commenting on the evidence, thereby requiring reversal of Brown’s convictions. The judge impermissibly told the jury that Allen’s recorded statement had been redacted to only include the “relevant portions,” thereby focusing the jury on the “relevant portions” of the statement.

The State, represented by the District Attorney’s and Attorney General’s offices, argues that Brown’s trial attorney did not render ineffective assistance of counsel. Statements Allen made *before* his motive to cooperate with the State arose, were admissible to rebut the defense’s attacks on his credibility. Allen’s statements to his children’s mother and his sister were made before he spoke to detectives and before he received any plea offer. The trial attorney also was not ineffective for not objecting to the detective’s testimony that allegedly bolstered Allen’s credibility, the State argues. The attorney specifically did not object to the detective’s or the prosecutor’s testimony to avoid bringing attention to it, which was reasonable. Finally, the judge did not violate state law because she did not improperly express her opinion as to what had or had not been proved or as to Brown’s guilt.

**Attorney for Appellant (Brown):** Brian Steel

**Attorneys for Appellee (State):** Daniel Porter, District Attorney, Lee Tittsworth, Asst. D.A., Charissa Henrich, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Aimee Sobhani, Asst. A.G.

### **BREWNER V. THE STATE (S17A1103)**

In another **Gwinnett County** case, a man is appealing his murder conviction and his sentence to life in prison without parole for his role in killing a man and shooting the man’s girlfriend and her 8-year-old daughter.

**FACTS:** According to the evidence at trial, in the early morning hours of Aug. 6, 2014, a group of men forcibly entered Adam Schrier’s home on Summercrest Lane in Duluth in an attempt to locate drugs and money they believed were in the home. Schrier’s girlfriend, Jami Smith, had gotten up to go to the bathroom at about 5:30 a.m., then went down to the basement-level garage to smoke a cigarette. While she was downstairs, Schrier had gotten out of bed to investigate noise he had heard as the men were breaking into the house. Schrier confronted the men and there was a struggle. A gun went off, and Schrier was struck, with the bullet penetrating his lung and lodging in his spine. Madison Smith, Jami’s 9-year-old daughter, had also been awakened by the sound of glass breaking. She got out of bed and saw two men outside her bedroom door carrying long guns. She tried to close the door to keep the men out, but they forced their way into her room and ordered her downstairs, making her lie next to her mother’s dying boyfriend. About the same time, after hearing sounds coming from the main floor, Smith started going back upstairs when she was confronted by a man who hit her in the head with a gun

and demanded to know where “the money” was. When Smith said she did not know, the man shot her in the leg and pulled her upstairs to the main floor where she was forced to lie next to Schrier and her daughter. The men told the mother and daughter to do what they said or they would kill them. They demanded to know where the money was, with one of the men saying he had been told there was \$40,000 in the home. Smith told them she had money in her purse upstairs, which they took. The assailants bound Smith’s arms and legs, and her daughter’s arms and legs, with duct tape. Then one of the men began shooting again. One of the bullets grazed Smith in the shoulder as she was covering her daughter from the gun fire. The bullet passed through her shoulder and entered her daughter’s arm. The men then left, and Smith was able to unbind Madison’s legs so the girl could retrieve a phone for Smith to call 911. Police and paramedics responded, but Schrier died at the scene.

At trial, the State presented evidence showing that the home invasion arose from a complicated web of drug-related transactions. In mid-2014, law enforcement conducted a drug bust at the apartment of Becky Banner, who was involved in a methamphetamine trafficking operation supplied by a Mexican drug cartel. While the bust was in progress, Banner’s son, Bryan, drove past his mother’s apartment, realized what was happening, and drove to his mother’s other home. Parked outside was his mother’s Chevy Blazer, from which Bryan proceeded to take five kilos of meth. Bryan then got his friend, Adam Schrier, to hide the drugs for him in a storage unit near Schrier’s home. Within a week, Bryan had sold most of the drugs.

Jamie Staples, who was also connected with the drug operation, knew that Bryan had taken the drugs from the Chevy Blazer but believed they were being stored at Schrier’s home. The week before the crimes, Staples approached Brian Joseph Brewner to ask for assistance in recovering the drugs and/or money from Schrier’s home. Staples had known Brewner since 2010 and often purchased drugs from him. In 2013, to recover a debt Staples owed him, Brewner had dispatched a crew of men to invade Staples’ home, where Staples was bound, beaten and robbed of \$5,500. Brewner later apologized to Staples over the incident.

At the time Staples contacted him about Schrier, Brewner was staying at a LaQuinta hotel with his girlfriend, Charlice Roberts. She later testified that Staples visited their hotel room several times during the week before the crimes and that Staples and Brewner were discussing a plot to recover drugs and money from Schrier’s home.

A few days after the crimes, Staples was arrested on drug trafficking charges, and in police interviews, he implicated Brewner in Schrier’s murder. Investigators also located Roberts and interviewed her.

Brewner and four others were charged with a number of crimes. Brewner was charged with 18 counts including malice murder, felony murder, aggravated assault, armed robbery and cruelty to children. He was tried separately and following his trial, the jury convicted him on all 18 counts. He was sentenced to life in prison without the possibility of parole plus 50 years. Brewner now appeals to the state Supreme Court.

**ARGUMENTS:** Brewner’s attorney argues that six errors were made during his trial, including that the evidence was insufficient to prove his guilt. The State failed to prove a common criminal intent. While the State contended that Brewner was the mastermind of the criminal scheme and a party to the crimes, the record belies that contention as Staples was the mastermind. “He had the motive and needed people to do his dirty work,” the attorney argues in briefs. Brewner “did not know Schrier and had no motive to hurt or harm him.” Among other

errors, Brewner's right to be present was violated when the trial court excused a juror without Brewner present and ruled on the State's motion to admit evidence of Brewner's participation in the prior assault on Staples. The trial court failed to make factual findings to support its ruling allowing in the evidence of the prior crime, and Brewner's trial attorney rendered ineffective assistance of counsel by failing to request that the judge instruct jurors about the limits of the extrinsic evidence involving the earlier break in of Staples' home.

The State, represented by the District Attorney's and Attorney General's offices, argues that Brewner's right to be present was not violated when the judge dismissed a juror or when the trial court ruled on the State's motion to introduce evidence of prior acts regarding Brewner's involvement in an earlier home invasion and drug dealing. And the trial court properly admitted the evidence of Brewner's prior acts as required under Georgia's new Evidence Code. Among other arguments, Brewner received effective assistance of counsel, the State contends. Finally, the evidence was sufficient to convict Brewner of murder and his other crimes.

**Attorney for Appellant (Brewner):** Frances Kuo

**Attorneys for Appellee (State):** Daniel Porter, District Attorney, Lee Tittsworth, Asst. D.A., Nigel Lush, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., S. Taylor Johnston, Asst. A.G.

#### **THE STATE V. COHEN, BUTTERS, BRINDLE (S17A1265)**

The **Fulton County** District Attorney is appealing a ruling that threw out charges against the former housekeeper of Waffle House Chairman Joe Rogers, Jr. for videotaping their sexual liaisons without his knowledge.

**FACTS:** This high-profile case has been tied up in litigation for several years. According to the State, which is represented by the District Attorney, David Cohen and John Butters are attorneys who represented Mye Brindle. Brindle had been employed as a housekeeper/personal assistant at Joe Rogers' home, during which time, Brindle and Rogers engaged in sexual activity. (He claims the couple had a consensual affair; she claims she was the victim of unwelcome sexual demands by her boss.) In 2008, Brindle was injured and was terminated from her position due to her inability to continue working, the State claims. In 2009, Rogers and his wife rehired Brindle as their housekeeper and house manager. When she returned to work at Rogers' home, the sexual activity between Rogers and Brindle resumed.

In June 2012, Brindle hired Cohen and Butters to represent her in a sexual harassment lawsuit against Rogers. According to the State, Cohen and Butters met with private investigators to discuss making a covert video. According to the State, the private investigators "explicitly" informed Cohen and Butters that recording video of a person in his own home without his consent would be illegal. Nevertheless, the investigators agreed to help the attorneys purchase a "spy camera" for such use. On June 20, 2012, Brindle allegedly used the camera to record Rogers while he was naked during a sexual encounter between the two in his bedroom. Brindle then turned over the camera and recordings to a private investigator who transferred the recordings to DVDs and delivered the footage to attorney Cohen. Soon after, Brindle resigned from her job with the Rogers. On July 16, 2012, Cohen sent Rogers a letter, stating that Rogers had engaged in "a long history of unwelcome sexual demands and other sexual harassment and abuse" toward Brindle, which was "well documented by numerous video and audio recordings." The letter stated that Brindle was prepared to proceed with a lawsuit. Cohen went on to say in the

letter that, “It is my experience that these sensitive type matters involving claims of a sexual nature are always best resolved early and outside of public litigation. I have been involved in numerous matters where defendants engaged in a scorched earth strategy of counteraccusations, denial, attempted delay, obfuscation and refusal to address the core issues promptly and properly. Never have I seen that strategy successful... My point here is simply to convey my belief that it is in the best interest of all involved to avoid this type of protracted litigation, injurious publicity to all parties, etc.”

On Sept. 17, 2012, Rogers sued Brindle in Cobb County. Two days later, Cohen filed a lawsuit against Rogers on Brindle’s behalf in Fulton County. Since then, there has been extensive civil litigation. On June 17, 2016, a Fulton County grand jury indicted Cohen, Butters and Brindle for conspiracy and unlawful surveillance. Specifically, the indictment alleged four counts: conspiracy to commit extortion (count one); conspiracy to commit unlawful eavesdropping or surveillance (count two); and unlawful surveillance (counts three and four). Brindle and her attorneys filed a motion to dismiss the indictment, and following a hearing, on Nov. 29, 2016, the trial court issued an order dismissing the indictment. The State now appeals to the Georgia Supreme Court.

**ARGUMENTS:** The State argues the trial court erred in dismissing count one of the indictment by erroneously finding that Georgia’s extortion statute, Georgia Code § 16-8-16, is “constitutionally vague.” The court’s order stated that threats to file civil litigation “cannot constitute extortion because ‘a settlement demand letter, even if it spells out the ancillary consequences of potential litigation, is protected speech.’” If such letters could constitute extortion, the order says, then the statute necessarily must be constitutionally overbroad. But that is incorrect, the State argues, because “in *specific circumstances*, a threat of litigation *can* amount to extortion.” The trial court also erred in ruling that the statute is overbroad because it violates or criminalizes a person’s right to sue in violation of the First Amendment rights to petition and free speech. The statute does not criminalize constitutionally protected speech, the State contends. The First Amendment’s provisions guaranteeing a right to petition “generally guarantee a right to petition *the government* for redress of grievances, not a constitutional right to sue private individuals for private matters.” Georgia’s extortion statute “is sufficiently narrow that it does not criminalize the threat or filing of lawsuits but only the threat or filing of baseless or ‘sham’ – and therefore constitutionally unprotected – lawsuits,” the State argues. “The prosecution in this case is proper because the ‘speech’ at issue falls within the narrowly drawn definition of extortion set forth in the statute. Embarrassing video footage of sexual encounters in which Brindle has been found by a trial court to be a willing participant was illegally procured as part of a conspiracy to extort the victim out of millions of dollars without any good faith basis or lawful legal claim.” The trial court also erred in dismissing counts two, three and four of the indictment. Among other arguments, the trial court erred in concluding that Rogers “did not have an expectation of privacy at the time of the recording,” when he was nude and having sex in the bedroom of his own house. The trial court’s order “constructs an interpretation of ‘private place’ that fundamentally subverts or *inverts* longstanding legal, social, and common sense understandings of privacy in Georgia,” the State argues. Another “flawed and erroneous reason” for the trial court’s dismissal of counts two, three and four is that “the fact that there was an extramarital relationship mandates that the person engaged in the extramarital relationship loses

his right to privacy as to the extramarital conduct.” “Georgia’s adultery statute is both irrelevant and inapplicable in this case,” the State contends.

Attorneys for Brindle and her two lawyers argue the trial court did not err in dismissing count one of the indictment. “Neither a demand letter nor the filing of a civil suit constitute extortion,” the attorneys argue in briefs. “Georgia courts have repeatedly refused, in the criminal context, to read the word ‘threat’ to include a threat to file civil litigation or the actual filing of civil litigation itself.” Indeed, criminalizing a threat to file suit or the filing of the suit would be unconstitutional. “A settlement demand letter, even if it spells out the ancillary consequences of potential litigation, is protected speech,” the attorneys argue. And contrary to the prosecution’s argument, the constitutional right to petition the government for a redress of grievances includes petitions to the courts for the redress of grievances between private parties. Recognizing the importance of this right, the trial court correctly held that “criminalizing a threat to file civil litigation, or the filing of civil litigation itself, would violate the state and federal constitutions.” Georgia’s extortion statute is overbroad and unconstitutionally infringes on First Amendment rights. The text of Georgia Code § 16-8-16 “contains no language restricting its application to ‘sham’ or ‘baseless’ litigation, nor is there any language in the statute synonymous with those terms.” The trial court also did not err in dismissing counts two, three and four of the indictment, the attorneys argue. They were properly dismissed because “they fail to charge a crime” that was argued by the prosecution. “Mr. Rogers had no expectation of privacy and the recording was not made in a private place,” the lawyers contend. “As the trial court correctly explained, ‘A covert video made by a person whose presence is known to the person recorded does not violate a person’s Fourth Amendment reasonable expectation of privacy.’” “Even if Mr. Rogers had privacy rights vis-à-vis Brindle in the recorded activity, Mr. Rogers’ adulterous conduct separately waived those rights as to the extramarital activity,” the attorneys argue. “A person engaged in an extramarital relationship loses his right to privacy as to the extramarital conduct.”

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