



Supreme Court of Georgia

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SUMMARIES OF OPINIONS

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FREEMAN V. THE STATE (S17A1040)

The Supreme Court of Georgia has reversed the conviction of a man arrested in **Hall County** for disorderly conduct after he “flipped a bird” at his pastor during Sunday church services.

In today’s unanimous opinion, written by **Presiding Justice Harold D. Melton**, the high court finds that the man’s behavior was protected speech under the First Amendment to the U.S. Constitution and he could not be convicted under Georgia’s disorderly conduct statute.

On Aug. 3, 2014, David Justin Freeman attended church with his family at the Flowery Branch campus of “12 Stones” 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 the congregation could pray for them to have a successful year. 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." The State conceded that Freeman's behavior was not "violent" but argued it was "tumultuous." 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 was sentenced to 12 months on probation and ordered to pay a \$270 fine. Freeman then appealed to the Georgia Supreme Court, arguing that the disorderly conduct statute is "unconstitutionally vague and overbroad."

In today's opinion, the Supreme Court rejects Freeman's constitutional challenge but finds that the statute does not apply to him because his conduct was protected by the First Amendment.

Freeman argued the statute was unconstitutionally vague because it does not define "tumultuous" behavior and therefore one cannot be sufficiently informed about what conduct the statute prohibits. In today's opinion, the Supreme Court disagrees. "A person of common intelligence can ascertain from the word 'tumultuous' that he or she may be found guilty of disorderly conduct under § 16-11-39 (a) (1) when that person acts in a disorderly, turbulent, or uproarious manner toward another person, which places the other person in reasonable fear for his or her safety," the opinion says. The statute is not unconstitutionally vague "as the statute provides sufficient notice to persons of ordinary intelligence of the prohibited conduct and does not encourage arbitrary and discriminatory enforcement."

A statute can be unconstitutionally overbroad, however, "if it stifles expression or conduct that is otherwise protected by the Constitution." In today's opinion, "we find that when properly construed, § 16-11-39 (a) (1) does not reach any, let alone a substantial amount of, constitutionally protected conduct." The statute makes it clear "that the level of 'tumultuous' behavior necessary to give rise to a sustainable charge must involve *acts* that would place another person in reasonable fear for his or her safety." And the type of expression that would give rise to such a reasonable fear would have to involve "fighting words" or a "true threat" which would not be protected under the First Amendment. The disorderly conduct statute "*only* reaches expressive conduct that amounts to 'fighting words' or a 'true threat,'" the opinion says.

"Because there was no showing here that Freeman's act of silently raising his middle finger from the back of the church during the church service constituted 'fighting words' or a 'true threat' that would amount to a tumultuous act, his conviction for disorderly conduct under § 16-11-39 (a) (1) cannot stand," the opinion says. As a result, "his conviction must be reversed and he cannot be re-tried on the disorderly conduct charge."

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

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

MORAN V. THE STATE (S17A0967)

The Supreme Court of Georgia has unanimously upheld the convictions and life-without-parole prison sentence given to Misty Sunshine Moran for associating with a gang and for killing a cab driver in **Hall County** after he begged her to spare his life.

Moran, who was near 40 years old when she was convicted, appealed her convictions and sentence, arguing the evidence was insufficient to prove her guilt. But in today's opinion, "We disagree," **Justice Robert Benham** writes for the Court.

According to the facts at trial, on March 15, 2015, Moran and several others went on a crime spree that included an attempted armed robbery and a home invasion, both of which were unsuccessful. Moran and her four associates, most of whom were in their early twenties, then conspired to rob a taxi driver. Moran contacted the taxi company, and driver Isaias Tovar-Murillo, 46, arrived at the Lenox Apartments in Gainesville to pick up Moran. Nearby, Moran's co-defendants waited in a Honda that was to serve as the "getaway" car. After Moran got into the taxi, Tovar-Murillo drove away, with the others following.

After driving for a brief time, Moran pulled out a 9 millimeter gun and demanded money from Tovar-Murillo. He drove off the road into the grass, opened the door, and tried to escape, at which time Moran fired a single shot into the back of his head. After killing him, she told her four co-defendants to collect the money from the taxi because she didn't "kill him for nothing." But her co-defendants, disquieted by all the blood and gore in the car, could not bring themselves to retrieve the money. Still in need of cash, the group decided next to burglarize a trailer. Moran later returned home and hid the murder weapon under a cement slab in her driveway.

The day after the murder, Moran confessed to a friend, Joanna Gonzalez, that she had killed someone. Moran told Gonzalez that while she held the taxi driver at gunpoint, he had cried, told her about his brother, and begged for his life. He offered to help her and told her she did not have to do this. When he attempted to flee from the taxi, Moran said she put the gun to the back of his head and shot him. After he was shot, she said his foot hit the gas pedal and the car drove into the woods, resting against a tree with its lights still on.

Gonzalez subsequently contacted the authorities. Initially Moran denied any involvement in the murder. She eventually admitted to police that she was in the victim's taxi with a gun but that it had discharged accidentally while cradled under her arm.

In March 2015, Moran and the other four were indicted on 17 counts, including malice murder, felony murder based on criminal attempt to commit armed robbery, aggravated assault, gun charges and participation in criminal gang activity. The State alleged that Moran was associated with two street gangs, SUR 13 and BOE 23. At her October 2015 trial, the man who had lent Moran the murder weapon, who was a member of BOE, testified Moran had led two or three of the gang's meetings at her home. Also at her trial, the firearm examiner testified the gun could not have been discharged without someone pulling the trigger. The medical examiner testified that stippling at the entrance of the wound indicated the gun had been fired within a foot of the victim's head.

Following the trial, Moran was found guilty of all charges other than one of the gun charges, and she was sentenced to life in prison without parole plus a number of years for her other crimes. Three of her codefendants pleaded guilty to attempted armed robbery, violation of the Georgia Street Gang and Terrorism Prevention Act, and other crimes to avoid prosecution for felony murder. The fourth was still awaiting a hearing on her case. Following her convictions, Moran appealed to the Georgia Supreme Court, arguing the evidence was insufficient to convict her of malice murder because there was no evidence she had intended to kill the victim.

But in today's opinion, the Court concludes "there was evidence of malice." "Appellant [i.e. Moran] made admissions that she shot the victim as he tried to escape and while he was begging for his life."

"The evidence was sufficient to authorize a rational trier of fact to find appellant guilty beyond a reasonable doubt of malice murder, as well as the other crimes for which she was convicted," the Supreme Court concludes. "Judgment affirmed. All the Justices concur."

Attorney for Appellant (Moran): Debra Jefferson

Attorneys for Appellee (State): Lee Darragh, District Attorney, Shiv Sachdeva, Asst. D.A., Laura Lukert, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Crowder

JOHNSON V. THE STATE (S17A1105)

The Supreme Court of Georgia has granted a new trial to a young man convicted eight years ago in **Lee County** of stabbing his girlfriend to death.

In today's unanimous opinion, **Justice David E. Nahmias** writes that because a fire in 2011 destroyed all the trial recordings before a written transcript could be prepared and the recreated transcript is inadequate, the man was unable to adequately appeal his conviction and he therefore must be retried.

"Our decision in this case rests on two fundamental principles," today's opinion says. "A defendant convicted of a crime has a right to appeal, and a defendant convicted of a felony has a right to a transcript of the trial to use in bringing that appeal."

According to the facts of the case, on Feb. 29, 2008, 23-year-old Nicole Judge was found stabbed to death in her apartment after her father went to her home and saw blood on the porch outside her door. He immediately called police without entering. The first **Lee County** Sheriff's deputy to arrive entered the apartment and followed a trail of blood from the front door to the bedroom. He found Judge's body with a knife stuck in her neck on the floor of her children's play room. Two broken knife handles and knife blades were recovered from the room. Judge had suffered 36 separate stab wounds, including 10 to her head, three to her neck, six to her liver, and 14 to her back. Blood was found outside and inside the apartment, including blood stains on the driveway and porch, projected blood stains in the hallway and play room, bloody footprints in the kitchen and bathroom, and blood spots in the cutlery drawer in the kitchen. Bloody fingerprints on the door of the apartment and on a toy in the apartment later matched the fingerprints of her boyfriend, Craig Johnson, who was in his early 20s. When agents with the Georgia Bureau of Investigation (GBI) searched Johnson's house a few days later, they found socks and a shirt with Judge's blood on them. Additionally, a bank ATM video showed Johnson trying to use Judge's ATM card on the night of her death, and Judge's driver's license and social security card were found in the bank parking lot.

Johnson was arrested and interviewed by GBI agents for almost four hours. He was advised of his *Miranda* rights under the U.S. Supreme Court's 1966 decision in *Miranda v. Arizona*, and he voluntarily waived his rights orally and in writing. Initially Johnson denied in the recorded interview that he had been at Judge's apartment at all. He then admitted that he had been there but said she had begun stabbing herself, and he tried to stop her before running away. After an agent told Johnson that Judge's stab wounds were not self-inflicted, he again changed his story, saying that while the victim was stabbing herself, her boyfriend arrived, and he and

Judge started fighting. Johnson said he ran to the kitchen to get a knife to defend himself, heard Judge scream, fought with the boyfriend, then ran away with the boyfriend following him. Johnson said the boyfriend then forced him to use Judge's ATM card.

After being told that the physical evidence did not match this account either, Johnson admitted that there was no boyfriend and told the following story: After he and Judge had sex, she told him she wanted him to leave his wife for her and threatened she would otherwise tell his wife about the affair. He said Judge then pulled out a knife and tried to stab him. While they were fighting over the knife, Judge was stabbed and Johnson cut his hand. He then went to the kitchen to get a knife, and when he returned, Judge rushed at him and he stabbed her, after which she grabbed the knife. He returned to the kitchen for another knife, and they continued to fight. After he stabbed her in the back, she eventually fell to the floor, and he stabbed her again. He said he left her lying on the floor, went to the bathroom, cleaned up, and then fled. He said he tried to use her ATM card because he wanted to get money for her children.

Following a September 2009 trial, the jury found Johnson guilty of malice murder and other charges, including aggravated assault, aggravated battery, and financial transaction card theft. He was sentenced to life in prison. As is common, in October 2009, his attorney filed a motion for new trial. In March 2011, Johnson obtained a new attorney for his appeal. On Nov. 13, 2011, a fire at the court reporter's house destroyed the tapes and other materials from which the verbatim transcript was to have been prepared.

At the initial hearing on his motion for new trial, his attorney argued that Johnson was entitled to a new trial because the transcript was unavailable. The State replied that the court should either deny the motion because Johnson had been dilatory in requesting the transcript, or use the procedures of Georgia Code § 5-6-41 (f) and (g), to recreate a transcript, using the recollections of the judge, the prosecutor and one of the State's investigators who was present for the entire trial. In November 2012, the court ordered the State to produce a recreated transcript and the defense to offer alterations or additions. After the State produced a 14-page recreated narrative transcript of the six-day trial, Johnson's attorney still objected but in July 2014, filed 12 minor suggestions for changes.

On July 26, 2016, Johnson's attorney filed an amended motion for new trial, raising five enumerations of error, including his argument that the destruction of the trial transcript denied Johnson the ability to "present an appeal." The court ultimately denied Johnson's motion for a new trial, ruling that the recreated transcript "is sufficient to be made the transcript of this trial along with the evidence...." Johnson then appealed to the Georgia Supreme Court.

In today's opinion, the high court disagrees that the recreated transcript in this case is complete – "meaning sufficient for Johnson to identify errors and this Court to evaluate the errors then enumerated."

"This Court has explained that 'it is the duty of the State to file the transcript after a guilty verdict has been returned in a felony case,'" the opinion says, quoting the Georgia Supreme Court's 1973 decision in *Wade v. State*. "'Such is the law in this state, and in this legal era of numerous appeals and numerous post-conviction reviews it is a wise and reasonable requirement.'"

Recreating the transcript may require the State to call witnesses who testified or other individuals who were present for the trial. "Such measures were not taken to recreate the transcript in this case," the opinion says. "The result of this lackluster information-gathering

process was a 14-page transcript – double-spaced, with wide margins and much additional white space – purporting to summarize a six-day trial and sentencing hearing.” This recreated narrative transcript “lacks sufficient accounts of crucial parts of Johnson’s trial.”

Prosecutors for the State argued that the recreated transcript was sufficient because it showed that the evidence against Johnson was overwhelming. But, “We cannot hold that an appellant is not entitled to a complete trial transcript simply because it appears from the record that exists that he is clearly guilty,” today’s opinion concludes. “Because Johnson has been deprived of the ability to appeal his convictions, the trial court should have granted his motion for a new trial. Judgment reversed. All the Justices concur.”

Attorney for Appellant (Johnson): Kevin Kwashnak

Attorneys for Appellee (State): Plez Hardin, District Attorney, Lewis Lamb, Chief Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Michael Oldham, Asst. A.G.

SPENCER V. THE STATE (S16G1751)

A woman convicted of drunk driving has had her conviction reversed under an opinion today by the Supreme Court of Georgia.

Mellecia Spencer, who was convicted in **Henry County** of driving under the influence, appealed to the Court of Appeals, arguing the police officer used “pseudo-science” in improperly claiming he could determine a person’s numeric blood alcohol level from the results of a commonly used field sobriety test. The Court of Appeals upheld her conviction.

In today’s unanimous opinion, however, the Supreme Court has ruled that the Court of Appeals erred in ruling that the trial court properly admitted a police officer’s testimony correlating the results of a “horizontal gaze nystagmus” (HGN) test with a numeric blood alcohol content. As a result, “we reverse the judgment of conviction and sentence with respect to the DUI,” **Justice Michael P. Boggs** writes for the Court.

According to the facts of the case, in the early morning hours of Jan. 31, 2015, Henry County Police Officer Wesley McNure stopped Spencer for driving a car with a non-working headlight. Upon approaching the vehicle, the officer smelled alcohol, saw that Spencer was wearing a paper bracelet from a bar with the word “Budweiser” on it, observed a plastic cup with what appeared to be an alcoholic drink in the car’s center console, and noticed that Spencer’s speech was slurred. She stated she had recently had surgery and she appeared unsteady when she got out of her vehicle, according to briefs filed in the case. Initially, Spencer denied having been drinking, but later admitted she’d had a margarita. McNure, who had spent two years on a DUI task force and conducted about 1,000 DUI investigations, had Spencer perform field sobriety tests, one of which included the HGN test, which evaluates eye movements. McNure later testified that the HGN test is a scientific test validated by studies. He said that anyone who conducts the test looks for six clues – three in each eye – that have to do with the involuntary jerking of the eyes. On Spencer, McNure observed four of six clues, including sustained involuntary jerking at maximum deviation in each eye. At trial, McNure stated: “Based on my training and experience, four out of six clues generally indicates a blood alcohol level equal to or greater than 0.08.” (Georgia’s DUI laws make it illegal for drivers 21 years and older to drive with a blood alcohol concentration of 0.08 percent or higher.) After his investigation, McNure placed Spencer under arrest for “DUI less safe.” He then read her the implied consent notice and

asked her whether she would like to take a state-administered breath test. The notice informs people that if they refuse to take the test, their license will be suspended for a year and their refusal may be used against them at trial. Spencer declined to take the test. The jury convicted her of DUI less safe and possessing an open container of alcohol in her vehicle. She appealed the DUI conviction to the Georgia Court of Appeals, arguing that the trial court erred by allowing the arresting officer to testify that Spencer's performance on the HGN test proved a specific numeric blood-alcohol content level. The Court of Appeals acknowledged that an officer's testimony identifying a specific numeric blood alcohol content based solely on a defendant's HGN results should be excluded, but it upheld the lower court's decision. The appellate court found that "the officer did not give such testimony, and instead properly testified that generally an HGN test showing four out of six clues indicates impairment." Spencer then asked to appeal to the Georgia Supreme Court, which agreed to review the case to determine whether the Court of Appeals erred in admitting the officer's testimony correlating HGN results with a range of blood alcohol content without reference to whether such correlations have reached a state of verifiable certainty in the scientific community.

In today's opinion, the high court concludes that the intermediate appeals court erred. "It is generally accepted that the HGN test 'has reached a state of verifiable certainty in the scientific community and is admissible as a basis upon which an officer can determine that a driver was impaired by alcohol,'" the opinion says. "But whether the HGN test may properly be used as evidence that a driver is impaired by alcohol is not the same question as whether the HGN test has been established as an indicator of either a specific number or a numeric range of blood alcohol content."

In its 2010 opinion in *Bravo v. State*, the Court of Appeals recognized the distinction, stating that it remains an open question "whether the HGN test has reached a state of verifiable certainty in the scientific community as a basis for determining the numerical level of a driver's blood alcohol level."

In this case, the Court of Appeals did not address its ruling in *Bravo*, today's opinion says. "It did not examine the reasoning of the many jurisdictions that have rejected the use of the HGN test for this purpose."

"We conclude that the evidence presented by the State in this case was insufficient to establish the scientific validity or reliability of any correlation between a particular number of clues on an HGN test and a numeric blood alcohol content, whether a specific percentage or 'equal to or greater than' a specific percentage," the opinion says. "The trial court therefore abused its discretion in admitting this evidence."

Because "we cannot say that this error was harmless," Spencer's DUI conviction has been reversed. It is up to prosecutors to decide whether to retry her.

Attorney for Appellant (Spencer): Thomas Thomas

Attorneys for Appellee (State): John Pipkin, III, William Kennedy, III

SMITH V. THE STATE (S17A1170)

The Supreme Court of Georgia has upheld the convictions and life prison sentence given to Luther Smith, Jr. for the 2007 assault and murder of his girlfriend's 15-month-old daughter, Deandra Turner.

Smith appealed his convictions, arguing in part that the evidence was insufficient to convict him. But in today's unanimous opinion, the high court disagrees. **Justice Britt C. Grant** writes for the Court that the evidence "was sufficient to enable a rational jury to conclude beyond a reasonable doubt that Smith was guilty of the crimes of which he was convicted."

According to the evidence at trial, in February 2007, Shakela Turner lived in an apartment in **Fulton County** with her two daughters – Deandra and a 3-year-old toddler. Smith, who was in his early twenties, lived with them. Turner recently had returned to work, and on Feb. 14, she left Deandra and the baby's older sister in Smith's care. When Turner's shift ended, she dropped back by the apartment to retrieve a food stamps card before going grocery shopping for dinner. When Turner knocked on the door, it took him unusually long to answer and she jokingly asked if he had another woman in the apartment, according to briefs filed in the case. When Smith opened the door, Turner noticed he was sweating. While Turner's 3-three-year-old was with Smith, he told Turner the baby was upstairs sleeping.

After Turner left for the grocery store, Smith walked to his grandmother's apartment in the same complex, leaving the baby and toddler at Turner's apartment. At his grandmother's home, where he went to borrow some laundry detergent, he met up with his cousin, Darnell Lawrence, and a friend, Samuel Davis, and asked the two to come back to Turner's apartment and watch television with him. When they entered, Davis and Lawrence saw baby Deandra lying face down on the sofa, appearing to be asleep. Smith scooped her up and took her upstairs while Davis and Lawrence settled down to watch TV. A little while later, Smith called Davis upstairs and asked him to look at the baby to see if he thought something was "wrong." Although she appeared to be asleep and felt warm to the touch, upon closer inspection, Deandra appeared not to be breathing. Davis began administering CPR, at which time blood came out of the baby's nose. Smith also attempted to give her CPR before they took her downstairs. When Lawrence saw the baby's condition, he told Smith and Davis to call 911. Instead, Smith called Turner and told her to hurry home, that something was wrong with the baby. When she arrived, she jumped out of the car and ran to Smith, who was holding Deandra. She asked Smith what had happened and he said he didn't know. She then called 911 but was too distraught to follow the operator's instructions. A neighbor, who heard Turner screaming, intervened and administered CPR until paramedics arrived. The paramedics found the baby unresponsive. She was not breathing and had no pulse. Smith told one of the paramedics "that the baby had choked on a vitamin or a piece of candy at that time and had gone unresponsive." Smith told a similar story to police investigators, saying Deandra had choked on candy he'd given her, and he had used the Heimlich maneuver to dislodge it. He said that afterward, Deandra had acted "woozy," so he had rocked her to sleep and put her in her crib upstairs. One of the investigators later testified that he found a bloody adult t-shirt in the apartment's washing machine. The blood on the t-shirt and on the baby blanket found in her crib matched Deandra's DNA.

Smith was indicted on a number of charges, including malice murder, felony murder, aggravated assault, aggravated battery and first degree child cruelty. At his trial, the medical examiner testified that he concluded the cause of death was blunt force trauma to the head, and secondarily, blunt force trauma to the abdomen. The autopsy revealed bruises on the baby's head and face, a brain hemorrhage, and multiple hemorrhages in her retinas, neck muscles, right kidney and stomach. There was a substantial amount of blood in the baby's abdomen, her liver was lacerated, and she had a broken rib. The State's expert witness, Dr. Randall Alexander,

testified that the baby's injuries were consistent with physical child abuse as opposed to accidental trauma.

Following the trial, the jury found Smith guilty of felony murder, aggravated assault and aggravated battery. It acquitted Smith of malice murder, one of the aggravated assault counts and both counts of child cruelty. Smith was sentenced to life in prison. He then appealed to the state Supreme Court.

In addition to arguing the evidence was insufficient to convict him, Smith's attorney argued the trial court erred in allowing Alexander to opine that the victim's injuries were the result of abuse rather than accident.

"We disagree," today's opinion says. "The State's expert, Dr. Alexander, was qualified as an expert in the fields of child abuse, child fatalities, and pediatrics." His testimony "was admissible, and the trial court did not abuse its discretion in permitting Dr. Alexander's opinion," the Court concludes.

Attorney for Appellant (Smith): Dell Jackson

Attorneys for Appellee (State): Paul Howard, Jr., District Attorney, Lyndsey Rudder, Dep. D.A., Kevin Armstrong, Sr. Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Jason Rea, Asst. A.G.

SHUMAN V. THE STATE (S17A1229)

In another child killing, the Georgia Supreme Court has upheld the murder conviction and life prison sentence given to Ernest Byrd Shuman, who pleaded guilty to choking to death a 7-year-old boy in 1990 and throwing his body into the Little Ochlocknee River.

After pleading guilty in 1990 to malice murder and concealing the death of another, in May 2016, Shuman – representing himself without an attorney – filed a motion for an "out-of-time" appeal, asking the court to allow him to appeal his convictions and prison sentence. Normally, a defendant has only 30 days from the date of the judgment against him to file a notice that he intends to appeal. Shuman waited nearly 26 years before filing his notice. There are instances when a court will grant extra time to file an appeal. In his motion, Shuman said he was seeking the late appeal on the grounds that his guilty plea was not "knowing, intelligent or voluntary," as required, and that his attorney was ineffective and incompetent, in violation of his constitutional rights. The **Thomas County** Superior Court denied his motion and he then appealed that denial to the Georgia Supreme Court.

In today's unanimous opinion, written by **Justice David E. Nahmias**, the high court has upheld the trial court's decision, ruling that the trial court properly denied Shuman's motion.

According to the facts of the case, in 1990, Shuman was running a gas station on Jackson Street in Thomasville, GA. Ronald Wyche, Jr., who was 7 years old, lived with his family on a dirt road that ran next to the station. On April 3, 1990 at about 7:00 p.m., Ronald left home to go to the station after his mother gave him a dollar to buy a drink or goodies. His family would never see him again. Shuman was just locking up for the night but allowed the child into the store. After ringing up Ronald's items and giving him change, Shuman choked the boy to death. He then put the boy's body in a bag and tossed it into the Little Ochlocknee River. Ronald's body was found in the river 29 days later about seven miles north of Thomasville.

On June 21, 1990, Shuman was indicted by a Thomas County grand jury for malice murder and concealing the death of another. The same day, Shuman entered a guilty plea to both

charges before Superior Court Judge George Horkan, Jr. He was sentenced to life in prison for the murder and 12 months for concealing the death, to run concurrently with the life sentence.

At Shuman's 1990 plea hearing, the prosecutor stated the facts that the State expected to prove had the case gone to trial. When the judge asked Shuman if those facts were true, Shuman said yes, then proceeded to give his own account of what had happened:

"He came to the station about a quarter till 7:00 to get a Coke and a pack of chips. And I was locking up and I told him to go ahead and get them like I'd done before. And I finished locking up and come inside to get his, took his money and give him his change back. And then I just lost control and choked him and then I panicked and put him in the bag and then took him to the river and threw him in."

In today's opinion, the high court reiterates what it has repeatedly said before: "Out-of-time appeals are designed to address the constitutional concerns that arise when a criminal defendant is denied his first appeal of right because the counsel to which he was constitutionally entitled to assist him in that appeal was professionally deficient in not advising him to file a timely appeal and that deficiency caused prejudice." But in this case, Shuman did not allege that ineffective assistance by his plea counsel was the reason he had not filed a timely appeal. Accordingly, the trial court properly denied his motion and the judgment is affirmed, the opinion concludes.

Attorney for Appellant (Shuman): Ernest Shuman, pro se

Attorneys for Appellee (State): Michelle Harrison, Assistant District Attorney, Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G.

DELONEY V. THE STATE (S17A0700)

DELONEY V. THE STATE (S17A0701)

In a third child killing, the Georgia Supreme Court has upheld the murder conviction and life prison sentence with no chance of parole given to Danny Deloney, who pleaded guilty to killing his 6-year-old daughter by holding her and her sister captive before setting her mother's **DeKalb County** apartment ablaze.

To avoid the death penalty, Deloney pleaded guilty in 2001 to felony murder, kidnapping and aggravated assault. But 14 years later, he filed a motion asking for permission to file an "out-of-time" appeal, alleging that the trial judge and his attorney had failed to inform him of his right to appeal from his guilty pleas. Normally, a defendant has 30 days to appeal from the time the judgment against him is filed in court. The trial court denied his motion, and Deloney, representing himself, then appealed the denial to the state Supreme Court, arguing the trial court erred in denying his motion and failing even to hold a hearing on the motion.

In today's unanimous opinion, written by **Justice David E. Nahmias**, the Supreme Court of Georgia disagrees, finding that "the record shows that he is not entitled to an out-of-time appeal and thus that the trial court was not required to hold an evidentiary hearing on his motion."

Deloney's convictions stem from crimes committed Nov. 16-17, 1999. At one time, Deloney and Tiffany Dixon had been involved in a romantic relationship and had a daughter, Porsha. The relationship had ended, and Dixon lived in an apartment in Decatur with 6-year-old Porsha and another 8-year-old daughter from a previous relationship. Today's opinion provides a detailed account of what occurred the night of the crimes: Deloney called Dixon, saying he was

in Madison, WI. Thirty minutes later, however, he crawled through a window at Dixon's apartment, put a screwdriver to her neck, and said he was there to kill her, their daughter Porsha, her other daughter, and himself. He retrieved a butcher knife and duct tape from the kitchen and held Dixon and the two girls at knifepoint overnight. The next morning, for reasons that are unclear, Deloney allowed Dixon to go to work and the girls to go to school, and Dixon believed the situation had somehow resolved itself. Shortly after arriving at work, however, Dixon called home to see if Deloney was still in her apartment. He was. Furthermore, it was clear he had checked out at least one of the girls from school. Dixon went right home where she found the apartment dark and Deloney holding both girls captive in a back bedroom and wielding a butcher knife. Dixon tried to flee but he grabbed her and ordered her to strip off all her clothes. He threatened to kill Dixon and said he was going to cut one of the girls. Somehow Dixon managed to call 911, and when police arrived, they were able to get Dixon out of the apartment but not the girls. Officers tried to coax Deloney into letting the girls go, but Deloney stood in the door, putting the butcher knife to each girl's throat and demanding that Dixon return to the apartment. When Dixon refused, he slammed the door shut, saying, "I am going to turn on the gas and kill all of us." Police could see him dragging the children around the apartment as he turned on the gas and set fire to various items. Police tried to rescue the girls by forcing their way inside, but they were unsuccessful due to the fire and smoke. Eventually, the flames blew out the back double-glass door and firefighters were able to gain entry. They found Deloney and both girls overcome by smoke inhalation. Deloney and the 8-year-old, who had a 2-inch laceration on her forehead, survived the fire. Porsha did not.

In December 1999, a DeKalb County grand jury indicted Deloney for the malice murder of Porsha, felony murder during the commission of arson, first degree arson, three counts of aggravated assault with a deadly weapon, the kidnapping with bodily injury of Dixon's older daughter, the kidnapping of Dixon and Porsha, and two counts of cruelty to children for threatening to kill the girls. The district attorney announced the State would seek the death penalty. Deloney then agreed to enter guilty pleas to some charges to avoid death.

Following a plea hearing, where Deloney acknowledged that he understood the constitutional rights he was waiving by entering guilty pleas, that no one had threatened or influenced him to plead guilty, and that he had been satisfied with his attorneys, Deloney signed a plea form. The judge ruled that the facts supported his guilty pleas and that he had entered them freely and voluntarily, as required. The judge then sentenced Deloney to life without parole.

In 2015, Deloney filed his motion for an out-of-time appeal, as well as a motion to throw out his sentence because the sentence of life without parole was improper, and a motion to withdraw his guilty pleas because his plea attorney had been incompetent and ineffective in violation of his constitutional rights. In separate orders, the trial judge denied all three motions. Deloney then appealed to the Georgia Supreme Court.

In today's opinion, the Supreme Court has determined that Deloney abandoned his appeal of the latter two orders and only addresses the denial of his motion to file a late appeal.

Deloney has made several claims as the basis for an out-of-time appeal. But the high court has rejected them all. Deloney "cannot show from the existing record that his pleas were not knowingly and voluntarily entered, so this claim provides no basis for an out-of-time appeal," the opinion says. The Court has also rejected Deloney's claim that the trial court abused

its discretion in denying his motion without holding a hearing to determine why he had not filed an earlier appeal within the required time period.

But the Court has concluded that, “the trial court was not required to hold a hearing before denying Appellant’s motion for out-of-time appeal.”

“Judgments affirmed. All the Justices concur.”

Attorney for Appellant (Deloney): Danny Deloney, pro se

Attorneys for Appellee (State): Sherry Boston, District Attorney, Anna Cross, Dep. Chief Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Vanessa Meyerhoefer, Asst. A.G.

IN OTHER CASES, the Supreme Court of Georgia has upheld **murder** convictions and life prison sentences for:

- * Isaiah Blackmon (DeKalb Co.) **BLACKMON V. THE STATE (S17A0993)**
- * D’Andre Theophilous Carter (Coffee Co.) **CARTER V. THE STATE (S17A1126)**
- * Darius Jamal Davis (Fulton Co.) **DAVIS V. THE STATE (S17A0949)**
- * Andre Faust (Fulton Co.) **FAUST V. THE STATE (S17A1177)**
- * Dennis Hampton (Cobb Co.) **HAMPTON V. THE STATE (S17A0984)**
- * Demetrius McNeal (Fulton Co.) **MCNEAL V. THE STATE (S17A1290)**
- * Mark Taylor (Hall Co.) **TAYLOR V. THE STATE (S17A1033)**
- * Derrick McLaurence Williams (Cobb Co.) **WILLIAMS V. THE STATE (S17A0764)**

IN DISCIPLINARY MATTERS, the Georgia Supreme Court has **disbarred** the following attorney:

- * James Edward Watkins, Sr. **IN THE MATTER OF: JAMES EDWARD WATKINS, SR. (S17Y1842)**