Supreme Court of Georgia
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SUMMARIES OF OPINIONS

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THE STATE V. COHEN ET AL. (S17A1265)

The Supreme Court of Georgia has reinstated three of four criminal charges against the former housekeeper of Waffle House Chairman Joe Rogers, Jr. regarding secret video recordings of sexual liaisons between the woman and her boss.

The **Fulton County** Superior Court had thrown out all the charges against Mye Brindle and her attorneys, David Cohen and John Butters, for their roles in allegedly conspiring to video record – and actually recording – Rogers and Brindle engaging in sex acts without Rogers' knowledge. But in today's unanimous opinion, written by **Presiding Justice Harold Melton**, the high court has reversed that ruling in part and reinstated the charges of conspiracy to commit unlawful surveillance and conducting unlawful surveillance against Brindle, Cohen and Butters. It has also reinstated one additional count of conducting unlawful surveillance against Brindle. However, the Supreme Court has upheld the lower court's dismissal of the conspiracy to commit extortion charge against the three defendants.

This highly-publicized case has been tied up in litigation for a number of years. According to the State, which is represented by the District Attorney, Brindle worked as a housekeeper and personal assistant to Joe Rogers, who was married, during which time Brindle and Rogers engaged in sexual activity. (Rogers claims they had a consensual affair; Brindle claims she was the victim of unwelcome sexual demands by her boss.) In 2008, following an injury, Brindle 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 allegedly 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 secretly record Rogers while he was naked in his bathroom and 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 "demand letter," allegedly 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." Although the actual letter was not included in the record provided to the high court, the parties contend the letter stated that Brindle was prepared to proceed with a lawsuit. Cohen allegedly 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. 14, 2012, according to the indictment, Cohen, Butters, and Hylton Dupree, another lawyer who represented Brindle, asked Rogers' attorneys for $12 million to settle Brindle's claims, which they argued were supported by the June 20 video.

Three days later, Rogers sued Brindle in Cobb County. Two days after that, 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 declare unconstitutional three statutes (Georgia Code §§ 16-8-16 (a) (3), 16-11-62 (2), and 16-11-66 (a)) as unconstitutionally overbroad or vague because "persons of ordinary intelligence" could not be expected to understand what the statutes allowed or prohibited. Following a hearing, on Nov. 29, 2016, the trial court dismissed all the counts of the indictment against all of the defendants. The State then appealed to the Georgia Supreme Court.

Today's opinion states that under Georgia Code § 16-8-16 (a) (3), "A person commits the offense of theft by extortion when he unlawfully obtains property of or from another person by threatening to…[d]isseminate any information tending to subject any person to hatred, contempt, or ridicule or to impair his credit or business repute." However, "there was no agreement to

unlawfully obtain property from Rogers by 'threatening' him in this case in any manner that could serve as a proper basis for a charge of illegal extortion under § 16-8-16 (a) (3)," today's opinion says. And "for this reason, the allegations in the indictment are legally insufficient to support a charge of conspiracy to commit extortion."

"From the plain language of the indictment, the alleged unlawful threat here was to file a lawsuit against Rogers and use the video as evidence in a court of law in the context of possible litigation," the opinion says. "The indictment does not allege any threat (express or implied) to release the information to anyone outside of the potential court proceedings if Rogers did not pay Brindle a certain amount of money." And, "a threat of litigation, by itself, is not unlawful. For this reason, we find that based on the authority of other courts that have examined similar issues, mere 'threats to sue cannot constitute criminal extortion.'"

"In light of the trial court's proper conclusion that Count 1 of the indictment failed to sufficiently allege a crime against the defendants under § 16-8-16 (a) (3) as a matter of law, the trial court did not need to decide any issue regarding the constitutionality of § 16-8-16 (a) (3)," the opinion says. "We therefore vacate that portion of the trial court's order purporting to declare § 16-8-16 (a) (3) to be unconstitutionally overbroad on its face."

However, "the State is correct" that the trial court erred in dismissing the remaining counts of the indictment, today's opinion says. Count 2 of the indictment charged that the defendants "did unlawfully, together, conspire to commit the crime of unlawful eavesdropping or surveillance" under § 16-11-62. Count 3 also charged them with committing the crime of unlawful eavesdropping or surveillance by recording with the use of a "spy camera," "the activities of Joe Rogers which occurred at [his home address], a private place, out of the public view."

"Under the plain language of § 16-11-62 (2)…a person cannot lawfully 'use…any device' to 'photograph…or record the activities' of others that occur in any private place and out of public view 'without the consent of all persons observed,'" the opinion states. And "the places involved in this case would meet the statutory definition of 'private place[s]' that were 'out of public view.'"

Finally, the trial court erred in concluding that §§ 16-11-62 (2) and 16-11-66 (a) are unconstitutionally vague, the opinion says. There is "nothing unclear about the requirement in § 16-11-62 (2) that 'all' persons being observed must give their consent to be photographed or video recorded before such persons can be photographed or video recorded in a private place and out of view. Nor is it unclear that the one-party-consent rule of § 16-11-66 (a) does not apply to eliminate the requirement for 'all' persons to give their consent to be legally photographed or video recorded in a private place and out of the public view consistent with the requirements of § 16-11-62 (2). People of ordinary intelligence can understand that they can be found guilty of illegal surveillance if they use a device to secretly photograph or video record others in private places and out of the public view without the consent of all persons being photographed or video recorded, and neither § 16-11-62 (2) nor § 16-11-66 (a) encourage arbitrary or discriminatory enforcement of their respective provisions."

Three justices – Justice David Nahmias, Justice Keith Blackwell, and Justice Britt Grant – have separately written "special concurrences," meaning they agree with the end result of today's opinion, but not necessarily with all of its reasoning.

Attorneys for Appellant (State): Paul Howard, Jr., District Attorney, Lyndsey Rudder, Dep. D.A., F. McDonald Wakeford, Asst. D.A.
Attorneys for Appellees (Cohen et al.): Brian Steel, Reid Thompson, Bruce Morris, Jimmy Berry

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

The Supreme Court of Georgia has rejected the arguments on both sides of an open records dispute involving Northside Hospital, and it is sending the case back to the **Fulton County** Superior Court to apply the correct legal standard.

With today's unanimous decision, written by **Justice Nels Peterson**, the high court has reversed a ruling by the Georgia Court of Appeals that was in favor of the corporation which operates Northside Hospital. Attorney **E. Kendrick Smith** had sued the corporation in an effort to obtain records of the hospital's acquisition of four physician groups. The Court of Appeals upheld the trial court's ruling that the records Smith wanted were not "public records" and therefore, he was not entitled to them. In this case, the hospital has argued that none of its records are open; Smith has argued that all of them are. In today's opinion, the high court finds that these "all-or-nothing" positions are both wrong, and it is remanding the case for further proceedings.

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

In 2011 and 2012, Northside acquired four physician practice groups. According to Smith's attorneys, the hospital paid more than $100 million for the groups. According to Northside's attorneys, what Northside paid is "unsupported and irrelevant," and the hospital "competed for and entered four private transactions with privately-owned physician groups and other private parties." In October 2013, attorney Smith sent an "Open Records Act request" to Northside requesting the records of the acquisitions. According to Northside's attorneys, Smith requested the records "on behalf of an undisclosed competitor of Northside Hospital, Inc. to use the Georgia Open Records Act to gain an advantage in the private healthcare marketplace." Northside declined to give Smith the records, claiming they were not "public records" under the Open Records Act and even if they were, they were not subject to disclosure under the Act's exemptions.

In November 2013, Smith sued Northside in Fulton County Superior Court to compel disclosure of the records. Three of the four physician groups intervened to protect their own

documents, which they argued were confidential and commercially sensitive. Following the three-day trial, the judge dismissed the case, finding that Smith had failed to show that "Northside entered into or performed any of the transactions for or on behalf of the Authority or exercised any of the Authority's powers when doing so," or that "the documents at issue were generated or maintained by Northside on behalf of the Authority." Smith appealed to the Georgia Court of Appeals, arguing that "all of Northside's records, including the requested records, are 'public records'" because the hospital "was created by the Authority as a vehicle to act on the Authority's behalf." The Court of Appeals upheld the trial court's ruling, finding there was "no evidence in this case that Northside entered the four specific transactions at issue on the Authority's behalf." The appellate court ruled that, "the trial court was authorized to conclude that the documents specifically requested by Smith were not 'public documents' within the meaning of the Georgia Open Records Act." Smith then appealed to the Georgia Supreme Court.

In today's 29-page opinion, "we conclude that the Court of Appeals and trial court applied the wrong legal standard, reverse the opinion of the Court of Appeals, and remand the case for the trial court to apply the correct legal standard." Applying the correct standard "requires a fact-intensive inquiry made difficult in this appeal given the divergent, all-or-nothing positions taken by the parties."

Since the Authority created Northside Hospital, Inc. decades ago, "the corporation has become massive with considerable assets in surrounding counties," the opinion says. "With the agency [i.e. Authority] barely even a dwindling dot in the rear-view mirror, the corporation now argues that it doesn't really do anything on behalf of the agency (in part because the now nearly-nonexistent agency has no idea what the corporation is doing), and thus the corporation's records of a series of healthcare-related acquisitions aren't subject to public inspection. If the corporation's aggressive position were wholly correct, it may well cast serious doubt on the legality of the whole arrangement between the corporation and the agency."

"A lawyer who seeks records from the corporation under this state's sunshine laws, on the other hand, takes the opposite (but equally aggressive) position, contending that everything the corporation does is for the agency's benefit and thus all of its records are public."

"Both are wrong," the opinion says.

"The corporation's operation of the hospital and other leased facilities is a service it performs on behalf of the agency, and so records related to that operation are public records. But whether the acquisition-related records sought here are also public records depends on how closely related the acquisition was to the operation of the leased facilities, a factual question for the trial court to determine on remand."

"Northside argues that nothing it does is for or on behalf of the Authority. At the very least, however, Northside's operation of the leased facilities is done on behalf of the Authority. How closely the transactions at issue are tied to operating the leased facilities will determine whether documents are 'public records.'"

Meanwhile, due to Smith's position that everything Northside does is for or on behalf of the Authority, "he has not endeavored to connect the particular records he seeks to the operation of the leased facilities," the opinion says. "This is not an issue the parties have briefed in any meaningful way. We remand for the trial court to consider in the first instance whether the records in question are sufficiently connected to the operation of the leased facilities to constitute public records" under the Open Records Act.

Attorneys for Appellant (Smith): Peter Canfield, Lucas Andrews, Andrew Pinson
Attorneys for Appellees (Northside): J. Randolph Evans, Thurbert Baker, Bryan Bates, James Rawls, S. Derek Bauer, Ian Byrnside

JONES V. MEDLIN, WARDEN ET AL. (S17A1291)
GARDINER V. MEDLIN, WARDEN ET AL. (S17A1292)
LUCCI V. MEDLIN, WARDEN ET AL. (S17A1293)

Three U.S. servicemen, who have been in prison the last 25 years after being convicted of a racially-motivated murder in **Chatham County**, are entitled to a new trial under an opinion today by the Georgia Supreme Court.

With today's unanimous opinion, written by **Chief Justice P. Harris Hines**, the high court has reversed a lower court's decision and ruled that State prosecutors improperly withheld evidence that would have been helpful to the men's defense.

BACKGROUND: On Jan. 31, 1992, Stanley Jackson, an African-American, was shot and killed at about 10:00 p.m. while standing on a street corner in a crime-ridden neighborhood in Savannah. He was shot with a semi-automatic assault type weapon. Less than an hour later, Mark Jason Jones, Kenneth Eric Gardiner and Dominic Brian Lucci, who were Army servicemen stationed at Fort Stewart, GA, were arrested for his murder. All three men are white. Following trial, in November 1992, all three were convicted of malice murder and possession of a firearm during the commission of a crime and sentenced to life in prison plus five years. In June 1994, the Supreme Court of Georgia upheld their convictions.

According to the facts of the case, earlier on the day of the shooting, Jones approached a fellow serviceperson on base and asked to borrow some military equipment. She declined. According to her testimony, they went on to discuss Jones' plans for the weekend. He told her that he was going to Savannah that night because "he had somebody that he was going to shoot." When asked who, he replied, "I got a black guy up there I got to get." Shortly after 10:00 p.m. that night, an eyewitness to the shooting, James White, said he heard rapidly repeating gunfire and observed a black 1992 Chevrolet Cavalier automobile come to a screeching halt at the intersection of East Broad and 33rd Street in Savannah. He observed two Caucasian men, later identified by him at trial as defendants Gardiner and Jones, leaning out of the front and rear passenger windows firing guns. The car then sped away. A third person was driving. Jackson's body was found lying in the intersection. He died as a result of multiple gunshot wounds inflicted by a high-powered weapon such as an AK-47.

In May 2012, Jones, Gardiner and Lucci filed petitions for a "writ of habeas corpus" following the release of police records in response to a 2010 open records request. (Habeas corpus is a civil proceeding that allows already convicted prisoners to challenge their conviction on constitutional grounds in the county where they're incarcerated. They generally file the action against the prison warden, who in this case was Jason Medlin.) In their petition, the defendants' attorneys argued that the State had failed to disclose evidence that would have been helpful to their case, namely that: 1) prior to trial, White told police officers he could not identify the shooters, which contradicted his positive identification at trial of Jones and Gardiner as the shooters; 2) that White had been coerced into testifying at trial that he could in fact identify the men; and 3) that there was a critical police report documenting a similar racially-motivated incident, which occurred the same night as Jackson's murder but after the three men were

already in custody. According to that report, about three hours after the servicemen were arrested, white men with military style haircuts and carrying semi-automatic weapons drove through the Yamacraw Village public housing project, threatening "to shoot blacks who hung out on street corners." A citizen reported the incident to a police officer who wrote a report (the "Yamacraw Report") that made its way into the Stanley Jackson police case file. But the report was never disclosed to the defendants' defense counsel and only came to light after a 2010 Open Records Act request.

The "habeas court" denied the three men's petitions on procedural grounds, but the Georgia Supreme Court reversed the ruling and sent the case back to the habeas court, stating that the petitioners "have raised an issue of arguable merit concerning the proper analysis of their claims of violations under *Brady v. Maryland*." Under the U.S. Supreme Court's 1963 *Brady* decision, the suppression by the prosecution of "exculpatory" evidence – or evidence favorable to the defendant – violates due process "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." In March 2016, the habeas court analyzed the prisoners' claims under *Brady* and again ruled against them, denying them relief, i.e. refusing to reverse their convictions. Jones, Gardiner and Lucci again appealed to the state Supreme Court, which granted their application to appeal.

In today's opinion, the high court concludes that "the Yamacraw Report clearly would have been helpful to the defense; it was evidence that others similar in appearance were threatening a racial attack similar to that alleged to have been suffered by Jackson, but three hours after his slaying, when the defendants were already in custody." The defendants' trial attorneys testified that had they been provided the report, they would have sought other residents of the area who might have witnessed those making the threats. They also would have argued to the jury that the fact the defendants were in custody at the time meant they could not have been the ones who committed the acts reported and therefore, there were other potential assailants the police had not sought. "Thus, the report would have also enabled the defense attorneys to further their attack on the thoroughness of the police investigation, and allowed them to present an alternative theory regarding the actors responsible for the shooting."

"Jackson was killed shortly after 10:00 p.m. on January 31, 1992," the opinion says. "There was trial testimony from several witnesses that, until 9:15 or 9:30 p.m., the petitioners were at the rehearsal of Jones's wedding, which was to take place the next day, and a dinner afterward, which took place in a town that was over a 50-minute drive away from the relevant areas of Savannah. No murder weapon was ever recovered; no firearm was found in the defendants' car, no casings from an automatic weapon were found there, and the forensic scientist who vacuumed the interior of the car looking for gunshot residue found none."

"There were also significant racial overtones to the trial," and "had the jury been presented with information that other persons, not the defendants, were in the area that same night, apparently ready to engage in racially motivated violence, the outcome of the trial might well have been different," the opinion concludes. "Thus, in light of the totality of the circumstances, confidence in the outcome of the trial was undermined by the State's failure to provide the Yamacraw Report to the defense. Certainly, in the face of the Yamacraw Report, the jury '*could* have voted to convict [the defendants], [but] we have no confidence that it *would* have done so.' Accordingly, the habeas court's denial of the petitions for writs of habeas corpus must be reversed."

Attorneys for Appellants (Jones, et al.): Steven Sparger, Peter Camiel
Attorneys for Appellees (State): Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Crowder, Asst. A.G.

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

* Jelani Asim Anthony (Cobb Co.) — **ANTHONY V. THE STATE (S17A0989)**
* Davoris D. Hodges (Laurens Co.) — **HODGES V. THE STATE (S17A0714)**
(Although the Supreme Court has upheld Hodges' life-without-parole sentence for shooting to death a **Johnson County** deputy sheriff, it has thrown out the additional 20-year sentence he received for aggravated assault with a deadly weapon. That conviction should have merged into his armed robbery conviction for sentencing purposes.)

The Supreme Court of Georgia has **reversed** the murder convictions of:

* Eric Thompson (Fulton Co.) — **THOMPSON V. THE STATE S17A0935)**
(The Supreme Court has reversed Thompson's murder convictions in connection with the deaths of Andre Geddis and Melody Keller, finding that certain character evidence against Thompson was improperly admitted at trial. Nevertheless, "Although we reverse Thompson's criminal convictions based on the incorrect admission of evidence, we again note that there was sufficient evidence to sustain the jury's guilty verdicts," the opinion says. "Double jeopardy therefore would not bar a retrial in this instance.")