



## Supreme Court of Georgia

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## CASES DUE FOR ORAL ARGUMENT

### Summaries of Facts and Issues

**Please note:** *These summaries are prepared by the Office of Public Information to help news reporters determine if they want to cover the arguments and to inform the public of upcoming cases. The summaries are not part of the case record and are not considered by the Court at any point during its deliberations. For additional information, we encourage you to review the case file available in the Supreme Court Clerk's Office (404-656-3470), or to contact the attorneys involved in the case. Most cases are decided within six months of oral argument.*

**Monday, February 5, 2018**

**10:00 A.M. Session**

**CAMPAIGN FOR ACCOUNTABILITY V. CONSUMER CREDIT RESEARCH FUND**  
**(S17G1676)**

**BOARD OF REGENTS V. CONSUMER CREDIT RESEARCH FOUNDATION**  
**(S17G1677)**

The Board of Regents of the University System of Georgia is appealing a Georgia Court of Appeals decision prohibiting the Board from providing information to a private organization that the Board was willing to release.

**FACTS:** In November 2013, the Consumer Credit Research Foundation, a non-profit group, entered into a consulting agreement with the Kennesaw State University Research and Service Foundation. Under the agreement, a Kennesaw State University professor conducted statistical research and analysis relating to “payday” loans, which the professor incorporated into a paper that was published in 2014. Payday loans are short-term, high-interest loans that critics have argued are harmful to low-income borrowers. In June 2015, another non-profit group, the Campaign for Accountability, which calls itself a watchdog group, filed an open records request with Kennesaw State University seeking copies of certain correspondence, including emails and other communications, between the professor and the Consumer Credit Research Foundation about the payday loan study. The university told the Campaign for Accountability that it did not

oppose the release of the research correspondence in redacted form and notified the Foundation that it planned to release the correspondence in response to the open records request. However, the Foundation objected to the release of the correspondence. Because Kennesaw State University is part of the state's University System, the Foundation subsequently sued the Board of Regents in **Fulton County** Superior Court, seeking "declaratory and injunctive relief" to prevent the release of the correspondence under the Georgia Open Records Act (Georgia Code § 50-18-70). The trial court granted a motion by the Campaign for Accountability to intervene in the lawsuit as a party.

The Foundation emphasized in its lawsuit that the Open Records Act contains a list of specific exceptions to public disclosure in § 50-18-72 (a). It argued that the research correspondence was specifically exempt under two of those exceptions (§ 50-18-72 (a) (35) and (36)). The Foundation further argued that because the research exceptions to disclosure applied, Kennesaw State University was prohibited from releasing the research correspondence to the Campaign for Accountability. The University responded that the Foundation had failed to prove that the research correspondence fell within either of the two research exceptions in the Open Records Act. Even if they did fall within the exceptions, those exceptions simply permitted, but did not require, the University to withhold the correspondence from disclosure. Consequently, the University had the discretion to release the correspondence to the Campaign for Accountability. The trial court ruled in favor of the University System, finding that the two research exceptions in the Open Records Act authorized a state agency to withhold research materials covered by the exceptions from public disclosure but that the Act did not mandate nondisclosure. The trial court ruled that Kennesaw State University had the discretion to release the correspondence, even assuming it fell within one of the exceptions, although ultimately the trial court did not decide whether it fell within the exceptions. The Foundation appealed to the Court of Appeals, which threw out the lower court's ruling and sent the case back to Fulton County court. The intermediate appellate court agreed with the Foundation that the trial court's ruling was inconsistent with the state Supreme Court's 1995 decision in *Bowers v. Shelton*. The Court of Appeals held that in *Bowers*, this Court addressed whether a private party can bring suit to prevent the disclosure of public records under the Open Records Act. In addressing the question, the state's highest court found that the federal Freedom of Information Act differs from the Georgia Open Records Act because while the federal act does not impose an affirmative duty on an agency to withhold certain information that is sought, the state's Act *mandates* nondisclosure if the records fall within a statutory exception. Because the trial court erroneously concluded that the University had the discretion to disclose the information, it never addressed whether it fell within the exceptions. Therefore, the appellate court has sent the case back to the trial court. Both the Campaign for Accountability and the Board of Regents now appeal to the state Supreme Court.

**ARGUMENTS:**

**(S17G1676):** Attorneys for the Campaign for Accountability argue that the fact that an agency *may* withhold records listed as exceptions under the Georgia Open Records Act does not mean that the exceptions *prohibit* or *forbid* their disclosure. "Reversing the trial court, the Court of Appeals ruled, for the first time, that all 50 exceptions to mandatory disclosure contained in the Open Records Act actually *require* nondisclosure," the attorneys argue in briefs. "That radical holding is contrary to the language and purpose of the Open Records Act and would

abruptly halt the long-standing practice among state agencies of exercising discretion to release public records that the Open Records Act allows (but, until the Court of Appeals' decision, has never required) to be withheld." The effect of the exceptions is to vest in state agencies the discretion to release or withhold the excepted records, as long as their disclosure is not prohibited by 1) court order or other law, 2) a recognized personal privacy interest, or 3) an explicit prohibition within the Open Records Act itself. If the General Assembly had meant for disclosure of all exempted records to be prohibited, it would have said so, especially given that when the General Assembly does intend to prohibit the disclosure of information to the public, it makes that intent clear.

**(S17G1677):** The state Attorney General's office makes similar arguments for the Board of Regents, arguing that the Georgia Open Records Act requires disclosure of "public records" unless specifically exempted from disclosure by law or court order. The Act itself grants a list of exceptions by stating that public disclosure "shall not be required for" certain categories of records. "This plain language relieves governmental entities of the obligation to disclose public records that fall within those categories, and nothing more; it cannot reasonably be construed to also *forbid* disclosure of all excepted records," the attorneys argue in briefs. The Court of Appeals has misinterpreted this Court's decision in *Bowers*, which "stands only for the limited proposition that a party may seek an injunction to prevent disclosure of certain records that the Act or other law affirmatively prohibits the government from disclosing." If, however, *Bowers* may be read to forbid the disclosure of all excepted records, "it should be overruled," the State's attorneys argue. This Court has never held that all the exceptions in the current version of § 50-18-72 (a) prohibit records from being released as the Court of Appeals concluded in its opinion. The appellate court ruling is contrary to the intent and purpose of the Act, and the result is that other courts may permit private parties to intervene and prevent the release of public records, thus allowing the interest of those private parties to prevail over the public's interest in the records.

Attorneys for the Consumer Credit Research Foundation filed identical responses to the Board of Regents and Campaign for Accountability. They argue that the Foundation contracted with Kennesaw State University for research on payday loans in reliance not only on written promises of confidentiality but also on the assurances provided by § 50-18-72 (a) (35) and (36) that the parties' academic-research communications, notes, and drafts would remain private. The Georgia Court of Appeals unanimously and correctly applied Georgia Supreme Court precedent extending back four decades. The plain language of the Act does mandate that certain records are exempt from disclosure as the Act states that certain records "are specifically exempted from disclosure." The Court of Appeals held – consistently with decades of case law – that the government does not have discretion to release exempt documents under the provisions of the Open Records Act. "This is especially crucial in this case because it is undisputed that Kennesaw State University entered into a confidentiality agreement" with the Foundation, the attorneys argue in briefs. The Board of Regents now argues, "apparently for the first time since the enactment of the Open Records Act in 1960, that its *discretion*" overrides a confidentiality agreement the University entered into with the Foundation. "The danger of Appellants' [i.e. Board of Regents' and Campaign's] position cannot be overstated," the attorneys argue. "Appellants' position necessarily is that confidentiality agreements are never enforceable against the State." Under established case law, contractors have operated knowing that documents

exempt from disclosure under the Open Records Act may be protected from disclosure pursuant to confidentiality provisions. That is why contractors “have always entered into agreements with government representatives to keep highly sensitive information confidential,” the attorneys argue. The Court of Appeals was correct. “These documents are exempt from disclosure under the Open Records Act,” and the Board of Regents does not have discretion to release them. Even outside the Open Records Act, they may not release the documents because they are protected by a confidentiality agreement.

**Attorneys for Appellant (Campaign):** Henry Chalmers, Megan Mitchell

**Attorneys for Appellant (Board of Regents):** Christopher Carr, Attorney General, Annette Cowart, Dep. A.G., Russell Willard, Sr. Asst. A.G., Jennifer Colangelo, Asst. A.G.

**Attorneys for Appellee (Foundation):** Thurbert Baker, Nathan Garroway, Mark Silver

### **WINFREY V. THE STATE (S17G1270)**

A man sentenced to 10 years in prison after pleading guilty to violating the Street Gang Terrorism and Prevention Act is appealing his conviction and sentence, arguing that the judge improperly participated in his plea negotiations to such an extent that his plea was “involuntary.”

**FACTS:** According to State prosecutors, the background to this case involves rappers Wayne “Lil Wayne” Carter and Bryan “Birdman” Williams, who were rival members of the Bloods gang. For some time, the two rappers and their followers had been hurling insults and threats at each other. **Jimmy Carlton Winfrey** was affiliated with Williams, and in April 2015 Winfrey pursued Carter and his group who were traveling in tour buses headed north on I-75 from Atlanta. Before they had left, Winfrey had threatened Carter, and Atlanta police officers had intervened, escorting the buses as they drove from the city. When the officers peeled off from the tour buses, according to the State, Winfrey’s white Camaro sped up and shots were fired from the Camaro at the two buses, in which Carter and 11 others were riding. Fifteen bullets hit; no one was injured.

In July 2015, a **Cobb County** grand jury indicted Winfrey on 27 counts, including aggravated assault, racketeering (RICO) charges, and other crime. If found guilty on all counts, the State said Winfrey could have faced 460 years in prison. At a pre-trial motions hearing, the prosecutor advised the judge that the State had made two plea offers, both of which Winfrey had rejected, with no additional offers anticipated. Winfrey’s defense attorney explained that Winfrey was hesitant to plead guilty because of the effect the Gang Act convictions would have on his ability to win parole. The judge then spoke directly to Winfrey, telling him, “This opportunity is going away. Go to trial and you get convicted, there’s not going to be any of me being concerned about when you parole out...And if you want to look around and see what happens to people in gangs in Cobb County, Georgia, you can look at what happened last week to the guy who went to trial and got convicted” and was sentenced to 100 years to serve 50 in prison. Subsequently, as part of a negotiated plea bargain, Winfrey pleaded guilty to six counts of violating the Street Gang and Prevention Act, while the State agreed to “nolle prosequere” – or not prosecute – the remaining charges. Winfrey received a 20-year sentence to serve 10 in prison.

Winfrey then appealed to the Georgia Court of Appeals, arguing that the trial judge had improperly participated in plea negotiations, rendering his plea involuntary. The Court of Appeals upheld Winfrey’s plea and sentence. In its unanimous opinion, the intermediate appellate court conceded that this was “a close case.” However, although the trial judge had

“strongly suggested” Winfrey would face a harsher sentence if he went to trial and was convicted, she “never explicitly told Winfrey that he would be facing a longer sentence if he rejected the State’s offer and went to trial.” Winfrey now appeals to the Georgia Supreme Court, which has agreed to review the case to determine whether the Court of Appeals erred in ruling that the judge did not improperly participate in the plea negotiations and render the plea involuntary.

**ARGUMENTS:** Attorneys for Winfrey argue the Court of Appeals opinion should be reversed, the case should be remanded to that court with directions that his guilty plea be set aside, and the Cobb County indictment should be reassigned to a different trial judge. Georgia Superior Court Rule 33.5 (A) states: “The trial judge should not participate in plea discussions.” Here, Winfrey’s “twice-counseled decision for trial was thwarted when the trial judge engaged Winfrey directly, expressed distaste for the charges, and highlighted an extreme sentence imposed in a recent Gang Act case to dissuade Winfrey from his not guilty plea,” the attorneys argue in briefs. In its 2017 decision in *State v. Hayes*, this Supreme Court ruled that, “Judicial participation is prohibited as a constitutional matter when it is so great as to render a plea involuntary.” In this case, “the trial judge violated Uniform Superior Court Rule 33.5 (A) when it participated in Winfrey’s plea negotiations to an extent that rendered his guilty plea involuntary.” The rule “prohibits the judge’s clear intimations to Winfrey of a longer post-trial sentence, just as it prohibits explicit comments.”

The State, represented by the District Attorney’s office, argues that “Georgia Supreme Court, Court of Appeals, and federal precedent, including recent decisions by this Court, show that the statements made by the plea court to Winfrey were permissible and did not affect the voluntariness of Winfrey’s plea.” The situation this Court recently examined in *Hayes*, “is extraordinarily similar to this matter,” the State argues. “There, this Court pointed out that telling a defendant that he *could be* sentenced to up to 20 years is not the same as telling a defendant that he *would be* sentenced to 20 years. Under *Hayes*, a court’s actions are impermissible if it states that it ‘will’ or ‘is going to’ impose a particular sentence. In both *Hayes* and this matter, no such predictive language was used.” Therefore, the trial judge did not impermissibly participate in plea discussions. “A contrary finding would act to overturn *Hayes*, which was just decided a few months ago and does not warrant reversal.” And as this Court has stated numerous times, “American courts adhere to the principle of *stare decisis*, which directs the courts to stand by their prior decisions.” Further, “Winfrey’s argument is improperly before this Court, as Winfrey failed to file a timely motion for withdrawal as required by Uniform Superior Court Rule 33.12,” attorneys for the State argue. “Finally, Winfrey’s failure to object to the plea court’s statements at the time of the hearing is fatal to his appeal,” the State contends. “For these reasons, the Court of Appeals’ unanimous, thorough, and well-considered opinion on this matter should be affirmed.”

**Attorneys for Appellant (Winfrey):** Steven Sadow, Matthew Winchester

**Attorneys for Appellee (State):** D. Victor Reynolds, District Attorney, Michael Carlson, Dep. Chief Asst. D.A., Gregg Jacobson, Spec. Asst. D.A., John Melvin, Chief Asst. D.A., John Edwards, Sr. Asst. D.A.

## **HOECHSTETTER ET AL. V. PICKENS COUNTY (S17G1500)**

A group of **Pickens County** neighbors are appealing a Georgia Court of Appeals decision, arguing they did not receive proper notice of a hearing in which government officials made a final zoning decision they opposed.

**FACTS:** The facts of this case are undisputed. In August 2015, Doug and Linda Tatum, who own about 75 acres of property in Pickens County, submitted a zoning request that sought approval of a conditional use permit so they could use their property for special events. Around Oct. 15, 2015, the Pickens County Planning Commission held a public hearing on the permit application. The parties agree that the County gave notice of that hearing in compliance with the state's Zoning Procedure Law (Georgia Code § 36-66-4). That law states that a "local government taking action resulting in a zoning decision shall provide for a hearing on the proposed action. At least 15 but not more than 45 days prior to the date of the hearing, the local government shall cause to be published...a notice of the hearing." Following the hearing, the planning commission recommended that the Pickens County Board of Commissioners grant the permit with conditions. Three months later, at its Jan. 21, 2016 meeting, the Board of Commissioners granted the Tatum's permit application. The only notice given for that meeting was a publication in the county's legal paper that appeared the same day as the meeting.

**Kurtis Hoehstetter** and 10 other neighbors who opposed the Tatums' request for a permit to allow special events to be held on their property appealed to the superior court. They argued the permit was invalid because the notice requirements under the law were not met. Although proper notice was given prior to the planning commission's meeting, no additional notice was given prior to the Board's meeting when the decision was actually made, they contended. They asked the trial court for "summary judgment" in their favor. A trial judge grants summary judgment after deciding that a trial is unwarranted because the facts are undisputed and the law clearly favors one side or the other. The trial court denied summary judgment, and the neighbors then appealed to the Court of Appeals. But the intermediate appeals court also ruled against them, finding that the Georgia Supreme Court – the highest court in the state – has interpreted the phrase, "taking action resulting in a decision" in § 36-66-4 to mean the "entire process of changing or adopting a zoning ordinance." "Under this interpretation, a hearing is required at only one point during the process, but not at every stage," the Court of Appeals ruled. Hoehstetter and the other neighbors now appeal to the state Supreme Court, which has agreed to review the matter to determine whether the Court of Appeals properly concluded that the law only required notice of one hearing and not an additional notice before the voting body.

**ARGUMENTS:** The neighbors argue the Court of Appeals erred in finding that the advertisement before the Pickens County Planning Commission met the notice requirement of the Zoning Procedure Law and that the subsequent hearing by the Pickens County Board of Commissioners was a continuation of the same matter that did not require another notice of at least 15 days. The planning commission only makes recommendations to the board, but it is the board that votes and makes the final decision. The County did not comply with the law's notice requirements, their attorney argues, and the zoning decision is therefore invalid. Taken to its logical conclusion, the neighbors argue, the Court of Appeals' opinion denies the public's due process rights to participate in the zoning process before elected officials.

The County responds that precedent-setting legal decisions establish that a local government is required to hold only one hearing during the process leading to a zoning decision;

that notice must be given for that hearing; and that the Zoning Procedure Law does not require further notice for a later meeting of the governing body at which a formal vote is taken. The Court of Appeals decision should be affirmed, the County's attorney argues.

**Attorney for Appellants (Hoechstetter):** John Capo

**Attorney for Appellees (County):** Phillip Friduss

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

### **GIBBS V. THE STATE (S17G1343)**

A man is appealing a Georgia Court of Appeals decision upholding his conviction in **Cobb County** for the aggravated assault of a police officer.

**FACTS:** According to the facts at trial, the evening of Feb. 12, 2013, Smyrna police officer Daniel Stuckey was on patrol when he drove to Jonquil Park after receiving information that two suspects, whom he had previously arrested on drug charges, again were possibly dealing drugs there. Upon entering the park in his patrol vehicle, Stuckey saw that the only vehicle in the parking lot was a small gray Hyundai occupied by several individuals. Stuckey parked a few feet away and got out of his car to talk to them. As he approached the Hyundai, the driver, **Kevin S. Gibbs**, stepped on the accelerator and briefly lunched forward, striking Stuckey's legs. Stuckey drew his weapon and ordered Gibbs to stop and get out of the car. Instead, Gibbs inched the vehicle toward Stuckey who again yelled at him to stop. Gibbs again stepped on the accelerator, and as the Hyundai barreled toward him, Stuckey dove out of the way while firing toward the driver's window. The gunshot shattered the glass and struck Gibbs in his upper chest. Nevertheless, Gibbs sped out of the park. Stuckey radioed dispatch, activated his car's emergency lights and went in pursuit. Stuckey spotted Gibbs's vehicle ahead and saw Gibbs pull over to allow his three passengers to jump out before turning onto a divided four-lane road heavy with rush-hour traffic and wet from rain. Eventually Stuckey caught up and performed a "PIT" maneuver, bumping Gibbs's vehicle and causing it to hit the raised median and come to a halt. Other officers arrived on the scene, and soon after, an ambulance transported Gibbs to a local hospital where he was treated for his gunshot wound and placed under arrest.

Gibbs was subsequently indicted for aggravated assault on a peace officer, obstruction of a police officer, fleeing from a police officer, and reckless driving. At his trial, a hospital nurse testified that when Gibbs was admitted, he told her he had smoked marijuana that day. Gibbs's trial attorney objected on the basis that the nurse had failed to give Gibbs his *Miranda* warnings, but the trial judge overruled him. Following the trial, the jury convicted Gibbs on all counts. Gibbs appealed to the Court of Appeals, and his attorney again argued that the nurse's marijuana testimony was inadmissible, although not due to *Miranda* rights but rather based on Georgia Code § 24-4-404 (b), which prohibits evidence to show a defendant's character. The attorney also argued in his appeal that the testimony involved protected medical records. However, the intermediate appellate court upheld the trial court's ruling. Gibbs now appeals to the Georgia Supreme Court, which has agreed to review the case to answer two questions: 1) Did the Court of Appeals err in determining that the nurse's testimony regarding Gibbs's marijuana use was admissible as "intrinsic evidence;" and 2) Did the Court of Appeals err in determining that Gibbs waived his right to argue at his appeal that his attorney provided ineffective legal service for

failing to object to the nurse's marijuana testimony because at his hearing on his motion requesting a new trial, his appeal attorney failed to question the trial attorney about this matter. (The state Supreme Court has ruled that evidence is "intrinsic" if it: 1) is an uncharged offense which arose out of the same transactions as the charged offense; 2) is necessary to complete the story of the crime; or 3) is inextricably intertwined with the evidence regarding the charged offense.)

**ARGUMENTS:** Gibbs's attorney argues that the trial court and Court of Appeals erred in ruling that the nurse's testimony about his marijuana use was admissible as evidence intrinsic to the act of aggravated assault. Here, there is no showing that some earlier marijuana use at an unknown time of the day of the shooting had any logical connection to the crime. There is no evidence that marijuana was associated with the conduct or transaction in this incident, that it was inextricably intertwined with the evidence regarding the offense, or that it was needed to complete the story of the encounter. The State impermissibly brought Gibbs's character into play which is expressly forbidden by Georgia Code § 24-4-404 (b), the attorney argues. Evidence of a prior "bad act" that implicates the character of the accused is excluded unless the State makes a sufficient showing of admissibility. Also, the Court of Appeals decision did not say that Gibbs's appeal attorney had waived the right to argue that his trial attorney was ineffective for failing to object to the nurse's testimony by failing to question the trial attorney at his hearing on his motion requesting a new trial. Gibbs's attorney expressly questioned the trial attorney both about his misplaced *Miranda* objection and his failure to object under § 24-4-404. The trial attorney was repeatedly questioned regarding the nurse's statement, his erroneous objection based on *Miranda*, and his failure to raise other objections, specifically an objection of improper evidence based on § 24-4-404. The evidence improperly smeared Gibbs's character and gave the jury an inappropriate reference to improper and irrelevant evidence that the accused was a bad person. It compromised Gibbs's right to a fair trial.

The District Attorney, representing the State, argues the nurse's testimony about Gibbs's use of marijuana on the day of the crime was admissible as "intrinsic evidence." As part of the admissions process, the nurse asked Gibbs about marijuana use and he told her he'd used the drug that day. The circumstances surrounding Gibbs's presence at the park were suspicious, since two weeks earlier the officer had encountered suspected drug dealers there. Intrinsic evidence generally does not improperly put a defendant's character at issue. Here, Gibbs's marijuana use was intrinsic to the charged criminal activity. It was linked in time and circumstances to his criminal acts, was intertwined in the events, and was necessary to complete the story that culminated in Gibbs's assault on the officer, his fleeing to elude police, and his reckless driving. Marijuana use provides an explanation for why Gibbs was keen to avoid a police encounter, the State argues. The Court of Appeals also did not err in determining that Gibbs had waived his right to argue that his trial attorney was ineffective for failing to object to the nurse's testimony because his appeal attorney failed to question the trial attorney about that issue at the motion for new trial hearing, the State contends. The Court of Appeals properly ruled that the appeal attorney "did not question trial counsel about medical records privacy rights or any other grounds for objecting to the nurse's testimony."

**Attorney for Appellant (Gibbs):** Forrest Shealy

**Attorneys for Appellee (State):** D. Victor Reynolds, District Attorney, Michael Carlson, Dep. Chief Asst. D.A., Amelia Pray, Sr. Asst. D.A.

## **NORMAN V. THE STATE (S18A0331)**

A man is appealing his murder conviction and life prison sentence for the shooting death of a man during a drug deal.

**FACTS:** Karon Norman was about 18 years old when, according to State prosecutors, he shot and killed Keith Williams on Oct. 14, 1997 because he believed Williams was charging him too much for crack cocaine. The killing occurred in the Lakeside Mobile Home Park in Hinesville, GA. A year later, a **Liberty County** grand jury indicted Norman, along with three others, for a number of crimes involving Williams' death. Norman's three co-defendants testified against him, and in June 1999, a jury convicted Norman of felony murder, armed robbery, and possession of a firearm during the commission of a crime. The State eventually "nolle prossed" – or opted not to prosecute – the charges against Norman's co-defendants. Within six months of his trial, in January 2000, Norman filed a motion requesting a new trial. More than 17 years later, in August 2017, the trial court held a hearing and denied Norman's motion. Norman now appeals to the Georgia Supreme Court.

**ARGUMENTS:** Norman's attorney argues that this Court should reverse the trial court's denial of Norman's motion for a new trial. Norman's appeals attorney makes three arguments, and to the extent they were not raised at trial, Norman received "ineffective assistance of counsel" from his trial attorney, in violation of his constitutional rights. His attorney first argues that the trial court erred when it denied Norman's due process claim based upon the 17-year delay between the filing of his motion for new trial and the order denying it. During those 17 years, the record shows, Norman wrote the trial court about the lack of activity in his case and asked for the court's help. He filed pro se motions so he could represent himself, and he wrote and asked that an attorney be appointed. "For 17 years, this case has languished," the attorney argues in briefs. Finally, a public defender was appointed in 2015 to represent him. "The Georgia appellate courts have been critical of 'extraordinary post-conviction, pre-appeal delay,' which 'puts at risk the rights of defendants and crime victims and the validity of convictions obtained after a full trial.'" Under the U.S. Supreme Court's 1972 decision in *Barker v. Wingo*, a delay of nine years between conviction and appeal implicates a defendant's due process rights and triggers a due process inquiry. Under *Barker*, a four-part analysis must consider four factors in determining whether a person's constitutional right to a speedy trial has been violated: 1) the length of the delay; 2) the reason for the delay; 3) the defendant's assertion of his right; and 4) the prejudice – or damage – to the defendant's case. The 17-year delay was not caused by Norman's inaction, the attorney argues, and under the facts of this case, all four factors weigh in Norman's favor. The trial court denied his due process claim, stating Norman had failed to demonstrate prejudice. But "Norman has made that showing," the attorney argues. The trial court also erred by improperly allowing in "other acts" evidence – namely that Norman was convicted of murder as a juvenile. The State improperly argued to jurors that they should not believe "Karon Norman, the same one that caused the death of somebody back in '93." "This is classic, 'he did it before, he did it again,' evidence," the attorney argues. "This was inadmissible." The trial court erred in determining that Norman had failed to overcome the presumption that his trial attorney had made a proper strategic decision in agreeing to admission of the 1993 juvenile adjudication. The trial court also erred in giving a "limiting instruction" about how they should consider this "other acts" evidence – what used to be called "similar transaction evidence." The

“flawed jury instruction,” to which Norman’s trial attorney also did not object, “imposed no limits,” the attorney argues.

The State, represented by the District Attorney’s and Attorney General’s offices, argues that Norman failed to show he was denied due process by the post-conviction delay under *Barker*. The trial court only addressed the fourth factor and concluded Norman had not demonstrated prejudice from the delay. “Appellee [i.e. the State] submits that conclusion was proper,” the attorneys argue in briefs. “Regardless of whether the first three factors of the test would weigh against the State and in favor of Appellant [i.e. Norman], Appellee submits that Appellant has failed to demonstrate prejudice.” In response to Norman’s argument that his trial attorney rendered ineffective assistance of counsel in going along with the admission of his prior juvenile murder case, the State argues that Norman failed to carry his burden under the U.S. Supreme Court’s 1984 decision in *Strickland v. Washington*, and his argument is without merit. Furthermore, any alleged error in submitting the evidence is harmless and does not require a new trial. Norman has failed to demonstrate how the judge’s limiting instruction demonstrated prejudice to his case. Even if the instruction was erroneous, and the State is not conceding it was, “based on the strong evidence against him at trial, Appellant has failed to demonstrate harm from any purported error in the instruction,” the State argues.

**Attorney for Appellant (Norman):** Amy Lee Copeland

**Attorneys for Appellee (State):** Tom Durden, District Attorney, Brooklyn Franklin, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Ashleigh Headrick, Asst. A.G.

#### **MEADOWS V. THE STATE (S18A0314)**

A man whose first trial ended in a mistrial is appealing the judge’s denial of his motion asking the court to prohibit a retrial on the ground that it would violate his constitutional right against double jeopardy.

**FACTS:** A **Bibb County** grand jury indicted **Jedarius Meadows** and two co-defendants with murder, armed robbery and aggravated assault. Meadows and one of the co-defendants were also indicted for Violation of the Street Gang Terrorism and Prevention Act. Meadows’ trial began Sept. 8, 2015 when a jury was sworn and empaneled. The jury heard testimony from a number of witnesses Sept. 9 through 11, and the lawyers wrapped up with closing arguments the morning of Sept. 12. At about 1:30 that afternoon, the judge instructed the jury, and jurors then retired to the jury room to deliberate. Shortly after, jurors were given lunch. After lunch, one of the jurors asked to be replaced with an alternate because, she said, she was “not in her right mind.” Following a brief hearing, the judge replaced the juror with the first alternate. Then the jury sent out a note asking for equipment to view some video evidence, which took up to a half hour to secure. At some point, the jury was allowed to take a break. At about 3:30, after consulting with the prosecution and defense counsel, the judge brought in the jury to ask if they were making progress. The parties don’t agree what then took place. According to Meadows’ attorney, the foreperson replied “yes,” and one “unidentified person” said “no.” According to the State, the foreperson said, “We’ve got some individuals that are very strongly – they are not moving,” and the judge later said that several jurors had indicated “no” when asked if they were making progress. The judge sent the jury back to the jury room and informed both the defense and the prosecution he would give the jury another 15-to-20 minutes, then would

“either give them an *Allen* charge or declare this jury hung.” (An “*Allen* charge” is an instruction a judge gives to dislodge jurors from entrenched positions and prevent a hung jury by encouraging jurors in the minority to reconsider.) The prosecutor said he did not believe an *Allen* charge would help, as he believed the jury was not going to reach a verdict. The defense attorney argued an *Allen* charge was required because progress was possible, given the short time the jury had been deliberating. Soon after, the judge informed the attorneys that the bailiff had told him things had become heated in the jury room and that “at one point he thought he was going to have to go in there.” The judge again summoned jurors to the courtroom and told them that, “based on the previous conversation with you, it doesn’t sound to me like you are really getting very far,” and he dismissed them over the defense attorney’s objection. On Oct. 2, 2015, Meadows’ attorney filed a “Plea in Bar Based on Double Jeopardy,” arguing a retrial would violate Meadows’ constitutional right against double jeopardy. (Double jeopardy prevents an accused person from being tried again on similar charges and the same facts following a valid acquittal or conviction.) In June 2017, the court held a hearing on the motion before denying it. Meadows now appeals to the state Supreme Court.

**ARGUMENTS:** Meadows’ attorneys argue that this Court should reverse the trial court’s denial of Meadows’ motion and bar the State from retrying him. “Under the United States and Georgia constitutions, the defendant had a right to have his case heard and decided by the jury that was originally impaneled and sworn,” the attorneys argue in briefs. “At the time that right was taken from him, no manifest necessity existed to do so. The jury was deliberating and, according to the foreperson, making progress, and any concern that the court may have had for the safety of the jury was not so great as to prompt the court to inquire. The court instead inquired as to a deadlock that was not previously indicated, and virtually ignored the ostensible reason that the jury had been summoned to the courtroom. Further, there is no indication in the record that the court gave any consideration to the multitude of less severe remedies that were at its disposal. It was an abuse of the court’s discretion to deprive the defendant of this very important right, and the initiation of a new trial violates his Fifth Amendment right against being placed twice in jeopardy for the same offense.” The trial court’s declaration of a mistrial was an abuse of discretion because: 1) nothing in the court’s reasoning meets any of the criteria required by Georgia Code § 16-1-8 (e), which lists the circumstances that must exist before a trial is terminated; 2) it was impermissibly based not on the judge’s own inquiry of the jury, but on the statements of a member of law enforcement and probably on an improper conversation with the prosecution while the defense was not present; 3) the judge did not seriously consider less drastic measures; and 4) the judge did not seriously consider Meadows’ right to have his trial completed by the particular tribunal.

The State, represented by the District Attorney’s office, argues that in challenges to the declaration of a mistrial, the Georgia appellate courts have based their decision upon whether there was “a manifest necessity for a mistrial.” The courts have read § 16-1-8 (e) in conjunction with a U.S. Supreme Court ruling that a trial court’s judgment about whether there was manifest necessity to grant a mistrial is entitled to great deference. The Georgia Supreme Court and Court of Appeals “have not limited the appropriate declaration of a mistrial to the limited situations laid out in § 16-1-8 (e) but have consistently held that a trial court may exercise its discretion in declaring a mistrial based on ‘the varying and often unique situations arising during the course of a criminal trial,’” the State argues in briefs. Trial courts also may declare a mistrial over the

defendant's objection, without barring retrial, "“whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity’ for doing so.” The U.S. Supreme Court and the Georgia Supreme Court have repeatedly held that “whether the required degree of necessity for a mistrial has been shown is a matter best judged by the trial court,” the State argues. In this case, the judge expressed concerns about the safety of the jurors based on his observations of one of the jurors who requested to be excused and because of reports to him by court security. “It is clear from the facts presented during the course of the Appellant’s [i.e. Meadows’] trial that the judge acted appropriately and within his discretion,” the State argues. “The fact that arguments could be made for other alternatives besides a mistrial in the case below is irrelevant.” The trial court’s decision should be affirmed by this Court, the State contends.

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