



## 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.*

**Tuesday, May 22, 2018**

### 10:00 A.M. Session

#### **GEORGIA PORTS AUTHORITY V. LAWYER (S17G1951)**

The Georgia Ports Authority is appealing a ruling by the Georgia Court of Appeals that the authority is not entitled to federal immunity from a lawsuit brought by a man injured on a ship who was awarded \$4.5 million in damages.

**FACTS: Bruce Lawyer**, a longshoreman, was injured while working aboard the M/V Ibrahim Dede ship that was docked at the Garden City Terminal in the Port of Savannah, located in **Chatham County**. Lawyer's job that day was to secure cargo containers that were being transferred onto the ship with a crane operated by a **Georgia Ports Authority (GPA)** employee. While the GPA employee was operating the crane, one of the "twist locks" attached to the container became dislodged and fell onto the ship's cargo hold. The twist lock, a metal piece weighing about 16 pounds, hit Lawyer in the head, causing permanent, life-changing injuries.

Lawyer sued the Georgia Ports Authority in state court, asserting claims under both federal maritime law (28 U.S. Code § 1333) and the Georgia Tort Claims Act (Georgia Code § 50-21-20). Prior to trial, the GPA filed a motion to dismiss Lawyer's claim on the ground that because the GPA was an "arm of the state," the Eleventh Amendment to the U.S. Constitution immunized it from suits for violations of federal law. The trial court reserved ruling on the motion until after the trial.

The jury returned a verdict finding that the GPA's negligence was the sole cause of Lawyer's injuries and awarding Lawyer damages of \$4.5 million. (The trial court apparently deferred its ruling on the motion because the Georgia Tort Claims Act caps damages at \$1 million. Therefore, had the jury awarded Lawyer \$1 million or less in damages, the question of federal Eleventh Amendment immunity would have been moot as the GPA would have had to pay the entire judgment. The \$4.5 million award, however, made a decision on federal immunity necessary because such immunity would allow the GPA to avoid paying \$3.5 million of that amount. Without that immunity, however, the GPA would be liable for the entire amount.)

The trial court subsequently ruled in favor of Lawyer and dismissed the GPA's pre-trial motion seeking to dismiss Lawyer's federal law claim, citing the Georgia Supreme Court's 2004 decision in *Hines v. Georgia Ports Authority*. In *Hines*, the state Supreme Court ruled that the GPA "is not an arm of the state," and it did so after considering the three-factor test articulated by the United States Court of Appeals for the Eleventh Circuit for determining whether an entity is an instrumentality of the state and therefore entitled to Eleventh Amendment immunity. Those three factors are: 1) how state law defines the entity; 2) what degree of control the state maintains over the entity; and 3) from where the entity derives its funds. In its decision in *Hines*, however, the Supreme Court did note that the record of evidence in the case was not as substantial as it might have liked, and an analysis of GPA's budget "would be most useful in determining whether it was dependent upon the State."

GPA appealed the Chatham County Superior Court's ruling to the Georgia Court of Appeals. It argued that the evidence showed that under the three-part test adopted in *Hines*, the GPA is indeed an instrumentality of the State of Georgia. The GPA argued that the ruling in *Hines* therefore should be reconsidered. "Regardless of the merits of the GPA's arguments on this issue, however, we are not at liberty to reconsider *Hines*, as 'this Court has no authority to overrule or modify a decision by the Georgia Supreme Court,'" the Court of Appeals ruled. "Accordingly, because we are bound by the Georgia Supreme Court's holding that the GPA is not entitled to immunity under the Eleventh Amendment, we affirm the trial court's denial of the GPA's motion to dismiss Lawyer's maritime claim."

The Georgia Ports Authority now appeals to the Georgia Supreme Court, which has agreed to review the case to determine whether the GPA was entitled to immunity under the Eleventh Amendment of the U.S. Constitution because it is an arm of the State.

**ARGUMENTS:** "The Georgia Ports Authority is a part of the State of Georgia, and sovereign immunity therefore bars maritime claims against it," the GPA, represented by the state Attorney General's office, argues in briefs. "As a threshold matter, the federal 'arm of the state' test governs the question whether an entity is entitled to sovereign immunity in *federal* court, but not necessarily whether the entity is entitled to sovereign immunity against federal claims in *state* court." State law generally controls that question because in state court, the underlying questions about an entity's character turn on state law. In 1996, the Georgia Supreme Court addressed in *Miller v. Georgia Ports Authority* whether the GPA is a part of the State and thus entitled to sovereign immunity in state court. "The Court correctly held that it is; the General Assembly created the Ports Authority as an 'instrumentality of the State' with an exclusively 'public purpose' to carry out an 'essential governmental function,' and the Ports Authority is controlled by and intertwined with the State." Yet eight years later, the state's high court in *Hines* concluded that the GPA is not part of the State entitled to sovereign immunity. "As a

result, the Georgia Ports Authority has a split personality in Georgia courts.” “In any event, the Ports Authority is an arm of the state under the federal test too,” the attorneys argue. “The record shows that, 1) state law structures the Ports Authority as part of the State; 2) the State exercises substantial control over the Ports Authority’s governance and finances; and 3) the State funds the Ports Authority and pays judgments against it.” “This Court should overrule *Hines* because it was based on a fundamental misconception of how sovereign immunity applies in state courts,” the State’s attorneys argue.

Lawyer’s attorneys argue the trial court and Court of Appeals correctly ruled that the GPA is not entitled to immunity under the Eleventh Amendment because it is not an arm of the state. This issue was already decided in the Supreme Court’s 2004 decision in *Hines*. “This decision was informed by federal ‘Eleventh Amendment’ jurisprudence, state law regarding the nature of the Authority, and the record provided by the Authority,” the attorneys argue in briefs. Throughout this litigation, the GPA has consistently argued that *Hines* defines the proper factors for determining whether it is an “arm of the state.” It claims *Hines* applied the correct test but reached the wrong conclusion because it did not have a fully developed record. “Now, after almost five years of litigation, the Authority completely abandons its prior reliance on *Hines*,” the attorneys argue. Instead, it argues that an entity’s immunity from a lawsuit in state courts, as opposed to federal courts, is purely a question of state law. “It argues that the conclusion reached in *Hines* is flawed because the Court applied the wrong legal analysis,” the attorneys argue. “*Hines* remains good law – both because it adopts an appropriate test for evaluation of an entity’s entitlement to Eleventh Amendment immunity and because it correctly concludes that the Authority is not an arm of the state.” Furthermore, “the Authority’s argument must be limited to application of the *Hines* test as it cannot raise new arguments for the first time in this appeal,” the State’s attorneys argue.

**Attorneys for Appellant (GPA):** Christopher Carr, Attorney General, Kathleen Pacious, Dep. A.G., Loretta Pinkston-Pope, Sr. Asst. A.G., Ron Boyter, Sr. Asst. A.G., Jared Campbell, Asst. A.G., Asst. A.G., Victoria Powell, Sarah Warren, Solicitor General, Andrew Pinson, Dep. Sol. Gen.

**Attorneys for Appellee (Lawyer):** Brent Savage, Kathryn Pinckney

### **COATES V. THE STATE (S17G1949)**

A man given four consecutive prison sentences for four separate counts of possession of a firearm by a convicted felon is appealing his sentence, arguing the counts should have been merged into one, and he should have been sentenced only to one count.

**FACTS:** In May 2014, police executed a search warrant on two neighboring addresses in the town of Broxton, **Coffee County**. At one address, **Hubert Coates** operated a makeshift store selling snack items and beverages, and he and his wife lived at the other. Police recovered less than an ounce of marijuana during the search of the makeshift store. They recovered four firearms – a 20-gauge shotgun, a .22 caliber rifle, another shotgun and a revolver – at the couple’s residence. Coates was indicted on one count of possession of marijuana with intent to distribute and four counts of possession of a firearm by a convicted felon. During the first phase of trial, Coates was convicted of the less serious offense of possession of less than an ounce of marijuana. During the second phase, Coates was tried and convicted of all four firearm counts. The trial court sentenced him as follows: one year in prison on the marijuana charge, five years

in prison for each of two of the firearm charges, five years on probation for one of the firearm charges, and a split sentence of three years in prison and two on probation for the fourth firearm charge. Because the court ruled the sentences would be consecutive, Coates was sentenced to a total of 21 years with the first 14 to serve in prison and the balance on probation.

Coates appealed to the Georgia Court of Appeals, arguing that the trial court should have merged the four firearm convictions and for sentencing purposes treated the simultaneous possession of multiple firearms as only one offense. The appellate court disagreed and upheld the trial court's ruling. Coates then appealed to the state Supreme Court, which agreed to review the case to determine what is the "unit of prosecution" for the crime of possession of a firearm by a convicted felon under Georgia Code § 16-11-131 (b).

At issue in this case is the wording of the statute governing the crime of possession of firearms by convicted felons (Georgia Code § 16-11-131), which states in subsection (b) that any person who has been convicted of a felony "and who receives, possesses, or transports *any firearm* commits a felony and, upon conviction thereof, shall be imprisoned for not less than one nor more than five years; provided, however, that if the felony as to which the person is on probation or has been previously convicted is a forcible felony, then upon conviction of receiving, possessing, or transporting a firearm, such person shall be imprisoned for a period of five years."

**ARGUMENTS:** Coates' attorney argues that the question in this case is under what circumstances may a defendant's actions result in multiple violations of the same statute. Under its 2003 ruling in *State v. Marlowe*, the Georgia Supreme Court pointed out that, "The United States Supreme Court has held that this question requires a determination of the 'unit of prosecution,' or the precise act or conduct that is being criminalized under the statute." The allowable unit of prosecution for a state criminal statute is set by the state legislature. But here, Coates argues, Georgia Code § 16-11-131 (b) is ambiguous as to the allowable unit of prosecution because it defines the offense as consisting of a convicted felon's possession of "any firearm," and that phrase can be either singular or plural. In other words, a person possessing a single firearm could be said to be in possession of "any firearm." But the same could be said of someone in possession of multiple firearms. Under the "rule of lenity," Coates argued, a court faced with an ambiguous criminal statute that sets out various punishments should resolve the ambiguity in favor of the more lenient punishment. This is the first case in which this Court has been called upon to determine the proper unit of prosecution under Georgia Code § 16-11-131 (b). But Georgia courts have considered the allowable unit of prosecution under Georgia Code Georgia Code § 16-11-106, which governs the crime of possession of a firearm *during the commission of a crime*. In its 2008 ruling in *Abdullah v. State*, the Georgia Supreme Court ruled that, "where multiple crimes are committed together during the course of one continuous crime spree, a defendant may only be convicted once for possession of a firearm during the commission of a crime as to each individual victim." The Court of Appeals incorrectly ruled that Georgia Code § 16-11-131 (b) was unambiguous as to the unit of prosecution and its ruling is inconsistent with the legislative purpose of the statute, Coates' attorney argues.

The State, represented by the District Attorney's office, argues that there is no ambiguity in the language of Georgia Code § 16-11-131 (b) as to the legislature's intended unit of prosecution. "The General Assembly clearly and unambiguously intended the unit of prosecution to be receiving, possessing, or transporting a single firearm," the State argues in briefs. "Said

another way, a felon who possesses a single firearm, has committed a new felony, and a felon who possesses four firearms has committed four new felonies.” Although the Court of Appeals noted in its ruling that the phrase “any firearm” could be singular or plural, “this is not entirely correct, grammatically speaking,” the State argues. “Firearm” may *not* be either singular or plural; it *always* designates singular. “Firearms,” on the other hand, always designates plural. “The General Assembly could have chosen to prohibit felons from possessing ‘any firearms,’” the State argues. Had it done so, Coates’ argument insisting on the merger of his four counts “would be completely correct. However, the legislature chose the singular form of the word. This alone makes abundantly clear the legislature’s intent to make a felon’s possession of a single firearm a distinct criminal act.” “The proper unit of prosecution under Georgia Code § 16-11-131 (b) is the possession of a single firearm,” the State argues, and “The decision of the Court of Appeals should be AFFIRMED.”

**Attorney for Appellant (Coates):** Joshua Larkey

**Attorney for Appellee (State):** George Barnhill, District Attorney, Ian Sansot, Asst. D.A.

### **THE STATE V. HERRERA-BUSTAMANTE (S18A0703)**

The State is appealing a **Gwinnett County** court decision granting a new trial to a man convicted of Driving Under the Influence (DUI).

**FACTS:** The parties do not dispute the facts of the case. On Oct. 15, 2015, **Moises Herrera-Bustamante** and a group of coworkers left a construction site in Knoxville, TN and rode in a work truck back to Georgia. Along the way, they stopped for dinner and Bustamante consumed some alcohol. When the group got to Acworth, GA, they went their separate ways and Bustamante started driving his personal vehicle back to his home in Gwinnett County. At around 12:40 a.m. on Oct. 16, Officer Austin York of the Gwinnett County Police Department observed Bustamante “almost running off the road and then gently swerving back into the lane of travel.” York pulled Bustamante over. York later testified that as he approached Bustamante’s car, he noted a faint odor of what he believed to be marijuana, as well as an odor of alcohol. When York ran Bustamante’s information, he determined that his license was suspended. York returned to Bustamante’s car and had him get out, noticing he had trouble and seemed to be unsteady. York asked if Bustamante would perform the three Standardized Field Sobriety Evaluations, and he agreed. While conducting the tests, York observed clues consistent with impairment on all three tests. York arrested Bustamante for DUI and had him sit in the back of his patrol car while he read him Georgia’s Implied Consent Warning. When York requested that Bustamante submit to a breath test, Bustamante responded with silence that York eventually took as a refusal. During a search of the vehicle, York found an open can of beer and an open bottle of Crown Royal whiskey that was within reach of the driver. York transported Bustamante back to the Gwinnett County Detention jail.

Bustamante was issued citations for DUI-Alcohol-Less Safe, Driving while License Suspended, Open Container, and Failure to Maintain Lane. During his December 2016 trial, York testified that when he had requested a breath test, Bustamante sat in silence, which York interpreted as a refusal. Bustamante’s attorney raised no objection and did not explore the issue during cross-examination. Following trial, the jury found Bustamante guilty of DUI and Open Container, but not guilty of the other charges. Bustamante’s attorney filed a motion requesting a new trial, and a hearing was set for Oct. 30, 2017 on the motion. Meanwhile, on Oct. 16, 2017,

the Georgia Supreme Court issued its decision in *Olevik v. State*. Bustamante's attorney then amended his motion for new trial, challenging the admission at trial of Bustamante's refusal to provide a breath sample, arguing it violated his constitutional rights under the reasoning of the *Olevik* ruling. Following a hearing, the trial court granted Bustamante a new trial "based upon its interpretation of the holdings in *Olevik*." The State now appeals to the Georgia Supreme Court.

**ARGUMENTS:** The State, represented by Gwinnett's Solicitor General's office, argues that the trial court erred in considering Bustamante's constitutional challenge of Georgia's Implied Consent Laws because he failed to properly raise it at the earliest possible time. "Specifically, this Court has repeatedly held that a constitutional challenge 'must be made at the first opportunity, and it is too late to raise such a question after a guilty verdict has been returned by the jury,'" the State's attorneys argue in briefs. Regardless, the trial court also erred by finding that the admission of Bustamante's refusal to provide a breath sample violated his constitutional right against self-incrimination. The manner in which the trial court interpreted the *Olevik* decision, "underscores the confusion that has arisen in Georgia's courts in the wake of that decision," the State argues. "The number of appellate cases on the subject of refusal evidence docketed since the *Olevik* decision highlights the urgency with which judges and attorneys involved with DUI cases in Georgia seek clarity on the issue of how refusal evidence should be treated. . . . That clarity must begin with a fuller explanation of precisely how far the constitutional right to refuse breath testing extends." *Olevik* does not give individuals a right to refuse *all* testing, which appears to be what Bustamante argued at trial. The question under *Olevik* is whether Bustamante's refusal was *compelled*, the State argues. "Georgia's historical treatment of 'refusal' evidence does not support a categorical bar on the admission of at least the fact that a defendant refused to provide a breath sample," the State contends. "Applying the proper analysis to Appellee's [i.e. Bustamante's] case reveals that the trial court erred in granting him a new trial based upon the admission of refusal evidence when his case was tried." "Even in the wake of *Olevik*, the established law of both this Court and the U.S. Supreme Court dictates that refusal evidence is not the product of coercion and does not otherwise violate the Georgia or Federal constitutions," the State concludes. "Therefore, Georgia's Implied Consent scheme as it relates to refusal evidence is constitutional both on its face and as applied to Appellee's case."

Bustamante's attorney argues that his client's argument against the admission of his refusal to take a breath test is not a constitutional challenge of the Implied Consent Notice. "More fundamentally, Appellee's challenge surrounds the fact that his silence, after being asked whether or not he would submit to a state-administered test of his breath, was used against him at trial," the attorney argues in briefs. The Georgia Constitution "protects against self-incrimination by stating, 'No person shall be compelled to give testimony tending in any manner to be self-incriminating.'" Because Georgia Code § 40-6-392 (d) and § 40-5-67.1 (b) (2) both use language that mandates using a suspect's refusal as evidence against him in trial, the constitutionality of these statutes has been called into question by [the Georgia Constitution] and *Olevik v. State*," the attorney argues. However, the actual language of the implied consent notice under § 40-5-67.1 (b) (2), as read to suspects immediately after they are placed under arrest, does not have to be held unconstitutional to rule in favor of the Appellee. The language of the implied consent notice itself states that a refusal *may* be used against a suspect in trial and simply warns of its potential use. Therefore, the language of the actual implied consent notice that is read to suspects is not being challenged. However, the use of refusal evidence for purposes of trial, as mandated

by § 40-6-392 (d) and § 40-5-67.1 (b) (2), is being challenged.” Contrary to the State’s argument, Bustamante’s constitutional challenge was raised at the first available opportunity, and the trial court correctly granted his request for a new trial based upon the decision in *Olevik*. “*Olevik* states that the implied consent notice itself is not coercive and that it isn’t the reading of the notice that would constitute a violation against self-incrimination, but rather, the admission of the result in trial,” the attorney argues in a footnote. “The holding in *Olevik* extends constitutional protections under Paragraph XVI [of the Georgia Constitution] not only to those breath tests that are compelled but also to *every* refusal. A person’s refusal to provide a breath sample is constitutionally protected by Paragraph XVI when the State attempts to introduce the fact into trial.” “In most areas of criminal law, a defendant’s right to remain silent has been protected for a long time, and breath tests were a unique area of law in which silence (or a refusal) could in and of itself have negative consequences,” Bustamante’s attorney argues. “However, the *Olevik* decision brings the law surrounding breath tests much closer to other areas of criminal law. In other words, a person’s silence cannot be held against him in order to illustrate guilt.” This Court should confirm the rulings by the trial court and Court of Appeals and find “that the use of a refusal at trial is impermissible.”

**Attorneys for Appellant (State):** Rosanna Szabo, Solicitor General, Joelle Nazaire, Chief Asst. S.G., Samuel d’Entremont, Asst. S.G.

**Attorney for Appellee (Bustamante):** Ramon Alvarado

### **GREEN V. THE STATE (S18A0796)**

**Raymon Jamaal Green** is appealing his convictions in **Bibb County** for malice murder and other crimes, stemming from two separate incidents on May 9 and May 21, 2010.

**FACTS:** On the evening of May 9, Nadina Waller and her mother, Diane Waller, entered a convenience store together. The women had driven in separate cars, and Nadina had her 3-year-old daughter and 8-year-old niece with her. While they were in the store, Nadina saw Green and Demeko Algernard Wilson enter. She whispered to her mother that Wilson was the person who had broken into her house. Wilson overheard Nadina and the two started arguing. When Diane got involved, Wilson spit in Diane’s face, after which Nadina hit him. Green was not involved in the altercation. Wilson walked off, then came back and lifted up his shirt so Nadina could see the gun in his waistband. Eventually, the two women went back to their cars and started to drive away, as Green and Wilson headed toward a Church’s Chicken fast food restaurant. Diane called police and told them Wilson had spit in her face. As Nadina and Diane were driving away, they heard four or five gunshots. Nadina slammed on her brakes, looking back to make sure her mother and the two children had not been shot. Following the shots, she saw Green and Wilson running back toward Church’s. Later, Diane did not identify Green in court but said that after she heard the shots, she saw the same two men she had seen in the store – recognizing them in the dark “by shape and body-wise.” She said she could see the shorter of the two, whom she assumed was Wilson, shooting a gun. Neither woman testified they saw Green with a gun.

The second incident occurred May 21 when Christopher Finney and Tony Chatfield were approached by two men Chatfield later identified as Green and Wilson. Green and Wilson displayed their handguns – Green a .45 caliber and Wilson a .380 caliber – and asked Chatfield and Finney what they had in their pockets. When Chatfield said that all he had was \$10 to buy

diapers for his baby, they turned their attention to Finney. Chatfield then started running away, with Finney following behind him. As he was running, Chatfield heard two shots and saw Green firing his gun. Finney was shot in the back and died from his injuries; police found \$878.37 in his pockets.

Green and Wilson were indicted together on four counts of aggravated assault based on the May 9 incident. Based on the May 21 incident, they were indicted for malice murder, two counts of felony murder, two counts of criminal attempt to commit armed robbery, two counts of aggravated assault, and possession of a firearm during the commission of a felony. Green and Wilson were tried together, and on Sept. 29, 2011, a Bibb County jury found them guilty on all counts. Green now appeals to the Georgia Supreme Court.

**ARGUMENTS:** Green's attorney argues the evidence was insufficient to support the verdicts. The trial court erred in denying his motion for a directed verdict because the verdict was contrary to the evidence and, without evidence to support it, is decidedly and strongly against the weight of the evidence, and is contrary to the principles of justice and equity. There was no direct evidence in any of the assaults alleged in the May 9 incident, the attorney argues. The only eyewitness to the shootings, Diane Waller, stated unequivocally that she saw only one shooter and that this shooter was the shorter of the two individuals she saw standing in the alley, i.e., Wilson. The evidence is even weaker as to the counts alleging assaults of Nadina Waller and the children. Nadina could not say from where the shots originated or where they were aimed, although Diane testified that the shots were directed at her. As to the May 21 incident, there was no evidence that Green brandished a weapon at Chatfield at any point or that anyone ever attempted to take anything from Chatfield by force. Chatfield's testimony that he saw Green and Wilson shoot Finney while he was running away in fear is not credible and could not be believed by any rational trier of fact, the attorney argues. It is also inconceivable that Green and Wilson would have killed Finney to rob him, and then with ample time, under cover of darkness, and in the absence of the only living witness, would not have taken the nearly \$900 police later found in his pockets. Green also argues that his trial attorney rendered "ineffective assistance of counsel" in violation of his constitutional rights. Among the attorney's shortfalls, the attorney failed to file a motion severing the counts related to the May 9 incident. There is little to no evidence that the alleged May 9 crimes and the alleged May 21 crimes were part of a single scheme or plan. The trial attorney also failed to have Chatfield's burglary conviction admitted at trial and failed to argue in closing that Chatfield's burglary conviction rendered his testimony unbelievable.

The State, represented by the District Attorney's and Attorney General's offices, argues the evidence was sufficient to support the verdicts. As to the May 9 incident, the evidence indicating that the shell casings found in the area where the shots were fired came from two different guns, along with the evidence that Green and Wilson were seen fleeing the scene together, authorized the jury to conclude that Green participated in the aggravated assaults. The State also argues that Green's trial attorney was not ineffective. A trial court does not abuse its discretion in denying a motion to sever where the evidence of one crime would be admissible in the trial of the other crime. And the decision not to introduce a certified copy of Chatfield's conviction into evidence is a matter of trial strategy that does not amount to ineffective assistance, even if considered unwise, the State contends.

**Attorney for Appellant (Green):** Matthew Dale

**Attorneys for Appellee (State):** K. David Cooke Jr., District Attorney, Jason Martin, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Crowder, Asst. A.G.