



## Supreme Court of Georgia

Jane Hansen, Public Information Officer  
244 Washington Street, Suite 572  
Atlanta, Georgia 30334  
404-651-9385  
hansenj@gasupreme.us



## CASES DUE FOR ORAL ARGUMENT

### Summaries of Facts and Issues

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**Wednesday, May 9, 2018**

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

#### **PATTERSON ET AL. V. BIG KEV'S BARBECUE (S17G1957)**

A couple is appealing a ruling by the Georgia Court of Appeals that stops their lawsuit from going forward against a barbecue restaurant and caterer. They claim that they and others suffered food poisoning at a wedding rehearsal dinner from chicken prepared by the caterer.

**FACTS:** On June 20, 2014, **Joshua and Taylor Patterson** were two of about 40 guests who attended a couple's rehearsal dinner in **Morgan County** at the Brady Inn. **Big Kev's Barbecue**, owned by Kevon, LLC, catered the dinner and served barbecue chicken, macaroni and cheese and coleslaw. A separate company provided dessert and a bartender's service provided alcohol. The next day, Saturday, Josh and some others ate leftover Big Kev's barbecue, while Taylor and others only consumed Big Kev's food the night before. A couple of days after the rehearsal dinner, the Pattersons were in Florida when Josh became very ill with diarrhea, vomiting, high fever and chills. He wound up in a hospital emergency room where he tested positive for salmonella, a bacteria that can cause food poisoning from the consumption of raw or undercooked meats and eggs, or of contaminated dairy foods, fruits or vegetables. His symptoms lasted about a week and due to the diarrhea, he eventually needed for an anal fissure. Taylor Patterson also became sick with the same symptoms and was treated for salmonella infection based on her husband's diagnosis, although he was never tested for it. The Pattersons

subsequently learned that about 17 other guests who ate at the rehearsal dinner also became ill, four of whom testified that they experienced the same symptoms within a similar time frame as the Pattersons, with one of them also diagnosed with salmonella. (The others were not tested.) According to the evidence, the only common food that the Pattersons and the four witnesses ate was the food served by Big Kev's. Nevertheless, a number of people who ate the rehearsal dinner and leftovers did not become ill.

The Pattersons sued Big Kev's owner and operator, Kevon, LLC, claiming that the food served at the dinner by Big Kev's had been negligently prepared and caused their illnesses. They also claimed that Kevon had violated the Georgia Food Act by serving food that was adulterated and that Kevon was strictly liable for failing to warn the Pattersons of defective conditions in the food. Kevon filed a motion asking the court for "summary judgment" in its favor. (A court grants summary judgment when it determines there is no need for a jury trial because the facts are undisputed and the law falls squarely on the side of one of the parties.) In its motion, Kevon argued the Pattersons had failed to prove that the food prepared and served by Big Kev's was the "proximate cause" of the Pattersons' illnesses. (Proximate cause is the legal term for a cause that directly produces an event and is legally sufficient to result in liability.) Specifically, Kevon noted the absence of scientific testing or other direct evidence that the food was underprepared or otherwise unfit for consumption. Therefore, the Pattersons had to rely on circumstantial evidence to prove their claim, and that required them to show that every other reasonable hypothesis as to the cause of their illness could be excluded. Kevon argued they failed to meet this burden. Following a hearing, the trial court ruled in favor of Kevon and Big Kev's, granting them summary judgment. The Pattersons then appealed to the Court of Appeals, but in a 5-to-4 decision, that court's majority agreed with the trial court and upheld the ruling, finding the Pattersons had failed to meet the burden of ruling out every other reasonable hypothesis. The appellate court ruled that the Pattersons' theory of the case did not exclude the possibility that the illness was transmitted to them from a source other than the food served by Big Kev's or explain why others who consumed the dinner did not get sick. Likewise, Taylor Patterson did not get sick until several days after her husband became ill, and she did not exclude the possibility that she became ill based on her exposure to him. The Pattersons now appeal to the state Supreme Court, which has agreed to review the case to determine whether the trial court was correct in granting summary judgment in this food poisoning case.

**ARGUMENTS:** The Pattersons argue that the Court of Appeals erred by confusing the burden plaintiffs had in seeking summary judgment with the burden of proof they would have if the case went to trial. Whether every other reasonable hypothesis can be excluded is not the question for a trial judge to answer in response to a motion for summary judgment. Instead, "the sufficiency of circumstantial evidence, and its consistency or inconsistency with alternative hypotheses, is a question for the jury," their attorneys argue in briefs, quoting the Georgia Supreme Court's 1988 decision in *Southern R. Co. v. Ga. Kraft Co.* In negligence suits, proximate cause is generally a question of fact that a jury must decide, and this case should therefore go before a jury. The Court of Appeals ruling contradicts long-standing and fundamental principles of Georgia law that make a jury the arbiter to determine matters of reasonableness, such as whether a hypothesis is reasonable. Through its motion for summary judgment, Big Kev's presented five "unsupported theories" of causation, or hypotheses of how so many could have gotten sick: the rehearsal dinner's dessert provided by a separate caterer, the

bartender's service of alcohol at the dinner, the leftovers eaten the next day, food served at the wedding reception by another caterer, and as for Taylor, her exposure to Josh after he became ill. The Pattersons' attorneys "responded to each of the theories advanced by Defendant [Big Kev's], more than meeting their obligation" by "pointing to evidence in the record refuting the theory, thereby creating a genuine issue of material fact that precluded summary judgment on causation." Not all those who became sick ate dessert, drank alcohol or consumed leftovers the following day. The Pattersons presented evidence establishing that "the only food items the Pattersons and the independent witnesses consumed in common, prior to becoming ill, were those items prepared and served by Big Kev's." The Court of Appeals also erred in failing to view evidence in favor of the "nonmovants on summary judgment" – those responding to, rather than originating, a motion for summary judgment. Georgia law requires that the evidence be viewed in a light most favorable to the Pattersons as the nonmovant. And the Court of Appeals erred because its decision "engages in the type of evidence weighing that Georgia law reserves for a jury," the attorneys argue. In reaching its conclusion, the appellate court not only improperly invaded the province of the jury, it "completely ignores" the testimony of Kevin Armstrong, Big Kev's employee who prepared the food for the dinner. His testimony "provides the very explanation the decision claims the Pattersons are missing – why some who consumed Big Kev's food did not become ill." Armstrong testified "he had no quality control procedures in place to ensure the wholesomeness of the food prior to serving it, he did not have a set time allotted for the chicken to cook, and he did not check the internal temperature of each piece of chicken prior to serving it." Rather he did spot checks of only some chicken. "Where there is evidence from which a jury could find that food poisoning was the only reasonable cause of a plaintiff's illness, and evidence that the defendant's food was the only reasonable source of that food poisoning, even if that evidence 'may strain credulity,' then a jury question is presented," the attorneys argue, and Big Kev's is not entitled to summary judgment.

Kevon's and Big Kev's attorneys argue the Court of Appeals and Morgan County Superior Court correctly granted summary judgment in favor of Big Kev's because: 1) the Pattersons were unable to show that their alleged food poisoning was proximately caused by Big Kev's, and 2) the Pattersons failed to exclude every other reasonable hypothesis as to the cause of their illnesses. "Specifically, the Pattersons have failed to dispel other reasonable hypotheses as to the cause of their illnesses, including: 1) dessert at the rehearsal dinner; 2) the bartender at the rehearsal dinner; 3) leftovers from the rehearsal dinner; 4) the wedding reception food; 5) Steak 'N Shake or other meals the plaintiffs consumed; or, in the case of Mrs. Patterson, 6) her care of her sick husband," the attorneys argue in briefs. "Furthermore, the Pattersons have presented no evidence as to why so many guests did not get sick at the rehearsal dinner and why it took so long for them to experience symptoms following the rehearsal dinner. Because the Pattersons cannot establish that Big Kev's food made them sick and cannot exclude each of these reasonable hypotheses, the Court should affirm the Court of Appeals' and trial court's grant of summary judgment in favor of Big Kev's." The Superior Court and the Court of Appeals applied the appropriate burden of proof to the plaintiffs' claims, the attorneys argue.

**Attorneys for Appellants (Pattersons):** Blakely Frye, Travis Cashbaugh

**Attorneys for Appellee (Kevon):** Pamela Lee, David Smith

**CITY OF COLLEGE PARK ET AL. V. MARTIN (S17G2008)**

The **City of College Park** is appealing a Georgia Court of Appeals ruling that it violated the Open Meetings Act by appointing an interim city manager without holding a public vote.

**FACTS: Chawanda Martin** was hired as a firefighter in September 2008. In 2011, she was disciplined and in 2012, she was fired by then-interim Fire Chief Wade Elmore for certain alleged misconduct. Under the City’s grievance procedure, Martin appealed her termination to interim City Manager Richard Chess, who upheld the termination. Martin filed an open records request with the City, seeking information about the process by which the interim officials had been appointed by the City. She ultimately obtained meeting minutes showing that the interim appointments of Elmore, Chess and two other officials had not been done by a vote by the City Council at an open meeting.

On Oct. 2, 2012, Martin brought a lawsuit in **Fulton County** Superior Court against the City, Chess, Elmore and City Council members, alleging that the interim appointments were made in violation of the Georgia Open Meetings Act and that therefore Elmore and Chess lacked the authority to fire her. Under § 50-14-3 (b) of the Act, certain meetings may be held privately in executive session “when discussing or deliberating upon the appointment, employment, compensation, hiring, disciplinary action or dismissal...of a public officer or employee.” However, the statute says, “The vote on any matter covered by this paragraph shall be taken in public and minutes of the meeting as provided in this chapter shall be made available.” In addition to civil penalties for violations of the Act, Martin sought reinstatement and expungement of her personnel record. In response, the City filed a motion asking the court to grant it “summary judgment.” A judge grants summary judgment after deciding that a jury trial is unnecessary because the facts are undisputed and the law falls squarely on the side of one of the parties. The trial court granted the defendants’ motion for summary judgment on the ground that Martin’s claims were barred by the Open Meetings Act’s time limitations and on the ground that she failed to provide sufficient evidence that College Park council members had “participated in any improper vote.” Martin then appealed to the Court of Appeals, the state’s intermediate appellate court, which upheld the trial court’s ruling that she had missed her deadline for filing her lawsuit under the Open Meetings Act. She was late in filing all her claims except her claim involving the hiring of interim City Manager Chess. In his case, the appellate court reversed the trial court’s ruling and found that the Open Meetings Act “requires a public vote on any matter” covered by the paragraph in the Act involving executive discussions on personnel. And there is no differentiation or exemption made for “interim” appointments. As “no vote was ever taken” with respect to the interim city manager’s hiring, the trial court erred in ruling that Martin could not demonstrate a violation of the Act, the appellate court ruled. The City, Chess, Elmore and City Council members now appeal to the state Supreme Court.

**ARGUMENTS:** Attorneys for the City et al. argue that the Court of Appeals misinterpreted the Open Meetings Act. It improperly interpreted the Act to create a cause of action against governments for not voting on personnel items. Contrary to the appellate court’s ruling, the Act may not be used to create a cause of action against government officials “where they take absolutely no vote and a hiring appointment is made otherwise,” the attorneys argue in briefs. College Park’s mayor testified that he fills city manager vacancies on an interim basis until a permanent replacement is voted upon by the City Council. “The Court of Appeals erred in holding that the Open Meetings Act required College Park to vote on the interim city manager’s

appointment,” the attorneys argue. The appellate court’s opinion “creates improper precedent that government officials may be sanctioned following their meetings for not voting on personnel issues discussed.” If the opinion is not reversed, “it will cause the Open Meetings Act to be in conflict with all government action across the state where governments have by charter, practice, and/or personnel policies, engaged in personnel discussions, and thereafter hired such personnel by a means other than council vote.” The opinion will “open a floodgate of litigation across the state” against governments that hire personnel, following council discussion, by a means other than council vote. “This will also include lawsuits likely to be filed by disgruntled and recently fired public employees,” the City’s attorneys argue.

“The plain and indisputable language of the Open Meetings Act requires any official action by the Council be done in the open in the presence of the public,” Martin’s attorneys argue in briefs. The Court of Appeals correctly interpreted the Act. Furthermore, the City’s Charter “requires the Council to approve the appointment of all City officials and officers, including the City Manager (or interim City Manager).” The Court of Appeals recognized that the Council “could only act by voting.” “This case presents a clear violation of the fundamental premise of the Open Meetings Act that the people’s business must be done in public.” The City has never explained how officials reached a “consensus” on the interim appointees by an action indistinguishable from voting. But the statute does not limit the official actions that must be taken in an open and public meeting to actions taken by voting. It states that, “Any resolution, rule, regulation, ordinance, or other **official action** of an agency adopted, taken, or made at a meeting which is not open to the **public** as required by this chapter shall not be binding.” By focusing on only one means by which official action may be taken, the City “is attempting to eviscerate the Open Meetings Act, but to no avail,” Martin’s attorneys argue. Also, its “unsupported assertion that City business across the state will violate the Open Meetings Act wholly misreads the decision of the Court of Appeals and misapplies the plain language of the Open Meetings Act.” The City’s Charter requires the mayor and city council to act officially to appoint an interim city manager. “When there was no vote in an open and public meeting, there is no valid action.” There is no evidence of widespread violation of the Open Meetings Act, other than by the City of College Park, and the City’s violation of the Open Meetings Act should not lead to further litigation. “Without a public vote, held in accordance with the Open Meetings Act, the Council did not act to confirm the appointment of the interim City Manager,” Martin’s attorneys conclude. “College Park has just been doing it wrong for the last 20 years.”

**Attorneys for Appellants (City et al.):** Steven Fincher, Winston Denmark, Emilia Walker

**Attorneys for Appellee (Martin):** Christopher Balch, Matthew Billips

**GEORGIA DEPARTMENT OF HUMAN SERVICES ET AL. V. ADDISON ET AL.**  
**(S18A0803)**

The State is appealing a **Dougherty County** court ruling that declares Georgia’s Child Abuse Registry unconstitutional.

**FACTS:** The appeal in this case stems from a lawsuit brought by five Dougherty County teachers and school administrators, including **Loy Addison**. The five worked in the special education program at Albany High School called Oak Tree Psychoeducational Program. According to the State, following a series of incidents in which several students allegedly groped other students, a child abuse investigator for the Dougherty County Division of Family and

Children Services substantiated reports of child abuse on the basis that the five teachers and school administrators were inadequately supervising the students. Subsequently, all five were placed on the Child Abuse Registry. According to the teachers and school administrators, however, in April 2017, Ms. Addison received information about “a possible sexual battery or inappropriate physical contact” of one student by one or more other students, wherein a group of students aged 14 to 19 were fondling each other.” Someone reported to Addison that maybe four or five high school students were playing spin the bottle in the school cafeteria during lunch when one of the female students was inappropriately touched by one or more students. According to the brief filed by attorneys for the teachers and administrators, the following day, Ms. Addison informed law enforcement about the reported sexual battery or inappropriate physical contact, and the Dougherty County School System Police Department, the Albany Police Department, and Tammy Frazier, a child abuse investigator for the Dougherty County Division of Family and Children Services, began investigating. Following her investigation, Ms. Frazier concluded that each allegation of child abuse due to inadequate supervision had been substantiated. A “substantiated case” means child abuse has been confirmed based upon a “preponderance of the evidence.” All five school officers received “Notices of Inclusion,” notifying each that he or she had been placed on the registry. Georgia law requires the name, age, sex, race, Social Security number, birthdate, and a summary of the case be included on the registry. Access to the information on the registry is available only to child abuse investigators, their designees, law enforcement, and any state agency that licenses entities related to childcare services. An individual placed on the list has 10 days after receiving notice to file a written request for a hearing before an administrative law judge. An adverse ruling by the administrative law judge may be appealed to the superior court and then to Georgia’s appellate courts.

After receiving Notices of Inclusion, Addison and the others promptly requested a hearing before the administrative law judge to appeal Frazier’s determinations. Prior to the administrative hearing, the five also filed a lawsuit in Dougherty County Superior Court against the State and three of its officers in their official and individual capacities, challenging the constitutionality of the registry. In their petition, they sought a “declaratory judgment” from the court, asking the court to “declare” the registry unconstitutional, and injunctive relief, asking the court to command or prevent certain actions. Following a hearing, the trial court ruled in their favor, declaring Georgia Code § 49-5-180 through § 49-5-187, as well as the rules and regulations governing the Child Protective Services Information System, unconstitutional. The trial court prohibited the State from including any of the five teachers and administrators as a substantiated child abuser on the computerized Child Abuse Registry and from disclosing any of the information. The State now appeals to the Georgia Supreme Court.

**ARGUMENTS:** The State argues the Supreme Court should reverse the superior court’s order. First, the claims by Addison and the others against the State and the named defendants in their official capacities are barred by sovereign immunity – the legal doctrine that protects the government or its departments from being sued without consent. “Absent a legislative waiver, sovereign immunity bars suits for injunctive and declaratory relief against the State, its departments and agencies, and its officers and employees sued in their official capacities – even when the relief sought pertains to the constitutionality of a state statute,” the State argues in briefs. Second, the superior court should have dismissed the lawsuit for failure to exhaust administrative remedies. “By ruling on Appellees’ [i.e. Addison et al.] petition for declaratory

judgment and injunctive relief before that hearing took place, the superior court violated the well-established rule that courts may not interrupt administrative proceedings in process or grant declaratory relief concerning a constitutional question that could have been raised on appeal from the administrative decision,” the State argues. Third, the trial court erroneously invalidated the registry on various constitutional grounds. It erred in holding that the registry statute violated due process and equal protection. And, it erred by holding that the actions of the child abuse investigator violated separation of powers under the Georgia Constitution. “The investigator was not acting in a combined executive and judicial capacity in substantiating claims of abuse against Appellees because, among other things, her substantiations were subject to review by an Administrative Law Judge...,” the State’s attorneys argue.

Attorneys for Addison and the other school officials argue the trial court correctly ruled that Georgia Code § 49-5-180 through § 49-5-187, and the rules and regulations governing the Child Abuse Registry, are unconstitutional. They allow the Division of Family and Children Services to investigate an allegation of child abuse, and then “unilaterally” place an individual on the registry prior to affording the individual any due process rights, including the right to notice and an opportunity for a hearing. A person placed on the registry, “is immediately deprived of one’s reputation and the fundamental rights to family privacy and autonomy, employment, and freedom from police surveillance,” the attorneys argue in briefs. Furthermore, the child abuse investigator “is given unconstitutional statutory authority to be the investigator of the facts of an alleged act of child abuse and at the same time given judicial authority to rule on the sufficiency of the evidence” to place an individual on the registry in violation of separation of powers. Here, the investigator – Frazier – conducted a “cursory, careless, and haphazard investigation” into the allegations, concluding they were “substantiated” without “weighing the evidence” available to her and without knowing the definition of “preponderance of the evidence,” the State argues. And, although an individual placed on the registry may appeal to an Administrative Law Judge, such a judge “has no authority to rule on a challenge to the constitutionality of any statute or rule,” the attorneys contend. They therefore properly raised their constitutional claims in the superior court. The school officers’ attorneys also argue that sovereign immunity does not bar their claims. They carefully crafted their petition to be consistent with the Georgia Supreme Court’s 2017 decision in *Lathrop v. Deal*, which stated that state officials may be sued in their *individual* capacities to prevent them from attempting to enforce an unconstitutional statute, the State contends.

**Attorneys for Appellants (State):** Christopher Carr, Attorney General, Annette Cowart, Dep. A.G., Shalen Nelson, Sr. Asst. A.G., Penny Hannah, Sr. Asst. A.G., Sarah Warren Solicitor General, Ross Bergethon, Dep. Sol. Gen.

**Attorneys for Appellees (Addison):** Gilbert Murrah, Charles Ferenchick

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

### **ATKINS V. THE STATE (S17G1996)**

A man is appealing his conviction in **Fulton County** for the statutory rape of a 13-year-old, arguing that in upholding his conviction, the Georgia Court of Appeals misinterpreted both

the corroboration requirement of the state's statutory rape statute and the Georgia Rape Shield Statute.

**FACTS:** According to the evidence at trial, in November 2010, the mother of 13-year-old A.O. learned the girl was pregnant after taking her to a gynecologist. When asked who the father was, A.O. said he was a "boy in the neighborhood." Her mother then called Leon Surles, who was like a father to A.O., and told him about the pregnancy. Surles did not believe A.O.'s explanation and at some point, threatened to give her a lie detector test.

After returning home from school, A.O. called **Jerome Atkins** and his wife and told them she was pregnant by Atkins. Following the conversation, Atkins called Surles and told him that A.O. had called and that she planned to tell Surles she was pregnant with Atkins' child so that she could have an abortion. Atkins denied both paternity and sexual contact with A.O. in his conversation with Surles. Surles then spoke with A.O. and threatened to "beat her" and "take her to the police" if she did not tell the truth about the paternity of her child. After A.O. told her mother that Atkins was the father, A.O.'s mother contacted police.

A.O. was interviewed by law enforcement personnel and reported two alleged sexual incidents with Atkins. During her initial interview with police on Nov. 20, 2010, she said that on Aug. 15, 2010, while sleeping on the floor of Atkins' apartment, she awoke to find Atkins on top of her having sex with her. During her later forensic interview, A.O. alleged for the first time that a prior incident had occurred in June or July of 2010, involving both Atkins and his wife at their previous residence. A.O. stated that Atkins was the only possible father because she had not been sexually active immediately prior to or after the August 2010 incident with Atkins. A.O. had an abortion on Nov. 27, 2010, and a search warrant for the DNA of the fetus was executed. Results of the DNA test showed that Atkins was not the father. The fetus at the time of the abortion was about 11 weeks into gestation, making time of conception around Sept. 11, 2010.

Nevertheless, Atkins was indicted on charges of statutory rape and aggravated child molestation. At trial, Atkins maintained his innocence and argued that A.O. identified him as the father to conceal the child's true paternity. His attorney sought to question A.O. about the identity of the true father for the purpose of demonstrating A.O.'s motive to falsely accuse Atkins. Relying on the Rape Shield Statute – which states that in prosecutions of sexual offenses, "evidence relating to the past sexual behavior of the complaining witness shall not be admissible" – the trial court did not allow that line of questioning.

In November 2013, a Fulton County jury convicted Atkins of one count of statutory rape and one count of aggravated child molestation. He was sentenced to 35 years in prison and probation for the rest of his life. Atkins appealed to the Georgia Court of Appeals on two grounds: 1) The trial court erred in denying his motion for a directed verdict on the statutory rape count; and 2) The trial court violated his Sixth Amendment right to confrontation by limiting cross-examination of A.O. In a split decision, the Court of Appeals upheld the trial court's decision, ruling that A.O.'s own prior statements provided sufficient evidence to corroborate the statutory rape allegation and that the identity of her baby's father was protected by the Rape Shield Statute (Georgia Code § 24-4-412). Atkins now appeals to the state Supreme Court, which has agreed to review the case to determine: 1) whether a victim's prior consistent statements are sufficient to corroborate her allegation of statutory rape under Georgia Code § 16-6-3 (a); and 2) whether the Rape Shield Statute prohibits a defendant from inquiring at trial about the identity of

the father of a victim's unborn child when evidence has already been introduced showing the defendant is not the father.

**ARGUMENTS:** "The prior statements of an alleged victim are insufficient to satisfy the corroboration requirement of § 16-6-3," Atkins' attorney argues in briefs. "Typically, the testimony of a single witness is sufficient to establish a fact. But a statutory rape conviction requires corroboration of the alleged victim's testimony." The statute mandates that "A person commits the offense of statutory rape when he or she engages in sexual intercourse with any person under the age of 16 years and not his or her spouse, *provided that no conviction shall be had for this offense on the unsupported testimony of the victim.*" In this case, the Court of Appeals ruled that because A.O. had told the police and the forensic interviewer before trial that Atkins had sex with her, A.O.'s allegations were supported by sufficient corroboration. "Under this interpretation of the statutory rape statute, the corroboration requirement has no teeth," the attorney argues. "Accordingly, this Court should find that an alleged victim's prior statements, standing alone, are not sufficient to satisfy the corroboration requirement of § 16-6-3 and overturn Atkins' statutory rape conviction." It was also improper to prohibit Atkins, "under the guise of § 24-4-412, from seeking the truth about who fathered the alleged victim's baby." A.O.'s relationship "with the person that she lied to protect does not qualify as 'past sexual behavior' and is not the kind or class of evidence protected by the Rape Shield Statute," Atkins' attorney argues. "It was therefore improper to curtail Atkins' cross-examination on this point, as it violated his right to confront the witnesses against him." "The identity of the baby's father is not 'sexual behavior,' which *would* be prohibited by the Rape Shield Statute." He was not seeking the information about the baby's father "to show her nonchastity or preoccupation with sex – rather, he was trying to uncover her motive to falsely accuse him of fathering her baby, a fact that was later proven to be false by DNA evidence," his attorney contends.

The State, represented by the District Attorney's office, argues that a victim's prior statements can constitute sufficient corroboration under § 16-6-3. "In a prosecution for statutory rape, the quantum of corroborating evidence need not be of itself sufficient to convict the accused," the State argues. "Slight circumstances may be sufficient corroboration." "In keeping with prior decisions, the Court of Appeals found that A.O.'s prior consistent statements to police provided sufficient corroboration." A number of the intermediate appellate court's decisions have held that "a victim's own prior statements to police, if found to be consistent with her later trial testimony, satisfy the corroboration requirement." Also, under the Rape Shield Statute, the trial court properly prohibited Atkins from seeking testimony regarding the sexual activity that was at issue in the trial, the State argues. "The Rape Shield Statute prohibits evidence relating to the past sexual behavior of the complaining witness. In any prosecution for statutory rape, evidence relating to the past sexual behavior of the victim shall not be admissible, either as direct evidence or on cross-examination of the victim or other witnesses." The trial court's refusal to allow Atkins to question A.O. about "who" fathered her child did not hinder his defense theory, the State contends.

**Attorney for Appellant (Atkins):** Christina Cribbs

**Attorneys for Appellee (State):** Paul Howard, Jr., District Attorney, Lyndsey Rudder, Dep. D.A., Arthur Walton, Asst. D.A.

## **RAINES V. THE STATE (S18A0725)**

A young man is appealing his conviction and life-without-parole prison sentence for the murder of a female taxicab driver in **Upson County** when he was 17 years old.

**FACTS:** On Dec. 21, 2011, a police officer was dispatched to Barnesville Street in reference to a possible shooting on Avenue N in the city of Thomaston. At the scene, the officer found a green Grand Marquis with a cab sign that had crashed into a fence outside a 7-11 convenience store. The cab's wheels were still spinning at a high rate of speed. The driver, a woman later identified as Brandy Guined, was slumped over in the driver's seat, unconscious and struggling to breathe. She had a gunshot wound to her upper back. She was transported to Upson Regional Hospital, but died soon after. Investigators initially had no strong leads, but three days later, 16-year-old Marquerious Traylor approached Thomaston investigators with information about the cab driver's death. He said that on the night the driver was killed, his neighbor and friend, 17-year-old **Dantazias Raines**, came to Traylor's back door and told him to come outside, saying he had the possibility of catching a "sweet lick" – street slang for committing a robbery. Raines asked if he could use Traylor's iPod, which had an app for making phone calls, and while Traylor went inside to grab a jacket, Raines used the iPod to call someone. Traylor later denied knowing who Raines allegedly called. Traylor later testified that Raines suggested they walk around the block, and they headed toward Avenue N. When a dark green taxicab approached, Raines flagged it down. Traylor said he saw Raines enter the cab from the back rear passenger side and brandish a gun. Traylor heard a gunshot and a woman's scream, and he then ran home, according to his testimony. Later that night, Traylor said he texted Raines, asking if he had shot the woman, to which Raines responded, "Hell, yeah." When Traylor asked why, Raines said she had tried to grab the gun and he got nervous, so he shot her. Traylor said Raines asked him to delete his name from Traylor's phone, and also discussed with Traylor the timeline of events. Traylor testified he deleted the text messages before approaching police because he was afraid of being tied to the shooting. But he also said that he recorded one of the conversations with Raines about the timeline on his iPod because he "didn't want to go down for something he didn't do." Traylor gave investigators the audio recording, saying the two voices were his and Raines'. The day after the shooting, Raines, Reginald Dawson and Terrell Searcy were riding in a car together when Dawson asked Searcy if he had heard about the "cab incident" the previous night. Raines interjected that when it happened, he had been coming from his mother's house and heard some arguing on Avenue N. He told them he heard a gunshot and a lady scream and saw the cab race by him.

Raines was arrested Dec. 24, 2011. According to officers, he did not comply with verbal commands, refused to put his hands behind his back, and after he was placed in handcuffs, became belligerent and refused to sit down. In March 2012, an Upson County grand jury indicted him for malice murder, felony murder based on attempted robbery, aggravated assault with a deadly weapon, criminal attempt to commit armed robbery, and gun possession charges. He was also charged with three counts of misdemeanor obstruction of a law enforcement officer stemming from his arrest. At Raines' trial, Traylor, who had been granted immunity, testified against him. Following the March 2013 trial, the jury found Raines guilty on all counts. He was sentenced to life in prison with no chance of parole, plus 19 years. Raines now appeals to the state Supreme Court.

**ARGUMENTS:** Raines’ attorney argues the trial court made five errors, including that the evidence was insufficient to convict him of the crimes. Three days after the murder of the taxicab driver, “Marquarious Traylor approached police with a story blaming his neighbor, Dantazias Raines, for firing the fatal shot after the two went on a mission to rob someone,” the attorney argues in briefs. “Because there is no independent evidence that Raines participated in the crime, Traylor’s story is insufficient to sustain Raines’ conviction and it must be overturned.” While the testimony of a single witness is generally sufficient to establish a fact, there is an important exception to that rule. Under Georgia Code § 24-14-8, “in felony cases where the only witness is an accomplice, the testimony of a single witness is *not* sufficient to support a conviction.” Rather, to corroborate an accomplice’s testimony, there must be independent, slight evidence that the defendant participated in the crime. Here, “there is no evidence to independently corroborate Traylor’s testimony that Raines *participated* in the crime,” the attorney argues. Furthermore, the judge improperly failed to instruct the jury that the only witness to the crime was an accomplice and therefore, under the law, his testimony had to be corroborated. Raines’ convictions also must be reversed because the jury considered materials that were never formally admitted into evidence. Although the recording of a conversation between two males was played for the jury, it was never admitted into evidence, and yet the jury no doubt considered it in its verdict. Even if the Georgia Supreme Court were to determine there is sufficient corroboration of Traylor’s story, the evidence is still insufficient to uphold Raines’ conviction because the State failed to prove venue, the attorney argues. It “presented no evidence that the location where the victim was shot was located in Upson County.” For all these reasons, Raines is entitled to a new trial on all the charges relating to the murder. The three misdemeanor obstruction convictions also fail because there was no proof of venue and no proof that Raines, who was already in handcuffs, was resisting arrest. Finally, Raines, as a juvenile, is entitled to a resentencing hearing “because he was sentenced to life without the possibility of parole with no determination on the record finding him to be in the rare class of juvenile offenders that deserve such a severe sentence,” Raines’ attorney argues. Under its 2012 decision in *Miller v. Alabama*, the U.S. Supreme Court ruled that it is cruel and unusual to mandate “life without parole sentences for those under the age of 18 at the time of their crimes.” For a judge to sentence a youth to life without parole, the judge must make “a distinct determination on the record that the defendant is a permanently incorrigible juvenile murderer,” Raines’ attorney contends.

The State, represented by the District Attorney’s and Attorney General’s offices, argues the State proved venue beyond a reasonable doubt. A number of witnesses testified about the exact intersection where Raines shot Guined. The Thomaston police officer testified he found the taxicab driver at the 7-11 store and the victim was taken to Upson Regional Medical Center. Reginald Dawson testified that Raines told him he heard people arguing followed by a gunshot when he was at the intersection of Avenue N and Barnesville Street. “While each of these pieces of evidence alone may not be sufficient to establish venue, the totality of the evidence is sufficient to prove venue in Upson County beyond a reasonable doubt” for the counts related to the driver’s murder, the State argues in briefs. Also, the evidence is sufficient to convict Raines on these counts because Traylor’s testimony was independently corroborated. First, the day after the murder, Raines told Terrell Searcy and Reggie Dawson that he had witnessed it from a distance. His account was almost identical to Traylor’s – only he described himself as the onlooker instead of the shooter. And, the responding officer noted that he found the victim with a

coin purse of money tucked in her arm, further supporting Traylor's account that Raines had a "sweet lick to catch," providing the motive for the crimes. Raines has not shown that the trial court committed a "clear or obvious error" from the absence of a charge to the jury on the need for accomplice corroboration or by publishing the audio recording that Traylor said was a conversation he had with Raines about the murder. When the State prosecutor said he was about to play the conversation for the jury, Raines' attorney said, "I have no objection." The evidence also was constitutionally sufficient to support the misdemeanor obstruction charges. Even though Raines was handcuffed, the evidence shows he continued to resist arrest, the State contends. However, both the District Attorney's and Attorney General's office agree that Raines' sentence should be thrown out and the case be remanded to determine if his sentence falls within the category of juvenile offenders for which life without parole is an appropriate sentence. In its 2016 opinion in *Veal v. State*, the Georgia Supreme Court ruled that before a juvenile can be sentenced to life without parole, the judge must make distinct determinations on the record that the defendant "is irreparably corrupt or permanently incorrigible, as necessary to put him in the narrow class of juvenile murderers for whom a life without parole sentence is proportional under the Eighth Amendment as interpreted in *Miller*," the State concludes. "Accordingly, this case should be remanded for resentencing on the malice murder count so that the trial court can make such determinations,"

**Attorney for Appellant (Raines):** Christina Cribbs, Georgia Public Defender Council

**Attorneys for Appellee (State):** Benjamin Coker, District Attorney, B. Ashton Fallin, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Elizabeth Brock, Asst. A.G.

### **THE STATE V. ATKINS (S18A0770)**

The State is appealing a **Fulton County** court ruling prohibiting it from presenting evidence of a 2013 murder when a man who was acquitted of that murder goes on trial for a 2015 murder.

**FACTS:** On Dec. 22, 2015, the body of Elijah Wallace was discovered on the side of Campbellton Road in Atlanta. He had been shot 13 times. A detective recovered a set of car keys and \$20 from the victim's body. An acquaintance, Justin Lyons, later told Detective Howard Griffin that Wallace regularly sold marijuana and had told Lyons he planned to meet with someone from Vidalia that evening. Lyons was with Wallace when two men drove up in a gray Nissan Sentra. Wallace, who was carrying a book bag containing marijuana, got into the back seat and the car drove away. Shortly after it drove out of view, Lyons heard the sound of several muffled gunshots.

The next day, the Montgomery County Sheriff's Office recovered a gray Nissan Sentra that had been set on fire near Austin, GA. Investigators found a bullet hole in the rear passenger door, spent shell casings, and blood on the rear passenger seat and floorboard. The vehicle's owner said that her boyfriend, Harold Foster, and his friend, **Denzel Atkins**, had asked to borrow her car the evening of Dec. 21, 2015 to drive to Atlanta. When they returned the car, Atkins told Foster's girlfriend that he had had to shoot someone in her car and that they had dumped his body on the side of the road. Atkins instructed her to report her car as stolen and said he would burn the car to destroy any evidence.

Several weeks later, Foster contacted Detective Griffin and turned himself in. In his statements to police, he said that on Dec. 21, Atkins invited him to go with him to Atlanta to “make some money.” They drove to Atlanta and met with Wallace on Astor Avenue. After Wallace climbed into the back seat of the car, Foster said Atkins raised a handgun and shot Wallace. They drove around for a few blocks before Atkins stopped the car and dumped the body on the side of the road. On the way back to Vidalia, Atkins threw Wallace’s gun and phone out the window. He later threw the gun he had used to shoot Wallace out the window along the interstate. In March 2016, federal marshals arrested Atkins in Savannah, GA where they found him hiding in a friend’s attic.

In May 2016, a Fulton County grand jury indicted Atkins, charging him with murder, armed robbery, aggravated assault with a deadly weapon, criminal attempt to purchase marijuana, and possession of a firearm during the commission of a felony. The State filed a “Notice of Intent to Present Evidence of Other Acts” pursuant to Georgia Code § 24-4-404 (b), which states that evidence of other crimes or acts “shall not be admissible to prove the character of a person,” but may be admitted to show “proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.” Under the three-part test for the admissibility of what is called “404 (b) evidence,” 1) the evidence must be relevant to an issue in the case other than the defendant’s character; 2) its value in proving or disproving something may not be substantially outweighed by undue prejudice; and 3) and there must be sufficient proof for a jury to find by “a preponderance of the evidence,” as opposed to the more stringent “beyond a reasonable doubt” standard, that the defendant committed the prior act.

In the 2013 case that prosecutors wanted to introduce as evidence, Atkins drove Rasheen Jones, who wanted to purchase marijuana, to meet Perry Herbert, who was a known dealer. Herbert’s body was later discovered in a ditch along Excelsior Church Road in Candler County. He had been shot several times. Investigators recovered a set of car keys, the victim’s wallet and shell casings near the body and the victim’s cell phone several miles away. Jones later contacted police and told a detective that when he and Atkins met up with Herbert, Atkins pulled out a handgun and ordered Herbert into the back seat of the car. Later, while driving back to Toombs County, Atkins ordered Herbert out of the car and shot him to death, Jones said. Eventually, Atkins threw Herbert’s cellphone out the window. A Candler County grand jury indicted Atkins on 11 counts, including murder, felony murder, armed robbery, kidnapping, false imprisonment, conspiracy to commit murder and possession of a firearm during commission of a felony. Jones also was indicted and pleaded guilty to lesser charges and agreed to testify against Atkins. At his February 2015 trial, Atkins’ defense was that he was not present for the crime and that Jones was the “real killer.” The jury acquitted Atkins of murder, felony murder, conspiracy to commit murder and possession of a firearm during commission of a felony. But it was unable to reach a verdict on the remaining counts, and the trial ended in a mistrial.

Following a hearing on the 404 (b) evidence, the trial court ordered that evidence of the 2013 murder would be excluded at Atkins’ trial for the 2015 murder. The State now appeals to the Georgia Supreme Court.

**ARGUMENTS:** The State, represented by the District Attorney’s and Attorney General’s offices, argues the trial court erred by excluding evidence of the 2013 murder because the judge found that the prior murder satisfied all of the requirements of Rule 404 (b). “In this case, the trial court expressly recognized that the prior murder met each part of the three-prong

test,” the State argues in briefs. “Yet, the trial court still chose to exclude evidence of the murder-related charges ‘out of an abundance of caution.’ This decision is without legal basis, and ultimately denies the State from introducing important, relevant, and lawful evidence of Appellee’s [i.e. Atkins’] guilt.” Although the prior murder resulted in an acquittal, and under the Georgia Supreme Court’s 1985 decision in *Moore v. State*, the “collateral estoppel” doctrine precludes the State from relitigating this evidence, the *Moore* decision has since been undermined by the U.S. Supreme Court’s 1990 ruling in *Dowling v. United States* and should be overruled, the State argues. (“Collateral estoppel” is a legal doctrine that prevents the relitigation of facts already resolved in a defendant’s favor by a final judgment.) Finally, the 2013 crime is relevant for a non-character purpose under the “doctrine of chances,” the State argues. The doctrine of chances allows the admissibility of evidence to show that it is unlikely a defendant would be innocently involved in repeated similar, suspicious circumstances. As one federal court remarked, “The man who wins the lottery once is envied; the one who wins it twice is investigated.” This court should reverse the portion of the trial court’s decision that excluded evidence of the prior murder, the State argues.

Atkins’ attorneys argue that the trial court was well within its discretion under Georgia Code § 24-4-403 to exclude the acts on Excelsior Church Road. Under *Moore*, the State is collaterally estopped from using extrinsic acts in a subsequent trial when the facts at issue were resolved in the defendant’s favor at the first trial. “Mr. Atkins was acquitted of acts on Excelsior Church Road after presenting an alibi defense, illustrating that facts at issue were resolved in his favor,” his attorneys argue in briefs. Furthermore, the acts on Excelsior Church Road are inadmissible under the “404 (b)” factors analysis. For one thing, the 2013 case “is not relevant to an issue other than the defendant’s character,” and under the law, it is only admissible if it is relevant to an issue other than character. As to the use of the “doctrine of chances” as an alternative method for admitting the acts on Excelsior Church Road, the lower court never ruled on this issue so it cannot be argued for the first time on appeal. “The doctrine of chances also can neither overcome Georgia’s statutory law nor its Constitution,” Atkins’ attorneys argue.

**Attorneys for Appellant (State):** Paul Howard, Jr., Kevin Armstrong, Sr. Asst. D.A., Scott McAfee, Sr. Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G.

**Attorneys for Appellee (Atkins):** Sandra Wolfe, T. Natasha Crawford