



Supreme Court of Georgia

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SUMMARIES OF OPINIONS

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CLAYTON COUNTY BOARD OF TAX ASSESSORS V. ALDEASA ATLANTA JOINT VENTURE (S18A0430)

The Supreme Court of Georgia has ruled against the **Clayton County Board of Tax Assessors** and upheld a trial court's ruling that a concessionaire who leases space at the Atlanta airport is not required to pay ad valorem property taxes to the County.

In today's unanimous decision, written by **Justice Robert Benham**, the high court has rejected the County's assertion that a contract between the City of Atlanta and a private business for the lease of retail space at the airport creates a taxable interest subject to ad valorem taxation by Clayton County.

The City of Atlanta owns the Hartsfield-Jackson Atlanta International Airport, but portions of the airport – including the portions at issue in this case – are located in Clayton County outside city limits. The City of Atlanta grants concessionaires the right to use portions of the airport to operate businesses that serve the airport's patrons.

In 2007, the City entered into a lease with **Aldeasa Atlanta Joint Venture**, allowing the private business to operate two duty-free retail stores on Concourses E and T of the airport. The term of the Concessions Agreement was five years. Aldeasa paid the County ad valorem taxes due on its *personal* property, including such things as inventory and computers. However, for the 2011 and 2012 tax years, the County issued *real* property tax assessments to Aldeasa for Aldeasa's alleged real property interest granted under the Concessions Agreement.

Aldeasa appealed the assessments to the Clayton County Board of Equalization. Because Georgia law requires taxpayers to pay 85 percent of taxes alleged to be due pending the outcome

of an appeal, Aldeasa paid \$399,384 in taxes while it appealed. After the Board of Equalization ruled in the County's favor, Aldeasa appealed to the Clayton County Superior Court. Following a hearing, the court ruled in Aldeasa's favor, finding that under the Concessions Agreement, Aldeasa had a nontaxable "usufruct" interest at the airport and not "an estate-for-years" interest. "Usufructs" are generally short-term leases that confer mere use rights and are distinguished from "estate-for-years leases," which grant an interest in land. The trial court rejected the County's assertion that it was legally authorized to impose a property tax on usufructs located at the airport. It also rejected the County's assertion that the Concessions Agreement created a taxable franchise. The trial court found that there were "severe restrictions imposed through the Concessions Agreement" on Aldeasa, including the City's right to terminate the lease at will, to relocate Aldeasa at will, and to require Aldeasa to invest in improvements belonging to the City. The County then appealed to the state Supreme Court.

With today's opinion, "we affirm the trial court's order," ruling in favor of Aldeasa.

"Because a usufruct is not considered an estate in real property under Georgia law, it is not subject to ad valorem property tax," the opinion says. "Here, the Concessions Agreement expressly states that it creates a usufruct and passes no estate out of the City."

The key inquiry, however, "turns upon whether various restrictions in the agreement, limiting [the lessee's] use of the premises, sufficiently negate the presumption that this is an estate for years," the opinion says. Here, the Concessions Agreement includes a number of restrictions on Aldeasa's use of the property, including "the right of the City to terminate the agreement at any time and without cause on 30 days' notice; the right of the City to require Aldeasa to relocate, or to contract or expand its retail space at any time; and the right of the City to retain control of the prices Aldeasa charges for merchandise, Aldeasa's hours of operation, the delivery companies it may use, and the types of cash registers it must use for record-keeping purposes. These terms rebut the presumption that this lease created an estate for years," the opinion says.

Among other issues, the high court also has rejected Clayton County's assertion that "the trial court erred by failing to find that Aldeasa owns taxable leasehold improvements, or that the court improperly failed to address this ground for taxation," the opinion says. "It is undisputed that Aldeasa has paid all applicable taxes on its personal property. The improvements that Clayton County attempts to tax are fixtures to realty. The trial court properly concluded, however, that Aldeasa held only a usufruct and not an estate in real property. It follows that Aldeasa could not be assessed for leasehold improvements that were not personal property but instead were attached to and passed with the real property it did not own."

Attorneys for Appellant (County): Jack Hancock, A. Ali Sabzevari

Attorneys for Appellee (Aldeasa): W. Scott Wright, Madison Barnett

MAXIM CABARET, INC. ET AL. V. CITY OF SILVER SPRINGS (S18A0496)

The Supreme Court of Georgia has upheld as constitutional the City of Sandy Springs' ordinances that ban the sale of alcohol in adult establishments.

With today's unanimous decision, written by **Justice Britt C. Grant**, the high court has affirmed a **Fulton County** court ruling against a strip club that challenged the ordinances as unconstitutional.

Since 1992, Theo Lambros has owned and operated a strip club serving alcoholic beverages on Roswell Road that operated under the name of **Maxim Cabaret**. (Today, it goes by the name of The Coronet Club, although when litigation in this case began, it was still using the name of Maxim.) Prior to Sandy Springs becoming a new city, the club operated in unincorporated Fulton County. When the City of Sandy Springs incorporated Dec. 1, 2005, Maxim came under the jurisdiction of the new City of Sandy Springs.

Following its incorporation, Sandy Springs adopted its own adult establishment regulations, which included a ban on alcohol in adult establishments. These ordinances are included in the Alcohol, Licensing, and Zoning chapters of Sandy Springs' Code of Ordinances. During public hearings in December 2005, the City Council received extensive information about the negative secondary effects of sexually oriented businesses, including higher crime, commercial depression of property values, acceleration of community blight in surrounding neighborhoods, and increase in expenditures for law enforcement to preserve law and order.

In January 2006, Maxim sued the City of Sandy Springs in Fulton County Superior Court, claiming that the City's adult business regulations were unconstitutional. During the decade-long course of litigation in superior court, the City amended its adult business ordinances multiple times, in many cases changing or removing provisions that Maxim had alleged to be unconstitutional. But in its eighth amended complaint, Maxim reasserted its constitutional claims regarding some of the City's ordinances that had since been amended, arguing that because the original ordinances were unconstitutional, they were automatically void and could not be cured by amendment.

In June 2016, the superior court issued "summary judgment" in favor of the City, ruling against Maxim on all its challenges. (A court issues "summary judgment" when it determines 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 ruled that the ordinances were designed to target adverse secondary effects and that Maxim had not cast doubt on the City's secondary effects evidence or rationale. The trial court also found that the regulations were narrowly tailored to serve the City's governmental interests and met constitutional standards. Maxim then appealed to the state Supreme Court.

In today's opinion, **Justice Britt C. Grant** writes for a unanimous court: "We hold that Maxim's challenges to prior versions of the City's ordinances that have since been replaced or amended are moot; current adult business ordinances prohibiting the sale of alcohol at businesses that offer live nude entertainment constitutionally regulate negative secondary effects of strip clubs without unduly inhibiting free speech or expression; and because the City may constitutionally prohibit Maxim from obtaining a license to sell liquor on its premises under the City's adult business licensing ordinances, Maxim lacks standing to challenge the City's alcohol licensing regulations." As a result, the Court has affirmed the trial court's ruling.

In response to Maxim's argument that the trial court erred in finding its challenges moot, "We disagree," the opinion says. "Maxim's claims are not saved by its argument that its constitutional challenges to the City's original adult business regulations are not moot because the challenged ordinances were amended rather than repealed and replaced." The ordinances challenged by Maxim "were never declared unconstitutional, and the mere existence of litigation challenging their constitutionality does not preclude an amendment to remove the challenged provisions," the opinion says.

“At the heart of Maxim’s challenges to the City’s adult business regulations is its desire to continue operating as a full-nudity strip club while also selling alcoholic beverages to its customers,” the opinion says. Maxim argues that because prohibiting it from both providing nude entertainment and alcohol will force it out of business, the City’s ordinances infringe upon Maxim’s right of free expression under the First Amendment of the U.S. and state constitutions.

“This is not the first time we have heard such a claim, and again, we disagree,” today’s opinion says. “It is true that both the First Amendment and the free speech provision of the Georgia Constitution have been held to protect nude dancing as a form of expressive conduct. But some limitation on the time, place, or manner of such expression is constitutionally permissible, as are appropriately limited regulations targeting the negative secondary effects of adult entertainment establishments.”

Among other arguments, Maxim also contends that the trial court erred in finding that it lacked standing to challenge the alcohol code. “Because the City’s adult business licensing regulations prohibiting the sale of alcohol are not unconstitutional, Maxim is not permitted to apply for an alcohol license in the first place, and therefore lacks standing to challenge the City’s alcohol code, which applies only to businesses applying for or possessing a license to sell alcohol,” the opinion says. “Judgment affirmed. All the Justices concur.”

In a concurrence, **Justice Nels S.D. Peterson** writes that he agrees “fully in the Court’s decision, which is a faithful application of our precedents. I write separately to express my concern with our approach to constitutional interpretation reflected in those precedents.” He agrees that Maxim’s free speech claims under the U.S. and Georgia constitutions should be rejected. “But our cases holding that the Georgia Constitution protects nude dancing at all rest on a shaky premise,” the concurrence says. “Although we have extended state constitutional protection to nude dancing for nearly 30 years, we have done so without any actual analysis of the Georgia Constitution.”

This Court first held that the Georgia Constitution’s Speech Clause protects nude dancing in its 1989 decision in *Harris v. Entertainment Systems, Inc.* At the time, two justices dissented to that opinion, pointing out that while the first Constitution of Georgia in 1777 guaranteed freedom of the press, and the 1877 Constitution guaranteed freedom of speech, “I cannot believe that our forebears, in writing these protections, intended to vest in each Georgian a constitutional right to dance naked for tips in a barroom,” the dissent in *Harris* said. “Nor do I think that the citizens of Georgia who ratified the Constitution of 1983 intended to preserve or to create any such ‘right.’”

Today’s concurrence states that the “freedom of speech” protected by the Speech Clause “must be understood in the light of what that term meant at the time it was adopted.” The concurrence recommends that “if an appropriate case were to arise, we should again consider the question we answered in *Harris*, but this time in the light of the Georgia Constitution’s language, history and context.” The concurrence is joined by Justice David E. Nahmias and Justice Keith R. Blackwell.

Attorneys for Appellant (Maxim): Cory Begner, Alan Begner

Attorneys for Appellee (Sandy Springs): Scott Bergthold, Bryan Dykes, Harvey Gray

CARR V. THE STATE (S18A0100)

The Supreme Court of Georgia has ruled that a Georgia statute is unconstitutional as applied to certain defendants who are declared mentally incompetent to stand trial and held in detention while the State evaluates whether they can be restored to competency.

Under today's unanimous decision, written by **Justice David E. Nahmias**, the high court has ruled that "such automatic detention without an individualized determination of whether the confinement reasonably advances the government's purpose violates a defendant's right to due process."

The appeal in this case involves **Ricky Lee Carr**, who was arrested in June 2016 and granted bond the same day. In November 2016, Carr was indicted for rape, aggravated sexual battery, two counts of child molestation and criminal attempt to commit a felony. The parties agreed to a court order requiring Carr to undergo a mental evaluation. Dr. Samuel Perri, a forensic psychologist with the Georgia Department of Behavioral Health and Developmental Disabilities, evaluated Carr and found him incompetent to stand trial. Perri explained that Carr was in the mild/moderate range of intellectual functioning and had been diagnosed with cerebral palsy. In a March 2017 report, Perri stated that based on Carr's "low intellectual functioning, there is a strong probability that Carr would not be able to be restored to competency" to stand trial. "Nevertheless, it is my opinion that there should be an attempt to restore Mr. Carr to competency," Perri said, adding that such an attempt should "occur in a community setting rather than in a psychiatric facility."

The following month, Carr's attorney filed in court a "Petition to Have Defendant Attempt Competency Restoration in the Community," i.e. as an outpatient rather than in an inpatient facility. The petition raised constitutional challenges of Georgia Code § 17-7-130 (c), stating that the statute "deprives defendant of due process and equal protection of the law as provided by the United States and Georgia constitutions." Specifically, Carr's attorney challenged the mandatory requirement that Carr, who was out on bond, be placed in custody merely because he had been found incompetent to stand trial.

The court held two hearings on Carr's competency to deal with the issues raised in the petition. Following a hearing on April 28, 2017, the trial judge found Carr incompetent to stand trial, stating that, "it appears to me that I have to transfer custody to the department." At a hearing on May 31, 2017, Carr's attorney again argued it would be a violation of Carr's constitutional rights to be placed automatically in detention while he was being evaluated to determine whether he could be restored to competency. Later that day, the judge issued an order finding that Carr was incompetent to stand trial and that § 17-7-130 (c) did not violate constitutional due process or equal protection rights. The order directed the sheriff to deliver Carr to the Department of Behavioral Health and Developmental Disabilities and ordered the department to evaluate Carr and determine within 90 days of the order whether there was a "substantial probability" that Carr could attain mental competency to stand trial in the foreseeable future.

Carr then filed a request to appeal to the state Supreme Court, and the high court agreed to review his appeal. His attorneys argued that the mandatory nature of his confinement under § 17-7-130 (c) was not reasonably related to the State's legitimate purpose of determining whether a defendant could be restored to competency for trial. The basis for their argument was that the statute requires that all defendants found incompetent after being accused of *violent* crimes, but

not those accused of *non-violent* crimes, be detained for evaluation regardless of the circumstances of the particular defendant's mental condition. Specifically, the statute says that "the court may allow the evaluation to be performed on the accused as an outpatient if the accused is charged with a nonviolent offense." Carr, however, was charged with "violent offenses," which under the statute include sexual offenses.

In today's 34-page opinion, the high court has ruled that the part of § 17-7-130 (c) requiring the automatic detention of all defendants found incompetent after being accused of violent crimes "cannot be applied constitutionally to Carr or similarly situated defendants who are not already being detained on another, lawful ground."

However, the high court disagrees that the statute allows Carr to be confined indefinitely or for an unreasonably extended time. Rather, "we construe § 17-7-130 (c) as limiting the detention it authorizes to the reasonable time needed to fulfill its purpose," the opinion says. "And because Carr initiated this appeal shortly after he was ordered to be detained, he has not as of yet shown on the record that the duration of his confinement is unreasonable."

"Carr does not contend that the 90-day maximum evaluation period in § 17-7-130 (c) is necessarily excessive to achieve the government's purpose of accurately evaluating a defendant, and we conclude that it is not," today's opinion says. The "express 90-day deadline on the evaluation period itself indicates that the General Assembly meant for the overall period of a defendant's detention under § 17-7-130 (c) to be limited to the reasonable time needed to serve the purpose of accurate evaluation."

Nevertheless, "No matter how short the duration of the detention, if the *nature* of the confinement is not reasonably related to the government's purpose of accurately evaluating the defendant's potential to attain competency, the detention is unconstitutional," the opinion says. "Rather than the particular *crime* with which a defendant is charged, it is his particular *mental condition* that affects whether his commitment is reasonably related to the goal of accurately evaluating his likelihood of attaining competence so he can be tried. Only in those cases where detention is in fact reasonably related to this objective does the State's interest justify depriving the defendant of his strong liberty interest."

"Neither the crime of which a defendant is accused – a crime of which he must constitutionally be presumed innocent – nor the finding of incompetency to stand trial is itself a sufficient ground to detain a citizen," the opinion says. "In fact, in some cases the evidence presented at the competency hearing may indicate that confinement will *not* serve the government's purpose of accurately evaluating the defendant's likelihood to attain competency."

In conclusion, the high court has reversed the trial court's judgment that § 17-7-130 (c) is constitutional; it has vacated the part of the judgment ordering that Carr be detained for inpatient evaluation; it has upheld the unchallenged finding that Carr is incompetent to stand trial; and on remand, it has instructed the trial court to use its discretion "in deciding whether Carr should be committed to the department's custody for evaluation or should be evaluated on an outpatient basis."

Attorneys for Appellant (Carr): David Dunn, Circuit Public Defender, Amber Connell, Asst. P.D.

Attorneys for Appellee (State): Herbert "Buzz" Franklin, District Attorney, Clayton Fuller, Asst. D.A.

MCGOUIRK V. THE STATE (S18A0130)

In a second case with facts similar to *Carr v. State*, the Georgia Supreme Court has issued the same ruling in the case of **Ryan L. McGouirk** that it did in *Carr*.

McGouirk, who was deemed incompetent to stand trial for the alleged aggravated child molestation of a 5-year-old, appealed a **Lamar County** court order committing him to confinement in a state mental hospital while he was being evaluated to determine whether he could be restored to competency.

“The constitutional issue involved in this case is identical to the one that was presented in, and is resolved by, this Court’s decision in *Carr v. State*,” **Presiding Justice Harold D. Melton** writes for a unanimous Court. “In *Carr*, this Court sustained a due process challenge to Georgia Code § 17-7-130 (c), which is a statute that had been applied to require the defendant who had been accused of violent offenses in that case and who had been found to be mentally incompetent to stand trial to be transferred to the physical custody of the Georgia Department of Behavioral Health and Developmental Disabilities for further evaluation.” In *Carr*, the high court ruled that because the nature of *automatic* detention of those accused of violent crimes and deemed mentally incompetent to stand trial “does not bear a reasonable relation to the State’s purpose of accurately determining the restorability of individual defendants’ competence to stand trial,” that aspect of the statute violates due process when the defendant is not already being detained on another ground. “In order for the trial court to apply § 17-7-130 (c) in a constitutional manner to McGouirk, the court must exercise its discretion to make ‘an individualized determination of whether [McGouirk’s] confinement reasonably advances the government’s purpose,’ of accurately determining whether ‘there is a substantial probability that [McGouirk] will attain mental competency to stand trial in the foreseeable future,’” today’s opinion says. “Judgment affirmed in part, reversed in part, and vacated in part, and case remanded with direction. All the Justices concur.”

Attorney for Appellant (McGouirk): Allen Knox

Attorneys for Appellee (State): Jonathan Adams, District Attorney, Anita Howard, Asst. D.A.

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

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

The Supreme Court of Georgia has decided in favor of the **Board of Regents** of the University System of Georgia, ruling that the Board is not prohibited from releasing certain information under the Georgia Open Records Act, even though exemptions in the Act authorize it to withhold the information.

In today’s opinion, **Justice David E. Nahmias** writes for a unanimous court that “the Court of Appeals erred in holding that all records that are exempted from the Open Records Act’s general disclosure requirement under Georgia Code § 50-28-73 (a) are prohibited from disclosure to the public.”

In November 2013, the **Consumer Credit Research Foundation**, a non-profit organization, entered into a consulting agreement with the Kennesaw State University Research and Service Foundation. Under the agreement, a Kennesaw State University professor conducted research about the effect of “payday” loans on the financial health of consumers. As part of the

project, the professor signed a confidentiality agreement with the Consumer Credit Research Foundation agreeing not to disclose any information relating in any manner to the Foundation or its contributing sponsors. A paper about the professor's research was published in 2014.

In June 2015, the **Campaign for Accountability** filed an open records request with Kennesaw State University seeking copies of all correspondence about the payday loan study between the professor and a number of organizations and individuals, including the Consumer Credit Research Foundation, its chairman, and its CEO. The request stated the purpose was "to educate the public about the true financial interests behind purportedly academic studies claiming payday loans do not pose a financial harm to borrowers." 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 to § 50-18-77). 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 exemptions to public disclosure in § 50-18-72 (a). It argued that the research correspondence was specifically exempt from disclosure under two of those exemptions (§ 50-18-72 (a) (35) and (36)), which deal with records collected or produced "in the conduct of, or as a result of, study or research." The Foundation further argued that because the research exemptions 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 exemptions in the Open Records Act. Even if they did fall within the exemptions, those exemptions simply *permitted*, but did not *require*, the University to withhold the correspondence from disclosure, the University argued. 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 exemptions in the Open Records Act authorized a state agency to withhold research materials covered by the exemptions but did not mandate it. The trial court ruled that Kennesaw State University had the discretion to release the correspondence, even assuming it fell within one of the exemptions, although ultimately the trial court did not decide whether it fell within the exemptions.

The Foundation appealed to the Court of Appeals, which vacated the Fulton County court ruling and sent the case back to that 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 under *Bowers*, the trial court erred in ruling that Kennesaw State University had the discretion to release the research correspondence. Because the trial court erroneously concluded that the University had the discretion to disclose the information, the appellate court found, it never addressed whether the requested records fell within the exemptions. Therefore, the appellate court sent the case back to

the trial court to address that issue. Both the Campaign for Accountability and the Board of Regents subsequently appealed to the state Supreme Court.

In today's opinion, "we now disapprove the Court of Appeals' broad reading of *Bowers* and reverse the court's judgment."

"Although *Bowers* used some imprecise language that understandably led the Court of Appeals astray, that opinion does not mandate the linguistic contortion of the Open Records Act that would be necessary to reach the result the Consumer Credit Research Foundation seeks," the opinion says.

The high court rejects the Foundation's contention that the phrase "*exempted* from disclosure" in § 50-18-71 (a) means "*prohibited* from disclosure," and that "disclosure *shall not be required*" as used in § 50-18-72 (a) means disclosure *shall be prohibited*."

"Reading the statutory text as the Consumer Credit Research Foundation suggests would be contrary...to the English language," the opinion says. "If a teacher tells his students that an extra credit assignment is not *required*, a student who completes the work would be quite annoyed if the teacher rejected it as *prohibited*."

"Read naturally and reasonably, § 50-18-71 (a) and § 50-18-72 (a) do not prohibit disclosure of records simply because those records are not required to be disclosed by a specific exemption from the Open Records Act's general disclosure duty," the opinion says. "Because the records [the Foundation] seeks to keep confidential are not subject to any prohibition against disclosure, we reverse the Court of Appeals judgment."

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 Garraway, Mark Silver

CALDWELL V. THE STATE (S18A0640)

The Supreme Court of Georgia has upheld the murder conviction and life prison sentence given to **Walter Caldwell** for beating to death his girlfriend's 15-month old baby girl.

In today's opinion, **Chief Justice P. Harris Hines** writes for a unanimous court that "we have reviewed the record and conclude that the evidence at trial was sufficient to enable a rational trier of fact to find Caldwell guilty beyond a reasonable doubt of the crimes of which he was convicted."

Caldwell, 24, lived with Mildred Carlton and her baby daughter, Tynisha, in an apartment in **Fulton County**. On March 2, 2009, Carlton left Tynisha in the care of Caldwell, who was unemployed, while she went to work. Carlton did not return until about 11 p.m. The apartment door was unlocked and only Tynisha was at home. Caldwell was gone. Carlton initially thought the baby was asleep in her bed, but on closer inspection, she noticed "two dark spots" on Tynisha's neck. When Carlton touched the baby, "she was just hard." Carlton immediately called a friend to come check the baby. He came into the room, and when he picked up the baby's arm, her body was stiff and lifted with her arm. He told Carlton he believed her baby was dead, and she called police. First responders confirmed the baby's death. A detective who arrived on the scene immediately noticed that Tynisha had sustained trauma to her head, the right side of her face, and her neck, scalp and lips.

The next morning, after giving her statement to police, Caldwell called Carlton from a payphone in Albany, GA, stating, "By now you know that she's dead." When she asked him what had happened, he said the television had fallen on Tynisha, he had pulled it off her, rubbed some Neosporin on her, then rocked her to sleep. But she had woken up crying and would not stop. He said all he could remember was putting his hands around the baby's throat. Carlton went to the police department to relay to them what Caldwell had said. While speaking to the detective, Caldwell called again, and Carlton put the phone on speaker so the detective could hear. He again said that the TV had fallen on the baby, but he said that was not what had killed her. He said he had choked her, killing her. He then asked Carlton to wire him money so he could return to Atlanta and turn himself in.

Following the money wire, Caldwell asked Carlton to meet him at Underground Atlanta to talk. Carlton informed the detective where the couple was due to meet so law enforcement could arrest him. During the meeting, Caldwell told Carlton he had written her a note and had tried to kill himself when he realized Tynisha was dead. But his suicide attempt failed so he threw the note away in a trash can at the apartment. The note, which was later recovered, stated that the TV fell on Tynisha but she would not stop crying. Caldwell wrote that he lost control of himself and started choking her until she stopped crying. After they left Underground Atlanta, Carlton waived down police. Caldwell walked over to the police car and said, "I killed her child last night." He was then taken to the police station where he waived his *Miranda* rights and made a statement. In that statement, he denied striking the baby, stating the TV had fallen on her and that he had "blacked out," but he admitted choking her, although he believed she was still alive after he choked her.

The medical examiner found hemorrhaging in the baby's eyes, cheeks, tongue muscles, scalp, kidneys and small intestines. Her ribs were broken, there were tears in her heart and liver, swelling in her brain and bruises covering her body. The hemorrhaging in the cheeks, eye and tongue muscles was consistent with choking; the injuries to her head and ears were consistent with being struck with a closed fist or shoe-clad foot. Although some of the baby's injuries could be consistent with a television falling on her chest, the injuries to her head, and the fact that the injuries covered her body, front, back and sides were instead consistent with multiple blows and/or striking something. The cause of death was blunt force trauma to the torso, namely to the heart and liver.

Following an October 2011 jury trial, Caldwell was found guilty of felony murder while in the commission of aggravated assault and cruelty to children in the first degree. He was sentenced to life in prison, and then appealed to the state Supreme Court. His sole challenge on appeal was to the trial court's refusal to strike three potential jurors for cause.

In today's opinion, the state Supreme Court has rejected his argument. "The trial court found that even though the objected-to members of the venire said that it might be difficult, they would try to be fair and do their best," the opinion says. "Simply, there is no showing that the trial court manifestly abused its discretion in refusing to excuse the challenged jurors for cause. Judgment affirmed. All the Justices concur."

Attorney for Appellant (Caldwell): Kenneth Kondritzer, Assistant Solicitor-General
Attorneys for Appellee (State): Paul Howard, Jr., District Attorney, Lyndsey Rudder, Dep. D.A., David Getachew-Smith, Chief Sr. Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Ashleigh Headrick, Asst. A.G.

WADE V. THE STATE (S18A0327)

In another murder of a toddler by the mother's boyfriend, the Supreme Court of Georgia has upheld the murder conviction and life prison sentence given to a man in **DeKalb County** for punching and kicking to death his girlfriend's 18-month-old son.

Nicholas Clarence Wade appealed his conviction and sentence on several grounds. In today's unanimous opinion, however, written by **Justice Carol Hunstein**, the high court has rejected all but one of his arguments and found that the evidence at trial "was sufficient to authorize a rational trier of fact to conclude beyond a reasonable doubt that Appellant was guilty of the crimes of which he was convicted."

Wade lived with his girlfriend and her son, Jillian and 18-month-old Keon Belk, at a house in DeKalb County. Wade and Jillian had been dating about a month. Jillian worked at Northside Hospital and left the house each day around 5:20 a.m. Wade was the toddler's sole caretaker until Jillian got home from work. Days prior to the child's death, Jillian noticed bumps and bruises on Keon's body, including a blackening of his toes, new scratches on his back and foot, and a scab over his eye. Wade told Jillian that the injury on Keon's back was from another child, that the injury on his foot was caused by a bike chain, and that the injury above his eye happened when he fell on the bathroom floor. No family members had noticed any changes in Keon's behavior, and Jillian did not take her son to the doctor because she believed Wade's explanation about the injuries. At previous wellness check-ups, the physician had said Keon was progressing like any normal, healthy child.

The morning of Feb. 3, 2014, Jillian left for work at the normal time. About an hour later, emergency medical personnel responded to a 9-1-1 call from the house reporting a medical emergency. Upon arrival, responders found Keon unconscious and unresponsive. Wade told them that he had put Keon to bed the night before, that he had heard a "loud bang" that morning, and that he had then called 9-1-1 and started performing CPR. Responders transferred the child to DeKalb Medical Center at Hillandale where doctors performed CPR for 20 minutes until they were able to reestablish Keon's pulse. They then transferred the child to Egleston children's hospital. Wade called Jillian and told her that Keon "wasn't breathing right" and was being transported to Egleston children's hospital. Wade told her that Keon had injured himself by falling from his bed and hitting a lockbox. Wade also stated that he himself had tripped over a make-shift baby gate and fallen on top of the child. He apologized many times without explaining the reason for his apologies.

At Egleston, the physician noted bruising on Keon's head and a healing burn on the child's toes. Based on tests, the doctor determined that Keon had a healing rib and leg fracture, a swollen and bleeding brain, multiple lacerations and hematomas to his liver, damage to his pancreas and kidneys, retinal bleeding, and fluid in his abdomen and lungs. Also, Keon's ribcage and spine had been forcefully compressed. The physician concluded that the child's injuries were consistent with child abuse, that his liver lacerations were the result of blunt force trauma to the abdomen inflicted by "some sort of blow, a punch, a kick," and that his rib and spine injuries were consistent with the child being squeezed and slammed. The physician testified that a child could not sustain such injuries by falling out of bed, and they could not have been caused accidentally. The day after he was admitted to the hospital, Keon died on Feb. 4, 2014. The medical examiner who performed the autopsy said the toddler had died from blunt force

abdominal trauma, and that his injuries were consistent with being kicked and punched in his chest and abdomen.

Law enforcement immediately began searching for Wade but could not locate him until he called Jillian several days later, and she notified police. After she picked up Wade behind a Walmart, police followed her car, in which Wade sat with a sawed-off shotgun in his lap. When police blocked the car in a church parking lot, Wade got out holding the shotgun to his chin. DeKalb County Investigator Victor Jones warned him not to shoot himself, at which time, Wade lowered the weapon in Jones' direction and fired. A nearby officer returned fire. Wade was injured during the gunfight, given aid, and arrested.

While in jail, Wade told Danny Cooper, an acquaintance, that he had been trying to make Keon "tough." He admitted he had put the baby's foot in a space heater, struck him with a remote control, and kicked him in the chest. He said that after Jillian had left for work the morning of Feb. 3, Keon was crying. Wade told Cooper "he wasn't raising a punk," and he kicked and punched the baby in the chest before putting him back to sleep on the couch. Shortly after, he noticed the baby's face was blue and called police.

Following a 2015 trial, the jury found Wade guilty of the malice murder of Keon, two counts of felony murder, cruelty to children in the first degree, aggravated assault and aggravated battery of Keon, aggravated assault of Investigator Jones, and other criminal charges. Wade was sentenced to life without parole and appealed to the state Supreme Court.

In his appeal, Wade argued that the trial court made a number errors, including the judge's failure to instruct the jury prior to its deliberations that it could consider Keon's death an accident. "The accident defense applies where the evidence negates the defendant's criminal intent," today's opinion says. "Here, the jury was properly and fully instructed that the State had the burden of proving beyond a reasonable doubt that [Appellant, i.e. Wade] acted with the requisite malicious intent to commit each of the crimes charged," and "the jury's conclusion that [Appellant] acted with malice thus necessarily means that it would have rejected any accident defense, which is premised on the claim that he acted without any criminal intent."

Wade also argued that the trial court erroneously admitted certain testimony and evidence, and it failed to give the jury an instruction on circumstantial evidence.

In today's opinion, however, the Court has rejected all but one of his arguments, which regards improper sentencing. Although it has upheld Wade's sentence to life in prison without the chance of parole, the Court agrees with Wade that the count against him for aggravated battery – based on Wade rendering Keon's liver useless – should have been merged with the malice murder count for sentencing purposes. Here, "there is no indication that the injury was not suffered as part of a single, continuous course of conduct; indeed, the evidence indicates that both crimes were the result of Appellant beating the child on the morning in question." Because the trial court erred in sentencing Wade separately for aggravated battery, the high court has thrown out that charge and is remanding the case for resentencing.

Attorney for Appellant (Wade): Matthew Winchester

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

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

- * John Kennedy Cope (Chatham Co.)
- * Odes Dupree (Douglas Co.)
- * Joseph Gadson (Fulton Co.)
- * Charles Mitchell (DeKalb Co.)
- * Stephon D. Rickman (Floyd Co.)
- * Brandon Lamar Taylor (Douglas Co.)

COPE V. THE STATE (S18A0313)

DUPREE V. THE STATE (S18A0268)

GADSON V. THE STATE (S18A0123)

MITCHELL V. THE STATE (S18A0779)

RICKMAN S V. THE STATE (S18A0841)

TAYLOR V. THE STATE (S18A0619)

(Although the Supreme Court has upheld Taylor’s murder conviction and life-without-parole prison sentence, it has thrown out his 10-year consecutive sentence for conspiracy to commit armed robbery, which should have been merged into the felony murder count for sentencing purposes. The high court is sending the case back to the trial court to fix the sentence.)

- * Robert Francis Ware (Richmond Co.)

WARE V. THE STATE (S18A0028)

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

- * Gary Lanier Coulter

IN THE MATTER OF: GARY LANIER COULTER (S18Y0993)