



## Supreme Court of Georgia

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## CASES DUE FOR ORAL ARGUMENT

### Summaries of Facts and Issues

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**Monday, August 6, 2018**

### 10:00 A.M. Session

#### **BELLSOUTH TELECOMMUNICATIONS, LLC ET AL. V. COBB CO., GA ET AL.** **(S17G2011)**

At issue in this case is whether municipalities may sue phone companies for failing to charge telephone customers enough to pay for the 9-1-1 services provided by the local governments.

**FACTS:** In 1977, the Georgia General Assembly passed the “9-1-1 Act” – Georgia Code § 46-5-120 “et. seq.” (i.e. sections that follow). The purpose of the legislation was to “establish and implement a cohesive statewide emergency telephone number 9-1-1 system which will provide citizens with rapid, direct access to public safety agencies by dialing telephone number 9-1-1.” The 9-1-1 Act authorized a local government to pay for the 9-1-1 services it provided by imposing “a monthly 9-1-1 charge upon each telephone service.” The Act makes telephone companies intermediaries between local governments and citizens for collecting the funds necessary to implement the 9-1-1 service and dispatch centers the localities provide. The law states that telephone customers “may be billed for the monthly 9-1-1 charge” of up to \$1.50 for each subscription per telephone service provided.

In December 2015, **Cobb and Gwinnett counties** sued **BellSouth Telecommunications, LLC** (doing business as AT&T Georgia), EarthLink, Inc., EarthLink, LLC, Deltacom, LLC, and

Business Telecom, LLC. The Counties alleged that the phone companies purposely did not bill certain kinds of customers enough 9-1-1 charges under the statute. The Counties sought to hold the defendants liable for damages equal to the amount of 9-1-1 charges owed by their customers, as well as for punitive damages. The phone companies filed motions to dismiss the lawsuits. The Gwinnett County Superior Court denied the defendants' motions and ruled in favor of the Counties. The trial court ruled that 9-1-1 charges are fees, not taxes; that the lawsuit was permissible because there is "no express language" preventing the Counties from suing the telephone companies; and that the Counties can also bring damages claims against the companies under "common law" and under Georgia Code § 51-1-6 and § 51-1-8 for allegedly failing to bill their customers all the 9-1-1 charges the 9-1-1 Act required them to pay.

In a pre-trial appeal, the Georgia Court of Appeals partially reversed and partially affirmed the trial court's ruling. The intermediate appellate court disagreed with the trial court and ruled that the 9-1-1 Act does not sanction a lawsuit by the Counties against the phone companies for their alleged failure to collect the 9-1-1 charges. However, it affirmed the trial court's ruling that the Counties could pursue their claims against the phone companies under Georgia Code § 51-1-6 and § 51-1-8. The Court of Appeals also vacated the trial court's ruling that the 9-1-1 charges are fees, and remanded the issue of whether they are a tax or a fee to the trial court for further proceedings. The phone companies now appeal to the Georgia Supreme Court. (The phone companies claim there are more than 30 complaints pending in Georgia state and federal courts awaiting resolution of this case that have been filed by 20 local governments seeking more than \$110 million in 9-1-1 charges from more than 50 telephone companies. A number of amicus curiae briefs have been filed in this case, including by the U.S. and Georgia Chambers of Commerce.)

**ARGUMENTS:** Attorneys for the phone companies argue that the Counties' claims should be dismissed because 9-1-1 charges are taxes, and the Counties may collect them only as the 9-1-1 Act authorizes. (Taxes differ from fees based on how and why the government collects the funds. A tax is an "enforced contribution" for raising revenue to be used for public or governmental purposes, while a fee is a charge fixed by law as compensation paid to a public officer for a privilege or service.) The Counties cannot collect 9-1-1 taxes from telephone companies because the 9-1-1 Act does not authorize such collection actions. "The Counties seek as compensatory damages only the amount of the allegedly unbilled 9-1-1 taxes," the attorneys argue in briefs. "But 9-1-1 taxes, like other taxes, can be collected only as authorized in the statute imposing them." Even if 9-1-1 charges were fees, the Counties could not sue telephone companies to collect unbilled 9-1-1 charges, the companies contend. "The General Assembly declined to grant the Counties any cause of action to sue telephone companies to collect unbilled 9-1-1 charges." The Counties also may not use the common law to pursue a damages remedy that the General Assembly did not grant them in the 9-1-1 Act. And Georgia Code § 51-1-6 and § 51-1-8 do not grant the Counties the equivalent of a right to sue the phone companies to recover allegedly under billed 9-1-1 charges, the companies' attorneys argue.

The Counties' attorneys argue that the phone companies failed to bill and collect the proper amount of 9-1-1 charges that are required by law. "By under billing monthly 9-1-1 charges to commercial customers with numerous lines, the service suppliers were able to offer 'sizable' savings to those customers and in turn increase their own profits," the attorneys argue in briefs. As both the trial court and Court of Appeals concluded, "the law allows the Counties to

pursue claims for damages against the wrongdoers and hold them accountable for their blatant refusal to comply with the statutory duties imposed by the 9-1-1 Act.” The 9-1-1 charge is a fee, not a tax, they contend. “9-1-1 charges do not raise general revenue – they are imposed for a particular purpose,” the attorneys argue. Although in its 2010 decision in *Fulton County v. T-Mobile South, LLC*, the Georgia Court of Appeals “incorrectly held” that 9-1-1 charges are “taxes,” “the Counties respectfully submit the decision should be overruled,” the attorneys argue. Furthermore, contrary to the phone companies’ position, the Counties are “injured parties” under § 51-1-6. “Clearly, they are the intended beneficiaries of these uncollected funds and the party entitled to recover.” And collection of 9-1-1 charges is a “private duty” under § 51-1-8. “Georgia Code §§ 51-1-6 and 51-1-8 and the common law allow recovery,” the Counties argue.

**Attorneys for Appellants (Phone companies):** Frank Lowrey, IV, Amanda Bersinger, J. Henry Walker, IV, John Jett

**Attorneys for Appellees (Counties):** Roy Barnes, John Bevis, Benjamin Rosichan, David Worley, James Evangelista, Jeffrey Harris, Madeline McNeeley

### **THE STATE V. ROSENBAUM ET AL. (S18A1090)**

In this highly-publicized murder of a 2-year-old, allegedly by her foster parents, two metro Atlanta District Attorneys argue for the State that a **Henry County** judge erred in ruling that when the case goes to trial, evidence from the couple’s iPhones and other electronic devices must be suppressed. At issue is whether the delay between the seizure and search of the devices violated the couple’s constitutional right against “unreasonable searches and seizures.”

**FACTS:** On Dec. 4, 2015, a Henry County magistrate judge issued two warrants for the arrest of **Jennifer and Joseph Rosenbaum** for the November 2015 beating death of 2-year-old Laila Daniel and the physical abuse of both Laila and her 4-year-old sister. The children were foster care placements with the Rosenbaums, who ultimately were charged in a 49-count indictment with malice murder, felony murder, cruelty to children, and aggravated assault. At the time, Jennifer Rosenbaum was a third-year Emory law student and candidate for the Henry County Commission; Joseph Rosenbaum was a correctional officer at Spalding County Correctional Institute. The night of Nov. 17, 2015, Jennifer had called 911 and reported a child was choking at their McDonough home. When police and emergency medical technicians arrived, she told them that while having dinner, Laila had begun choking on a piece of chicken. The EMTs noticed bruising on the toddler’s body, as did medical personnel who later treated her at Piedmont Henry Hospital, where Laila died. The official cause of death was blunt force injury to her abdomen, which transected her pancreas. She had suffered other injuries, including a broken leg, prior to the injuries that caused her death. Further examination of Laila’s sister also uncovered significant injuries to her body consistent with inflicted trauma and child abuse. The night of the Rosenbaums’ arrest, detectives with the Henry County Police Department had tracked the Rosenbaums to the Merle Manders Conference Building, where they were attending a benefit dinner for a local children’s shelter that houses abused children. Jennifer, once a foster child herself, had once lived at the shelter. Following the dinner, the Rosenbaums were arrested as part of a traffic stop, and incident to the arrest, police seized their iPad and MacBook computer from their vehicle. The Sergeant in charge of the investigation instructed his detectives to go to the jail and retrieve their cell phones. The iPad, MacBook and iPhones were

subsequently placed in “property and evidence” at the Henry County Police Department for safekeeping, but according to the State, officers never communicated this to the lead detective.

In January 2017, the newly elected District Attorney of Henry County recused himself from the case, and the District Attorneys of Cobb County and DeKalb County were appointed as the new prosecutors. On May 26, 2017 – approximately 539 days after the Rosenbaums were arrested – prosecutors obtained search warrants for the Rosenbaums’ iPhones, iPad and MacBook after the Rosenbaums’ attorney asked prosecutors if they could get their electronic devices returned. According to the State, it was the first time the prosecutors or lead detective had been made aware of the existence of the devices, and it was the first time anyone had asked for their return. According to the Rosenbaums’ attorney, however, the couple had “repeatedly sought the return of their electronic devices” since their arrest, including at nearly every court appearance. In January 2018, the Rosenbaums filed a motion seeking to suppress evidence recovered from their electronic devices. According to the State, the devices contained incriminating evidence, including conversations between the couple about the children’s injuries during their care, as well as with third parties. In February 2018, the Henry County judge granted the motion to suppress. The State, represented by the Cobb and DeKalb District Attorneys, now appeals to the state Supreme Court prior to the trial.

**ARGUMENTS:** The State argues that the trial court erred in finding that the delay between the seizure and the search of the Rosenbaums’ electronic devices violated their Fourth Amendment right. The trial court “clearly erred in its factual determinations relevant to Appellees’ (i.e. Rosenbaums’) purported attempts to secure return of their property, when and how the State first learned of the existence of the devices in question, who eventually contacted and confirmed the existence of the devices, and the recovery of records from Appellees’ MacBook,” the State’s attorneys argue in briefs. There is no question the initial seizures during the Rosenbaums’ arrest were lawful. “The question for this Court is whether or not the delay in obtaining warrants for the devices so offended the Fourth Amendment that the seizure became unreasonable. This requires a proper balancing of competing privacy-related and law enforcement-related concerns, and the trial court failed to balance those interests fairly and appropriately,” the State argues. “Under a proper analysis, the seizure and searches of Appellees’ devices did not violate the Fourth Amendment.” Here, the delay in seeking warrants to search the devices was “quite lengthy,” the State concedes, but the delay “was not constitutionally unreasonable based on the particular facts in this case. Even among the limited number of federal cases addressing this issue, courts have regularly found lengthy delays to be reasonable in light of the specific facts of the case.” The State urges the Supreme Court to reconsider its 1992 ruling in *Gary v. State*, arguing that Georgia Code § 17-5-30, which provides the rule suppressing evidence that has been illegally seized, does not contain a blanket prohibition against recognizing a “good faith exception” as exists in this case.

The Rosenbaums’ attorney argues that the State’s “significant delay” in obtaining search warrants for the Rosenbaums’ electronic devices was unreasonable and violated the Fourth Amendment to the U.S. Constitution. The trial court therefore correctly ruled that all evidence from those devices would be excluded at trial. Meanwhile, the Rosenbaums continue to demand their devices be returned to them “for personal purposes and to adequately prepare for trial.” The trial court “correctly applied the standards and rules for evaluating a Fourth Amendment reasonableness analysis in the instant case,” the attorney contends. This issue of a delay in

obtaining a search warrant after a legal seizure of evidence has not yet been addressed by the appellate courts of Georgia. But in the absence of applicable case law, the trial judge “correctly turned to the persuasive authority set forth by the Eleventh Circuit” of the U.S. Court of Appeals and found that a delay of 539 days was unreasonable and violated the Rosenbaums’ constitutional rights. Also, the State’s request that this Court create a “good faith” exception to the rule provided in § 17-5-30 should be denied, the attorney argues. That statute “guarantees greater protections than the federal constitutional exclusionary rule, making no provision for a ‘good faith’ exception to the exclusionary rule.” “In the 26 years since this honorable Court addressed the issue in *Gary*, the Legislature has never chosen to add a good faith exception to § 17-5-30,” the Rosenbaums’ attorney argues. “This Court has appropriately eschewed legislating policy matters from the bench and usurping the Legislature’s role.” “The State failed to show that the warrants were obtained in a timely fashion, that Appellees abandoned their property, or that Appellees failed to demand the return of their devices. The police in this case were not diligent in the pursuit of their investigation; instead, they were negligent. There were no overriding circumstances justifying such neglect.”

**Attorneys for Appellant (State):** Sherry Boston, DeKalb District Attorney, D. Victor Reynolds, Cobb D.A., Anna Cross, DeKalb Dep. Chief D.A., Daysha Young, DeKalb Dep. Chief D.A., Charles Boring, Cobb Dep. Chief D.A.

**Attorney for Appellees (Rosenbaums):** Corinne Mull

#### **GRANT V. THE STATE (S18A0934)**

A man is appealing his conviction and life prison sentence for murder, arguing that the trial court should have suppressed his statements to law enforcement officers because the officers violated his constitutional right to remain silent.

**FACTS:** On March 12, 2013, Christopher Walker and his friend, Alberto Rodriguez, went to a Taco Bell in Alpharetta, GA in **Fulton County**. Rodriguez later testified that as Walker and he walked into the restaurant, they passed three men who were outside talking to one another and were later identified as **Michael Grant**, Matthew Goins, and Richard Davidson. Rodriguez said he thought he noticed Goins eyeing the gold chain Walker wore around his neck. Later, when he and Walker came out of the restaurant, Rodriguez noticed that Grant’s car had moved across the street and was now facing the Taco Bell. Three people were in the car, one of whom Rodriguez recognized as Goins, but he said he didn’t “think too much of it” at the time. He and Walker then proceeded to drive to Walker’s home in Milton, GA. As they were getting out of the car, they were approached by someone later identified as Davidson, who asked Walker and Rodriguez if they knew where to get some marijuana. When they said no, Davidson at first started to walk away, but he returned and told Walker he liked his gold chain. Davidson then pulled out a gun and demanded Walker’s chain. When Walker refused, Davidson held the gun to Walker’s head, and following a brief struggle, shot him in the head. As Rodriguez ran to call for help, he saw Davidson flee to Grant’s car and Grant drive Davidson away from the scene “at a high rate of speed.” Walker died later that night.

Detective Kevin Barry of the Milton Police Department posted information about the case, including surveillance footage from the Taco Bell, on Crime Stoppers, a service used by law enforcement to obtain help from the public in tracking down criminals. A woman named Danielle Weed, who lived with Grant’s brother, saw the post and told police that the men in the

Taco Bell video were Grant, Goins and Davidson. She also provided the tag number of a vehicle registered to Grant.

Grant was brought to the Roswell Police Department where he was interrogated by Milton police. The interrogation was recorded on audio and video and played for the jury at trial. The following exchange occurred:

Detective: Do you want to waive your *Miranda* rights and let us tell you what this is about? (*Miranda* rights, read upon arrest, include: “You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you.”)

Defendant: Do I want to waive my rights? No.

Detective: You don’t? So you don’t know what it’s about?

Defendant: I’m not waiving nothing.

Detective: So you don’t, you don’t want us to tell you?

Defendant: Not if it causes me to give up my rights, no...

(Grant then asked the detective if he was under arrest, and the detective said he was.)

Defendant: Then I don’t got nothing to say...

The officers then told Grant he was under arrest for murder and other charges, left the interview room and returned 10 minutes later, at which time they read Grant his *Miranda* rights. Then there was this exchange:

Detective: Want to hear your side of it, but we can’t unless....

Defendant: If I’m already under arrest, then I don’t got nothing to say about nothing.

However, when one of the detectives again asked, “so you don’t – you don’t want to sign this and waive your rights,” Grant relented and agreed to sign. Eventually he agreed to speak to the other detective, and he acknowledged being at the scene and driving the vehicle. He denied knowing about Davidson’s plan to rob Walker and said he was merely following Davidson’s instruction to follow Walker and Rodriguez when they left the Taco Bell. Grant said that when Davidson returned to the car, he said he had accidentally shot someone. However, in defending Goins, his cousin, Grant stated that, “he didn’t know we was going to do that...he didn’t know we planned on doing nothing....”

In June 2013 Grant, Davidson and Goins were indicted for malice murder, felony murder, and other crimes. Prior to trial, Grant’s attorney filed a motion to suppress his statements during the interrogation on the grounds that law enforcement had failed to honor Grant’s repeated invocations of his constitutional right to remain silent. Following a hearing, the trial court denied his motion, finding that a criminal defendant cannot effectively invoke his constitutional rights prior to being advised of what they are.

At a joint jury trial with Goins in October 2014, Grant was convicted of felony murder, aggravated assault, attempted armed robbery and firearm possession. He was sentenced to life plus five years in prison. (In a separate trial, Davidson was convicted of murder and sentenced to life without parole; Goins was acquitted on all counts.)

Grant now appeals to the Georgia Supreme Court.

**ARGUMENTS:** Grant’s attorney argues the trial court erred in admitting Grant’s statements into evidence at trial when Grant “unequivocally, unambiguously and repeatedly invoked his right to remain silent in the face of custodial interrogation.” “It is difficult to imagine a more clear-cut invocation of the right to remain silent than what Mr. Grant repeatedly

expressed to the law enforcement officers in this case,” the attorney argues in briefs. “It is equally difficult to imagine a more clear-cut disregard of such an invocation by law enforcement officers.” Also, where the evidence established no more than Grant’s mere presence at the scene and mere association with the principal, “the State failed to prove beyond a reasonable doubt that the Appellant [i.e. Grant] was a party to the crimes,” the attorney argues. “In a case where the evidence of Mr. Grant’s knowledge and thus his liability as a party to the crimes, was otherwise flimsy, the admission of his statement was undeniably prejudicial. Without it, he likely would have been acquitted like co-defendant Goins, for whom the evidence was actually more damning in other respects....”

The State, represented by the District Attorney’s and Attorney General’s offices, argues that the trial court correctly denied Grant’s motion to suppress his statement. Grant did not clearly and unequivocally invoke his *Miranda* rights before the officers left the room because he had not yet been read his *Miranda* rights. “No reasonable officer would have assumed that Appellant was fully apprised of his *Miranda* rights simply because he said he was,” the State’s attorneys argue in briefs. “Given law enforcement’s strong interests in public safety and duty to prosecute criminal activity, the only option for a reasonable officer would have been to clarify Appellant’s intent by reading him his rights in their entirety before deciding to cease interrogation altogether.” “Given Appellant’s equivocal responses, law enforcement was entitled to ask questions to clarify Appellant’s intentions.” But even if the trial court did err in denying Grant’s motion to suppress, the error was harmless, the State contends. The evidence was sufficient to prove Grant’s guilt beyond a reasonable doubt. Here, “there was sufficient evidence that Appellant was the ‘getaway driver,’ and was thus a party to Davidson’s crimes.”

**Attorney for Appellant (Grant):** Benjamin Goldberg

**Attorneys for Appellee (State):** Paul Howard, Jr., District Attorney, Lyndsey Rudder, Dep. D.A., Arthur Walton, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew O’Brien, Asst. A.G.

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

### **THE STATE V. HOLMES (S18A0851) and HOLMES V. THE STATE (S18X0852)**

The State is appealing an order by the **Fulton County** Superior Court granting a new trial to a man who was convicted of murder and criminal street activity. The man is also appealing, arguing that the evidence against him was insufficient to prove his guilt.

**FACTS:** According to the State’s evidence, on the night of Oct. 21, 2013, Todd Burkes was hanging out with his friend, **Quantravious Holmes**, in downtown Atlanta. They were later seen on surveillance video outside a Waffle House, laughing and joking around with no evidence of animosity. Holmes was wearing a dark-colored hoodie with white stripes and a large white logo design on the front. Earlier in the evening, Holmes and Burkes were seen handling a pistol. Also earlier that evening, they were seen together near the Greyhound Bus terminal. At about 3:30 a.m. on Oct. 22, a resident of a third-floor condo near the Georgia Dome heard gunshots coming from a pedestrian bridge near Elliott and Nelson Streets. Looking over his balcony, he saw someone running at “full clip” and wearing a gray hoodie, but he said he could not identify anyone.

Police found Burkes's body on the bridge. He'd been shot four times, but the gun was never found. His phone and wallet were missing, leading the State to believe that someone had killed him as part of a robbery. Through Burkes's phone records, investigators found that the phone was still being used and tracked it to a man named Colin Hamilton. When an investigator showed up at Hamilton's residence, Hamilton immediately said, "I found the body." He also said he had taken a cell phone from next to Burkes's dead body. In a statement at the police station that was recorded and transcribed, Hamilton told the investigator that the prepaid phone was his and had been stolen from him. So when he found the body, Hamilton said, "I grabbed my phone, then we go find a police officer and we sent the police officer over there...." Following the shooting, Holmes left Atlanta for New York where he was arrested in December 2013.

In March 2014, Holmes was charged in an indictment with malice murder, felony murder, armed robbery, aggravated assault, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon.

The State and defense were unable to find Colin Hamilton before trial and he was therefore unavailable to testify. The State, however, called two witnesses to testify about the day's events. One, Debra Dunbar, testified that Burkes and Holmes were friends and that she often would see them together downtown, shopping and hanging out. She also testified that Holmes was sad about Burkes's death and had come downtown the day after his death and was crying and "talked to us for a long period of time." Dunbar testified that she had not seen Holmes with a gun that night, even though she acknowledged she had told the lead detective in the case that she had seen him with a revolver and had seen Burkes and Holmes arguing earlier in the day. Under oath, however, she said she had lied in the hope of avoiding pending criminal charges. Another man also testified that Holmes and Burkes were friends and he had seen them passing around a pistol much earlier in the day near the Greyhound Bus station. Following trial, Holmes was convicted of all charges but armed robbery and the related felony murder count.

At issue in this case is the motion State prosecutors filed prior to trial, objecting to the admission of Hamilton's statement on hearsay grounds. In response, the defense attempted to get in portions of Hamilton's statement under an exception to the hearsay rule. The trial judge ultimately ruled that the defense could enter the statements that it was requesting but that it would have to enter his entire statement. As a result, the evidence was not presented to the jury at trial. Following his convictions, Holmes's attorney filed a motion requesting a new trial. Following a hearing on the motion, the judge granted Holmes a new trial, in part ruling that the trial court had erred by not allowing Holmes to present evidence that someone else had been on the bridge the night of Burkes's murder and somebody else had taken his phone. In case number S18A0851, the State now appeals to the Georgia Supreme Court the trial court's order granting a new trial. In cross-appeal number S18X0852, Holmes appeals his convictions on the ground that the evidence was insufficient to support the verdict.

**ARGUMENTS:** The State argues in response to Holmes's cross-appeal that, "the largely circumstantial evidence is legally sufficient and excludes every reasonable hypothesis save the guilt of the accused." Hamilton's statement that Holmes sought to introduce is not admissible under the residual hearsay exception of § 24-8-807. Such an exception is reserved for those statements where cross-examination would not matter because the statement is so trustworthy. This one is not trustworthy. While Holmes wanted to admit that portion in which Hamilton stated he had found his own phone near the body, which had been taken from him in a robbery, Holmes

did not want to admit other portions in which Hamilton stated he had been robbed by Holmes and Burkes around 11:00 p.m. that night near the bus station, and that Holmes was wearing a dark gray hoodie. As to the State's appeal, "the trial court manifestly abused its discretion in granting a new trial on the ground that the court had erroneously excluded testimonial hearsay offered under the 'residual hearsay' exception of § 24-8-807," the State argues in briefs. "The order granting a new trial on this ground leaves one with 'a definite and firm conviction that the court made a clear error of judgment in the conclusion it reached based upon a weighing of the relevant factors.' That clear error of law fatally infected the exercise of the court's discretion in granting a new trial on the general grounds, resulting in a further abuse."

Holmes's attorney argues in the cross-appeal that the State's evidence was insufficient to show that Holmes committed the crimes. Mere presence at the scene of a crime provides insufficient evidence of guilt, even where a defendant had a motive for murder and fled after the murder, according to the state Supreme Court's 1986 decision in *Moore v. State*. The restaurant surveillance video shows that just minutes before the shooting, Holmes and Burkes were smiling and laughing together with two law enforcement officers. The following day, Holmes was crying over the death of his friend. No evidence was presented that Holmes was present at the time of the shooting. Also, the attorney points out, the witness who saw someone running from the bridge wearing a hoodie did not see anything on the hoodie, whereas Holmes was wearing a hoodie with a bright white emblem on it. And the trial testimony about the presence of a pistol at best showed that Holmes was seen much earlier in the day with a pistol while hanging out with Burkes. The State tried to establish greed and theft as a motive for the murder, but no evidence was presented that Holmes took anything from Burkes. Rather, the evidence supported that another man, Hamilton, took Burkes's phone. The State cannot, and did not exclude the reasonable hypothesis that another man, Hamilton, committed these offenses, Holmes's attorney argues. Also, the trial court did not abuse its discretion when it granted a new trial and ruled that it had erred by not allowing Holmes to admit portions of Hamilton's statement into evidence under the "residual hearsay exception." Here, two of the charges Holmes faced were armed robbery and felony murder based on robbery. The trial court, however, directed a verdict in favor of Holmes on those two charges, yet he was convicted of the remaining charges, without any of Hamilton's statement being presented to the jury. A trial court has a duty to exercise its discretion as the "thirteenth juror" when it finds the verdict contrary to the principles of justice and equity. The trial court's grant of a new trial should be upheld by the Supreme Court, Holmes's attorney contends.

**Attorneys for Appellant (State):** Paul Howard, Jr., District Attorney, Lyndsey Rudder, Dep. D.A., Marc Mallon, Sr. Asst. D.A.

**Attorney for Appellee (Holmes):** Suzanne Tevis

### **CONLEY, WARDEN, V. PATE (S18A1121)**

The State is appealing a court ruling that set aside the convictions and 20-year prison sentence given to a teenager in **Gwinnett County** for the statutory rape of a 13-year-old while allegedly threatening her with a knife.

**FACTS:** According to the facts at trial, in December 2008, M.R. reported that two years earlier, when she was 13, **Brandon Myles Pate**, who was 15 at the time, had entered her bedroom, demanded sex, held a knife to her, and threatened to injure her father if she refused. A

friend who was spending the night with M.R. corroborated M.R.'s testimony and witnessed Pate having sexual intercourse with M.R. Prosecutors for the State also presented the testimony of a boy M.R. knew, who said M.R. had told him about the sexual assault in the fall of 2007, prior to her December 2008 outcry. In addition, the State presented testimony from Officer T.D. Roach, who initially investigated M.R.'s outcry. As "similar transaction evidence," the State presented testimony of another girl, M.K., who said she was dating Pate in 2007 when he came to her house and forced her to have sex. He did not have a weapon, she said, but he threatened to kill her father if she told anyone. M.K. did not report the incident to police, but she later told a friend and then her parents.

Following an April 2010 trial, the jury found Pate guilty of statutory rape, aggravated assault, and possession of a knife during commission of a felony. It found him not guilty of rape and a number of other charges. The judge sentenced Pate to 20 years in prison for the statutory rape followed by 25 years on probation – 20 for aggravated assault and five for the knife possession. Pate appealed, but the Georgia Court of Appeals upheld his convictions and sentence in March 2012.

In December 2013, representing himself "pro se," Pate filed a petition for a "writ of habeas corpus." (Habeas corpus is a civil proceeding that allows already convicted prisoners to challenge their convictions on constitutional grounds in the county where they're incarcerated. They generally file the action against the prison warden, which in this case was **T.J. Conley**.) In his petition, Pate raised one ground, alleging he had received "ineffective assistance of counsel" from his trial lawyer, in violation of his constitutional rights. By June 2017, Pate was represented by an attorney who amended Pate's petition, alleging that Pate's sentence for statutory rape was "illegal because his victim's age was never proven at trial and so, construing her age in his favor, they were both juveniles, making his statutory rape conviction a misdemeanor." The attorney argued that the felony knife charge therefore could not stand because it was based on a misdemeanor statutory rape charge. He further argued that Pate's total sentence of 45 years, to serve 20 in prison, was "cruel and unusual punishment" under the U.S. and Georgia constitutions.

In February 2018, the habeas court granted Pate relief on these amended claims and set aside his convictions. The judge stated that Pate's "youth, immaturity, and impulsivity should have been considered during charging and sentencing" and called Pate's 20-year sentence for statutory rape "grossly disproportionate" as both he and his victim were below "the age of consent." The judge said both had "consented" to the sexual intercourse. The judge said Pate's crime would have been a misdemeanor in other jurisdictions and he should have received a misdemeanor sentence for statutory rape. The habeas court also held that the felony knife possession conviction "must be" reversed because it was based on what was a misdemeanor statutory rape under the facts of this case. Finally, the habeas court vacated the felony aggravated assault conviction, ruling that the Youthful Offender Act should have been considered when imposing sentence given the "compelling" testimony offered in mitigation. The State now appeals to the Georgia Supreme Court.

**ARGUMENTS:** The State, represented by the Attorney General's office and representing the prison warden, argues the habeas court's ruling should be reversed. First, the issues on which the habeas court based its ruling had not been raised at the trial court level or when the convictions were first appealed. Because they were not raised at the earliest possible

time, under court procedure they may not be raised for the first time in a habeas case. “The court made no determination of whether the claims were defaulted and did no preliminary analysis of whether cause and actual prejudice had been shown to overcome the defaults before considering the issues on the merits,” the State argues in briefs. Second, the habeas court erred in concluding that Pate should have been charged with, and sentenced for, misdemeanor and not felony statutory rape. The habeas court’s statement that Pate’s youth and immaturity should have been considered during charging and sentencing is erroneous, “as it is not the province of a habeas court to ‘second guess’ charging decisions of prosecutors and sentencing decisions of trial judges,” the State argues. Third, the habeas court erred in vacating the conviction for possession of a knife during the commission of a felony because the statutory rape was not a misdemeanor and misdemeanor punishment was not available due to the victim’s age. Finally, the habeas court erred in vacating the conviction and sentence for aggravated assault. “The habeas court found no constitutional infirmity as to the sentence imposed for aggravated assault, but vacated this conviction on what the court thought should have been done,” stating that the Youthful Offender Act “should have been considered.”

Pate’s attorneys argue the State is wrong in its argument that the habeas court’s ruling must be reversed because the issues were procedurally defaulted from the failure to raise them at the earliest possible time. A petitioner’s failure to raise “a general challenge to the sufficiency of the evidence on appeal does not necessarily preclude review by the habeas corpus court, provided that the petitioner establishes either ‘cause and prejudice’ or that relief is necessary to prevent a ‘miscarriage of justice,’” the attorneys argue in briefs. And the habeas court did not err in ruling that Pate’s felony sentence for statutory rape is disproportionate. “The petitioner was a juvenile, similar in age to M.R., when they engaged in an act of consensual sex between two adolescents; a one-time occurrence between willing participants. This was not a situation where petitioner was an adult seeking to take advantage of M.R.; nor was this a situation where M.R. was injured by his actions.” The fact that Pate was found guilty of statutory rape but acquitted of forcible rape, one count of aggravated assault with intent to rape, one count of terroristic threats, two counts of child molestation, two counts of burglary, and two counts of cruelty to children “speaks to the jury’s belief that both individuals were willing participants,” Pate’s attorneys argue. Having determined that the statutory rape in this case was a misdemeanor, the habeas court correctly reversed Pate’s conviction for possession of a knife during commission of a felony. And it did not err “in substituting its judgment for the trial court as to what the sentence for aggravated assault should have been,” Pate’s attorneys argue. “The habeas court reviewed the record and correctly determined that the trial court erred in not applying the Youthful Offender Act in this case.”

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**Attorneys for Appellee (Pate):** Ecleynne Mercy, Timothy McCalep

### **BLAKE V. THE STATE (S18A1162)**

A man whose murder trial ended in a mistrial is appealing a **DeKalb County** judge’s denial of his “plea in bar,” in which he argued that a retrial would constitute double jeopardy in violation of his constitutional rights.

**FACTS: R’Shon Chauncey Blake** was charged with shooting and killing Amountrae Hawkins on March 27, 2015 during a marijuana deal at an apartment complex in Lithonia, GA. In June 2015, a DeKalb County grand jury indicted him for malice murder, three counts of felony murder, armed robbery, aggravated assault, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon. Trial began Monday, June 19, 2017. On Tuesday, June 20, five witnesses testified; on Wednesday June 21, three witnesses testified. At the end of the day Friday, June 23, 2017, a deputy informed the trial judge that the jury foreperson had told him that one of the jurors had been doing research on the case. Specifically, she had asked a friend or family member who is a police detective to explain the difference between malice murder and felony murder, then shared the information with other jurors. The following Monday, June 26, the judge had the foreperson brought to the courtroom at the beginning of the day to discuss the matter. Upon learning that the juror had given examples to other jurors regarding malice murder and felony murder that were wrong, the judge expressed concern. The defense attorney asked the judge to remove the juror; the prosecutor for the State suggested they all speak to the juror. The judge brought the juror into the courtroom, and she said she had “Googled” certain terms she did not understand, such as “aforethought,” and that she had shared the information with the jurors, including her understanding of the definitions of malice murder and felony murder. She said one of the other jurors had discussed confusing terminology with friends who were lawyers. Blake’s attorney then requested that the trial judge inquire of each juror separately and on the record whether they had heard any of the information or paid attention to it. The judge, however, said he did not see the need to go further, that these appeared to be discussions among the entire jury and not just side conversations, and that he had no choice but to declare a mistrial. Blake’s attorney objected.

On Jan. 3, 2018, Blake’s attorney filed a “plea in bar,” arguing that the State was now barred from trying Blake again on the charges because the trial court overruled his objection to the mistrial without a finding of “manifest necessity,” without fully exploring its premises, and without considering less drastic alternatives. Following a hearing, the trial court denied his plea in bar, and Blake now appeals to the Georgia Supreme Court.

**ARGUMENTS:** Blake’s attorneys argue that the state’s high court should reverse the trial court’s denial of his plea in bar. “It was error for the superior court to declare a mistrial in the first place, without fully exploring its premises, considering less drastic alternatives, and making a record that it was necessary,” the attorneys argue in briefs. The double jeopardy and due process clauses of the U.S. Constitution prohibit the State from making repeated attempts to convict an individual of an alleged offense, “thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.” An accused person has a “valued right... once his jury has been sworn and impaneled...to have his trial proceed to acquittal or conviction before that tribunal,” the attorneys argue, quoting the Georgia Supreme Court’s 1974 decision in *Jones v. State*. The trial judge rejected the defense attorney’s suggestion that the juror simply be removed, the jury recharged, and the trial proceed. But “nothing in the record to the slightest indicates why the alleged misconduct would have thoroughly corrupted the entire jury to make the suggestion unfeasible,” the attorneys argue. “It was not even clear that it was necessary that the juror herself should be disqualified.” “By acting precipitately, without any regard whatsoever toward exploring and considering the apparent, less drastic alternatives –

excluding [the juror], inquiring of the rest, and recharging the jury – the court...acted outside the mantle of its discretion,” the attorneys contend. “Its declaration of mistrial warranted no deference.”

The State, represented by the District Attorney’s and Attorney General’s offices, argues that the trial court properly declared a mistrial and properly denied Blake’s plea in bar. Under the double jeopardy clauses of the U.S. and Georgia constitutions, “Trial courts may declare a mistrial over the defendant’s objection, without barring retrial whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity to do so,” the State’s attorneys argue in briefs, quoting the Georgia Supreme Court’s 2015 opinion in *Harvey v. State*. “The ‘manifest necessity’ standard is met when there is a ‘high degree of necessity’ which is determined by weighing the defendant’s right to have the trial completed before that particular tribunal and the interest in the public in having fair trials.” “Absent prosecutorial misconduct, which was not an issue in this case, the United States Supreme Court has declared that great deference should be accorded to decisions to grant a mistrial based on the judge’s belief that the jury cannot reach a verdict or that the jury has been biased by improper evidence, argument or outside influences.” “As this Court has held for well over a century, when a jury is selected and sworn to try a defendant, the law ‘contemplates that no outside influence shall be brought to bear on the minds of the jury and that nothing shall occur outside of the trial which shall disturb their minds in any way,’” the attorneys argue. “When a juror inserts extrajudicial evidence, that juror basically becomes an unsworn witness against a defendant in violation of the Sixth Amendment.” Here, the trial court “gave careful, deliberate, and studious consideration as to whether the mistrial was required. The pervasiveness of the extrajudicial, and inaccurate, information provided the trial court with more than a reasonable basis for finding manifest necessity and declaring a mistrial.”

**Attorneys for Appellant (Blake):** James Bonner, Jr., Michael Tarleton, Janet Hankins

**Attorneys for Appellee (State):** Sherry Boston, District Attorney, Helen Pott, Asst. D.A., Deborah Wellborn, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Crowder, Asst. A.G.