



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Monday, November 5, 2018

10:00 A.M. Session

STATE OF GEORGIA AND REGULATORY TECHNOLOGIES, INC. V. INTERNATIONAL INDEMNITY CO. AND SUN STATES INSURANCE GROUP, INC. (S18G0493)

REGULATORY TECHNOLOGIES, INC. V. STATE OF GEORGIA ET AL. (S18G0499)

The State is appealing a ruling by the Georgia Court of Appeals in a case involving the liquidation of a now defunct insurance company.

FACTS: The litigation in this detailed, complex case has been going on for nearly 18 years. In January 2001, the **State of Georgia**, acting on behalf of the Insurance Commissioner, filed a petition for liquidation of **International Indemnity Co.** in **Fulton County** Superior Court. The same day, the trial court appointed as liquidator then-Insurance Commissioner John Oxendine. Oxendine appointed Department of Insurance employee Don Roof as deputy liquidator and Henry Sivley, Jr. as assistant deputy liquidator. Oxendine engaged Sivley's business, **Regulatory Technologies, Inc.** ("Reg Tech") to manage the liquidation. The Department had a longstanding contract with Reg Tech to assist in the liquidation and rehabilitation of insurance companies, and Reg Tech was heavily involved in the liquidation of International Indemnity. In March 2008, after marshaling all of International Indemnity's assets

and converting them into cash or short term instruments, Oxendine filed in Fulton County court an “Accounting and Verified Petition for Order Approving Accounting, Distribution of Remaining Assets, Dissolution of Corporate Existence, Discharge of Liquidator, and Other Relief.” However, in June 2008, **Sun States Insurance Group, Inc.**, International Indemnity’s sole shareholder, objected to the discharge of the liquidator, claiming that Reg Tech had withdrawn several million dollars in excessive administrative expenses from the International Indemnity estate and used the money to finance its own ventures. Sun States asked the Fulton County Superior Court to “surcharge” the liquidator, i.e. order Oxendine to return to the estate the improperly withdrawn funds before discharging him from his duties. Oxendine did not dispute Sun States’ right to pose objections, but argued that sovereign immunity protected him and his assistants from being sued.

In July 2008, the trial court entered an order that approved full payment of all accepted claims against the International Indemnity estate and distribution of more than \$7 million to Sun States. It also required the appointment of an independent auditor to audit the estate. In February 2010, the auditor filed his report, which recommended that the trial court credit more than \$450,000 to the International Indemnity estate from Reg Tech. The report additionally raised concerns that Reg Tech had overcharged the estate by an additional \$1.2 million or more by allocating compensation and overhead expenses to International Indemnity that should have been allocated to other projects.

The trial court rejected Oxendine’s sovereign immunity argument, ruling that under section 8.1 (b) of the Georgia Insurers Rehabilitation and Liquidation Act, the State’s sovereign immunity was inherently waived. (Sovereign immunity is the legal doctrine that protects the government or its departments from being sued unless they consent.) The trial court ruled that neither sovereign nor official immunity would protect the liquidator or his employees from having to put back into the estate any excessive administrative expenses if they had engaged in “intentional or willful and wanton misconduct.” “It is essential for a trial court to have the power to surcharge, lest the assets of a mortally wounded insurance company be frittered away,” the trial court ruled. On appeal, the Court of Appeals reversed the sovereign immunity ruling, holding that this form of immunity was not waived, but agreed that a surcharge would be appropriate if Sun States could present evidence of “intentional or willful and wanton misconduct,” which would nullify immunity under the Act. Both parties then petitioned to appeal to the Georgia Supreme Court.

However, the high court did not rule on the merits but remanded the case to the trial court to address a change in procedural law. Eventually, the Court of Appeals again reviewed the case. And again, it reversed the sovereign immunity ruling, but affirmed that the liquidator and his employees could be liable under the Insurers Rehabilitation and Liquidation Act if their conduct was “intentional or willful and wanton.”

The parties now appeal to the state Supreme Court again in two related cases, with Sun States arguing it can prove that the liquidator and his assistants are not shielded by sovereign immunity because they “engaged in willful and wanton misconduct when they robbed the estate they were charged with overseeing,” and the liquidator arguing that under the Act, “Sun States Insurance Group, Inc.’s claim for a surcharge against the State/Liquidator is barred by the doctrine of sovereign immunity.” The Supreme Court has agreed to review the case to determine

whether the Act waives the State's sovereign immunity regarding Sun States' claim for a surcharge.

ARGUMENTS (S18G0493): The State, represented by the Attorney General's office, argues that Sun States' claim for a surcharge is barred by sovereign immunity. The Court of Appeals correctly reversed the trial court's ruling that sovereign immunity had been waived and that the State/Liquidator could be held liable for the damages sought by Sun States. But the Court of Appeals should have ended its analysis there. Instead, it "erroneously remanded the case for the trial court to determine whether Sun States was entitled to the same monetary relief under the statutory grant of *official* immunity" under Section 8.1 of the Insurers Rehabilitation and Liquidation Act. That section states that, "The receiver and his or her employees shall have *official* immunity and shall be immune from suit and liability, both personally and in their official capacities, for any claim or damage..." provided that the liability is not "caused by the intentional or willful and wanton misconduct of the receiver or any employee." Sending it back to the trial court "was error," the State contends, because the Court of Appeals' determination that the Act does not waive sovereign immunity ends the matter with respect to Liquidator, who is only a party to this case in his official capacity," the State argues. The Court of Appeals' ruling "is also contrary to well-established law that similarly worded grants of immunity do not waive sovereign immunity." "Importantly, if even one immunity bars Sun States' claim against Liquidator, then there is no need to determine whether its claim is also barred by some other immunity. A finding that one immunity bars Sun States' claim is sufficient to deprive the trial court of jurisdiction." Furthermore, "the remand of the case to the trial court conflates the separate and distinct doctrines of official and sovereign immunity," the State contends. "Finally, by construing Section 8.1 (b) as an 'alternative basis' for permitting Sun States to seek monetary relief, the Court of Appeals judicially creates an exception to sovereign immunity that is prohibited by the Constitution."

Attorneys for Sun States Insurance Group, Inc. argue that the state Supreme Court should reverse the Court of Appeals' conclusion that sovereign immunity applies. However, the state Supreme Court should affirm the lower appellate court's conclusion that under section 8.1 (b) of the Georgia Insurers Rehabilitation and Liquidation Act, state actors whose misconduct is shown to be intentional or wanton and willful are not immune from liability," the attorneys argue. "Under either approach, this Court should affirm the court's conclusion that the superior court should proceed with trial.

ARGUMENTS (S18G0499): Attorneys for Reg Tech argue that the Court of Appeals "correctly decided that sovereign immunity bars Sun State's claim for monetary relief, but it committed reversible legal error by ruling that Sun States nevertheless could continue to pursue that claim in the trial court because § 33-37-8.1 (b)...may create an exception to sovereign immunity." Reg Tech asks this Court to reverse those portions of the Court of Appeals opinion remanding the case to the trial court "for further development of Sun States' claims under § 33-37-8.1 (b).

The State argues that, "this Court should conclude that Reg Tech's and Sivley's assertions of immunity are baseless." Any claims against Reg Tech, a private contractor, to reimburse the liquidation estate for excessive expenses are not barred by sovereign or official immunity and should be remanded to the trial court for further proceedings. Corporations and private contractors are not entitled to the constitutional grant of sovereign immunity or the

immunity granted to state officers and employees by the Georgia Tort Claims Act, the State argues.

Attorneys for State: Christopher Carr, Attorney General, Isaac Byrd, Dep. A.G., Daniel Walsh, Sr. Asst. A.G., Jeffrey Stump, Sr. Asst. A.G.

Attorneys for Sun States: Thomas Gallo, L. Rachel Lerman, Brian Casey

Attorneys for Reg Tech: Richard Robbins, Alexander Denton

THE ANTHEM COMPANIES, INC. AND RICHARD ANDREWS V. CHERYL WILLS AND AMAJAM, INC. (DOING BUSINESS AS) CAPTAIN TOM'S RESTAURANT (S181512)

A company is appealing a **Muscogee County** court decision in a lawsuit filed by a restaurant owner after one of the company's employees claimed she found a worm-like bug in her black-eyed peas.

FACTS: The Anthem Companies, Inc. is affiliated with Blue Cross and Blue Shield of Georgia, Inc., which in 2008 had a cafeteria at its facility in Columbus, GA. Under an arrangement Blue Cross had with another company, various food vendors sold their food in the cafeteria with Blue Cross maintaining the authority to retain or dismiss the vendors. In September 2008, one of the vendors at the cafeteria was **Captain Tom's Restaurant**. Captain Tom's also operated a stand-alone location in Columbus. On Sept. 24, 2008, Deondra "Dee Dee" Smith, a Blue Cross employee, had lunch in the cafeteria where she bought fried chicken and black-eyed peas from Captain Tom's. The food was served in a Styrofoam box. Smith returned to her desk to eat, and as she was finishing her lunch, she noticed a worm or worm-like bug in the peas. Smith took photos with her digital camera, then returned to the cafeteria where a Captain Tom's employee took back the boxed lunch and gave Smith a refund. That night, Smith downloaded the photos into her computer and transmitted them to Walgreens for printing. In an email, she complained about the incident to facilities manager, Richard Andrews, and attached the digital photos she had taken. The next morning, she went to Walgreens and had paper copies of the photos printed off, then delivered a set to Andrews' office. Smith and Andrews later testified that the photos depicted a bug or worm in the black-eyed peas. Andrews kept the printed photos in a file cabinet at Blue Cross Blue Shield, but after moving several times, at some point between 2008 and 2017, the photographs were misplaced or lost.

The Styrofoam container that Smith had returned to Captain Tom's was inspected by Cheryl Wills, owner of Captain Tom's, as well as by some of her employees. Wills and her employees signed affidavits stating there was no bug or worm in the black-eyed peas but rather something that looked like a lentil or underdeveloped pea. On Sept. 25, 2008, Andrews sent an email to about 2,200 Blue Cross employees, which said, "You may have heard by now of the worm...found in her peas and talk of a boycott. Since then, I've received several e-mails with similar complaints about...Capt. Tom's....Normally I love a good boycott, pitchforks and all....I've already asked for Capt. Tom's to be replaced."

On Nov. 20, 2008, Wills's attorney sent a letter to Blue Cross demanding a retraction of Andrews's email and other allegedly defamatory statements within 10 days. Blue Cross did not retract the email or statements, and Wills and the restaurant sued Anthem and Andrews in December 2008, alleging defamation, interference with contract or business relationship, and seeking a permanent injunction and relief. During a March 2017 deposition of Andrews, Wills's

attorney asked about the three photographs Smith had given Andrews in September 2008. Andrews responded he was not sure where they were and that “they may have been trashed.”

In August 2017, a Muscogee County Superior Court judge signed two orders, ruling primarily against Andrews and Anthem. In the first, involving the photos, the judge ruled that their inadvertent loss or misplacement constituted “spoliation,” a legal term meaning the destruction of, or failure to, preserve evidence that is necessary to litigation. “In the present case, it is clear to the Court that Defendants had a duty to preserve the photographs or prints which were given to Defendant Andrews on Sept. 25, 2008,” the judge wrote in the order in which he also imposed sanctions. The second order was in response to Andrews’s and Anthem’s/Blue Cross’s request that the judge grant them “summary judgment” in their favor. A judge grants summary judgment after determining a jury trial is unnecessary because the facts are undisputed and the law falls squarely on the side of one of the parties. Here, however, the judge determined that, “there is a genuine issue of fact as to what was in the black eyed peas which must be resolved by a jury.” While Andrews and Blue Cross claimed the item in the peas was a Cowpea Curculio, a common agricultural pest in Georgia, Wills claimed it was a lentil or underdeveloped pea. The judge also determined that whether the email, which was at the heart of the defamation claim, was privileged internal communication that was not “published” for the purpose of defaming anyone was also a jury question. The judge, however, ruled that Blue Cross did have the authority to retain or dismiss vendors such as Capt. Tom’s and therefore it granted summary judgment to Andrews and Anthem regarding the claim of interference with the business relationship.

Andrews and Anthem now appeal to the Georgia Supreme Court both the spoliation ruling and the refusal to grant summary judgment regarding the email.

ARGUMENTS: “This case presents straightforward questions about whether a court can find spoliation and order sanctions based on the loss of identical copies of documents when the original electronic documents have been preserved,” attorneys for Andrews and Anthem/Blue Cross argue in briefs. “No spoliation occurred based on existing law because the misplaced documents were copies of documents currently maintained in digital form.” The trial court erred in ruling that spoliation occurred when “appellants” (i.e. Andrews and Blue Cross) “misplaced one set of prints from digital photographic images, even though identical copies of those images were produced in discovery to appellees (i.e. Wills and Capt. Tom’s), and the images have been retained and stored digitally for the duration of this case.” There is no evidence that the misplaced set of print copies was different from the preserved digital copies, and the judge “specifically found that appellants had not acted in bad faith.” “Nevertheless, the trial court sanctioned appellants and decided that it would give an adverse inference jury instruction in the trial of this matter. In so doing, the trial court misapplied the law of spoliation, the burden of proof in considering motions for sanctions, and the standard for issuing sanctions,” the attorneys argue. The trial court also erred in its ruling on the appellees’ defamation claim and its denial of appellants’ motion for summary judgment. The email Andrews sent was privileged under the law, the attorneys contend. “Here it is undisputed that Ms. Smith’s statement to Mr. Andrews and Mr. Andrews’s email to Blue Cross Blue Shield of Georgia’s employees were between members of the same organization. It is further undisputed that, as facilities manager, Mr. Andrews was the Blue Cross employee responsible for fielding complaints regarding food vendors and for resolving any issues with those vendors.” The Supreme Court should reverse this

part of the trial court's ruling and order that judgment be entered in favor of Andrews and Blue Cross, their attorneys contend.

"The Superior Court did not abuse its discretion in finding spoliation," Wills's and Captain Tom's attorney argues in briefs. "The spoliation of the **original** photographs can justify a finding of spoliation and justify minimal sanctions even when the photographs are digitally stored. This is especially so when the subsequently-produced digital photographs conclusively show that they have been digitally-altered, colorized, and do not depict the original event accurately." Wills's "Request for Production of Documents" specifically asked appellants for the three original photographs, which were never produced. Wills's attorney argues that the subsequent copies of the three missing original photos "clearly show alterations in the color of the Styrofoam box have been made by someone during the course of this litigation. The attached photographs depict a pinkish/brown Styrofoam box. The Styrofoam box was '**white.**' This is spoliation." "Ms. Smith used 'Photoshop' on digital photographs," the attorney contends. The trial court also properly denied summary judgment to the appellants, the attorney argues. "The infamous email accused appellees of criminal conduct by selling adulterated food," the attorney argues. "The sale of adulterated food is a crime in the state of Georgia." This is defamation and libel under Georgia laws, and in 2009, Capt. Tom's was closed. "Appellee Wills and her family were forced into bankruptcy, lost their house, cars, property and had their lives destroyed."

Attorneys for Appellants (Andrews): Pete Robinson, James Washburn, Steven Strasberg, Jerry Buchanan, James Doyle

Attorney for Appellees (Wills): James Patrick

HART V. BURFORD, JUDGE, ET AL. (S18A1642)

A man convicted of disorderly conduct in Sandy Springs is appealing a **Fulton County** judge's denial of his petition to appeal his conviction and sentence. He argues he was denied his right to a jury trial and was represented by an incompetent lawyer, both in violation of his constitutional rights.

FACTS: After **Nicholas Hart** got into a confrontation with a woman whose dogs had soiled his parking lot, he was charged in February 2014 with two counts of disorderly conduct in violation of a local ordinance of the City of Sandy Springs. Hart filed a demand for a jury trial in Sandy Springs Municipal Court, which was denied in August 2014. In September 2014, Hart appeared at a bench trial (before a judge with no jury) in municipal court. The judge found him guilty and sentenced him to 12 months on probation, a \$2,000 fine, and 30 days in jail to be served on weekends. His attorney then filed a petition to appeal his conviction and sentence in Fulton County Superior Court, but the attorney failed to follow the proper procedures and the superior court judge dismissed Hart's petition. In July 2015, Hart's attorney then filed a petition for a "writ of habeas corpus" in Fulton County Superior Court. Habeas corpus is a civil proceeding available to those who have already been convicted that allows them another opportunity to show that their conviction or sentence is unconstitutional. Generally it is an action filed against a prison warden, but here it was filed against **Judge Joseph Burford** and a number of mostly local officials. Following a hearing, the judge denied his petition, and Hart, who by then had a new attorney, now appeals to the state Supreme Court.

ARGUMENTS: Hart's attorney argues the habeas court judge erred in ruling that Hart could not assert the same claims in a habeas petition as he had in his first appeal because his

appeal was never heard by any court, due to having an incompetent lawyer. “Not only did counsel’s actions deny appellant (i.e. Hart) a review of the sufficiency of his conviction and his right to a trial by jury, but the trial court erroneously found that the conduct of the trial court in refusing to grant appellant’s motion for jury trial was appropriate,” Hart’s attorney argues in briefs. “Sadly, appellant could not ever get his case before a jury.” Among other arguments, Hart argues that the trial court and habeas court both erred in denying Hart a right to a trial by jury. And his first appellate attorney was “clearly ineffective,” resulting in the denial of Hart’s chance to appeal his case, in violation of the U.S. Supreme Court’s 1984 ruling in *Strickland v. Washington*. “This resulted in a void sentence,” his attorney argues. As a result, Hart’s appeal should be granted.

The attorney for the judge and other local officials argues that Hart failed to meet his burden and show, “by clear and convincing evidence,” that his first appellate attorney’s performance was deficient. He also failed in meeting his burden to prove that except for the attorney’s deficiencies, there was a reasonable probability that he would have been granted his right to appeal his case in superior court. Hart also incorrectly argued that although he was convicted of violating a Sandy Springs disorderly conduct ordinance, that ordinance was nearly identical to the State of Georgia’s misdemeanor disorderly conduct statute, and he therefore had a constitutional right to a jury trial. “As the Georgia Supreme Court has long held, ‘offenses against ordinances passed in the exercise of the express or implied powers vested in Municipal Corporations...are not crimes to which the constitutional jury right applies,’” the judge’s attorney argues in briefs. “Thus, since the Legislature expressly authorized municipalities enact their own disorderly conduct ordinance violation, the City of Sandy Springs was authorized to create one, for which the jury trial right would not apply.” This Court should therefore deny Hart’s application to appeal.

Attorney for Appellant (Hart): Robert Citronberg

Attorney for Appellants (Burford): Daniel Lee

2:00 P.M. Session

LICATA V. THE STATE (S18G0563)

A man is appealing the Georgia Court of Appeals’ reversal of a court ruling that had granted his motion to suppress his refusal to take a breath test when his DUI case goes to trial.

FACTS: On April 7, 2016, a **Forsyth County** sheriff’s deputy received a BOLO dispatch (“Be on the Lookout”) for a dark colored SUV travelling on Georgia 400. According to the dispatch, the vehicle was driving erratically, unable to maintain lane, and had just been involved in a traffic accident. On State Route 20, the deputy spotted an SUV that had significant front end damage, was failing to maintain lane, and was riding on the driver’s side rim, causing sparks to fly. Upon merging into the right lane, the SUV hit multiple construction cones, running over one that became stuck under the vehicle and brought it to a stop in the middle of the road. Another deputy arrived on the scene, called for a tow truck, and began to talk to the SUV’s driver, **Michael Richard Licata**. The officer asked if Licata had recently been involved in a collision and Licata confirmed that he had. The deputy told Licata he wanted to talk to him about the accident, but first wanted to read him something. The deputy then read Licata his *Miranda*

rights (“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.”) After Licata responded that he understood his rights, the deputy questioned Licata about the accident.

The deputy then administered field sobriety tests but did not advise Licata that he did not have to perform the tests. After completing the tests, Licata was arrested and charged with driving under the influence (DUI). The deputy next read Licata the “implied consent notice,” which under Georgia Code § 40-5-67.1, states: “Georgia law requires you to submit to state administered chemical tests of your blood, breath, urine, or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing, your Georgia Driver’s license or privilege to drive on the highways of this state will be suspended for a minimum period of one year. Your refusal to submit to the required testing may be offered into evidence against you at trial.”

The officer then asked Licata if he would submit to a state administered breath test. Licata asked instead if he could retake the field sobriety tests, but the deputy said that was not an option and again asked if he would submit to the state’s breath test. He told Licata he had already determined it was not safe for Licata to be driving and his decision was not going to change. Licata asked what the implications of saying no were. The officer then re-read the implied consent notice. “Can I call my attorney?” Licata asked. “No, sir, you’re unable to at this point,” the deputy responded. “Your decision’s solely based on your decision. You’re not entitled to an attorney when it comes to making...” Licata asked the deputy what he suggested he do, but the deputy said he couldn’t offer legal advice. Licata ultimately responded that he would not submit to a breath test.

Following his arrest and before his trial, Licata’s attorney filed a motion to suppress the results of the field sobriety tests and evidence of his refusal to take a breath test. The Forsyth County state Court granted the motion. The trial court suppressed the field sobriety tests because Licata was in custody and had been read his *Miranda* rights, but the traditional *Miranda* warning omitted any reference to Licata’s right “not to act,” and therefore failed to adequately apprise Licata of his constitutional right against self-incriminating action. The trial court also suppressed evidence that Licata had refused to submit to a breath test because he had requested an attorney after having his *Miranda* rights read to him, which stated he had a right to an attorney.

The State then appealed to the Court of Appeals, which reversed the trial court’s decision, ruling that the trial court erred in concluding that Paragraph XVI of the Constitution required police officers to also give a warning that a suspect has the right not to perform acts. The intermediate appellate court concluded that the state Supreme Court’s 1998 opinion in *Price v. State* stands for the proposition that giving a *Miranda* warning to a suspect in custody is sufficient to render the tests admissible. The appellate court noted that the state Supreme Court has never addressed whether a *Miranda* warning is sufficient to apprise a defendant of the additional right against self-incrimination afforded by the state Constitution. And it suggested there may be tension between this Court’s *Price* decision and the state Constitution’s right against self-incrimination. The appellate court also concluded that the trial court erred in suppressing the refusal evidence, because a suspect is not entitled to the advice of a lawyer when asked to submit to a breath test and Licata’s decision to refuse to submit to the test could not

have been based on a belief that he was entitled to an attorney because the deputy told him he wasn't. Licata now appeals to the Georgia Supreme Court.

ARGUMENTS: Licata's attorneys argue the Court of Appeals erred in reversing the suppression of Licata's field sobriety test results because the standard *Miranda* warning failed to advise Licata of his constitutional right to refuse to act in a way that would incriminate him. The Georgia privilege against self-incrimination is more expansive than the federal privilege because the federal privilege is limited to oral testimony. The Georgia Constitution states that, "No person shall be compelled to give testimony in any manner to be self-incriminating." "'Testimony,' however, has long been construed by Georgia courts to 'embrace any evidence,' and thereby prevents police from compelling a suspect to do an act which is incriminating in nature," Licata's attorneys argue in briefs. "Acts" that implicate the privilege when compelled include such things as production of a handwriting sample and under the state Supreme Court's 2017 decision in *Olevik v. State*, state breath tests. "In *Olevik*, this Court declined to reach the issue of whether a '*Miranda*-style prophylactic rule'" should be imposed to protect a suspect's constitutional right against self-incrimination. "The answer to the question left open by *Olevik* is 'yes,'" the attorneys argue. This is especially true in DUI arrests where self-incrimination actions such as field sobriety evaluations and chemical breath tests are central to law enforcement investigations, the attorneys contend. The *Miranda* warning read to Georgia suspects does not include the right to refuse to perform self-incriminating acts, and most Georgia suspects are not aware such a right exists. The attorneys also argue that following the *Olevik* ruling, "a Georgia suspect is entitled to the advice of counsel when he is asked to submit to a chemical breath test." "In Georgia, an arrestee's request to call his lawyer is an unequivocal invocation of the right to counsel," they contend.

The State, represented by the Solicitor General's office, makes three arguments: First, there is no authority that requires officers to read *Miranda* warnings to individuals who are in police custody prior to requesting that they perform acts protected by the state Constitution's right against self-incrimination. "The U.S. Supreme Court has specifically held that field sobriety evaluations are not testimonial in nature and therefore not protected," the State argues in briefs. "There is no federal constitutional requirement to place an individual on notice of his state constitutional right to refuse field sobriety." Second, the standard *Miranda* warning is sufficient to advise a suspect of his right not to be compelled to act in a way that incriminates himself. Third, after *Olevik*, an individual is not entitled to the advice of counsel when he is asked to submit to a breath test, the State contends. To accept Licata's argument would introduce the impracticality of putting on hold breath testing until an attorney was available. "Unlike a lengthy interrogation where a subject is asked a number of questions, a breath test is very limited in scope," the State argues. "A breath test asks the single question of how much did you have to drink tonight."

Attorneys for Appellant (Licata): Woodrow Smith, Matthew Winchester

Attorneys for Appellee (State): William Finch, Solicitor General, Adam Keller, Sr. Asst. S.G.

MORGAN COUNTY V. MAY (S18A1622) and MAY V. MORGAN COUNTY (S18X1623)

Morgan County is appealing a court's dismissal of the criminal prosecution of a woman who rented out her home at Lake Oconee for short periods in violation of the county's zoning ordinance.

FACTS: Christine May is a 76-year-old licensed real estate agent who lives in New Jersey. In 2007, she built a vacation home on Lake Oconee in Morgan County, and soon after, began renting out her lake home for short-term vacations. In July 2009, the County demanded that May and a few other homeowners cease offering their homes for rent for periods of less than 30 days, stating that such short-term rentals were prohibited under Chapter 4.6 of the Morgan County Zoning Ordinance. Despite the County's demand, May continued renting her property short-term.

In October 2010, the County formally amended its zoning ordinances to explicitly prohibit all rentals of single-family dwellings for less than 30 days in all zoning districts, except for those districts where such rentals were permitted by conditional use. On Dec. 7, 2010, the County designated the zoning districts in which short-term rentals would be permitted conditionally, but the district where May's lake home was located was not among them. Nevertheless, despite being aware of the new zoning ordinance, May did not challenge it and continued renting her home on a short-term basis.

In August 2011, after determining that she was still offering her home for short-term rentals despite being warned to stop, the County issued a criminal citation to May for violating the new zoning ordinance. In response, in April 2012, May sued the County, and the criminal prosecution against her was stayed. Specifically, May sought an injunction to restrain the County from applying the 2010 zoning ordinance to her property and a "declaratory" judgment from the court stating that the use of her property as a short-term rental home was permitted under the pre-2010 zoning ordinance. Therefore, she argued, she had a constitutionally "grandfathered" right under the County's previous ordinance to continue using her property as a short-term rental.

In September 2012, following a bench trial (before a judge with no jury) on May's civil lawsuit, the trial court ruled that May's right to use her lake home for short-term rentals was grandfathered and, therefore, the explicit prohibition of such rentals under the 2010 zoning ordinance did not apply to her property. On appeal, however, the Georgia Court of Appeals vacated the trial court's judgment and remanded the case with direction. On remand, the trial court ruled against May on all of her claims based on: 1) her failure to exhaust administrative remedies (i.e. seek a rezoning before filing her action in court); and 2) her failure to file her lawsuit within 30 days of the County's amendment of its zoning ordinance. Her attempt to appeal that decision to the Court of Appeals, and later to the Supreme Court of Georgia, was denied.

In June 2015, May filed a motion to dismiss the criminal prosecution, arguing once again that the use of her property as a short-term rental home was permitted under the pre-2010 zoning ordinance, and therefore, such use was grandfathered. Alternatively, she argued that the pre-2010 zoning ordinance was unconstitutionally vague and therefore void. The trial court denied May's motion to dismiss, and on March 23, 2016, the court found May guilty beyond a reasonable doubt of violating the County's 2010 zoning ordinance. She was sentenced to 30 days in jail and a \$500 fine. She served three days in jail before being released on bond pending her appeal. Again May appealed.

Ultimately, the Court of Appeals agreed with the trial court's 2015 decision, holding that May had no grandfathered right to rent her house on a short-term basis because the pre-2010 ordinance prohibited such a use. However, the Court of Appeals reversed and vacated the trial court's conviction and sentence of May because the trial court allegedly "did not address May's constitutional challenge to the pre-2010 ordinance, much less issue a ruling on this argument." In

particular, the Court of Appeals held that the trial court failed “to address May’s alternative argument that the prior zoning ordinance is constitutionally vague.”

In May 2018, the trial court reversed its earlier ruling and found that the pre-2010 ordinance did not prohibit short-term rentals. The intermediate appellate court then concluded that because the old ordinance was “void for vagueness and unconstitutional under the due process clauses of the Georgia and United States constitutions,” the County’s prosecution of May under the new ordinance was dismissed. The Court of Appeals vacated her sentence and ordered the trial court to consider May’s constitutional argument. Following the Court of Appeals’ directive, the trial court dismissed the County’s prosecution. The County now appeals the dismissal order to the Georgia Supreme Court. And in a cross-appeal, May argues that if this Court reverses the trial court’s dismissal order, her conviction and sentence should be overturned.

ARGUMENTS (S18A1622): “Even assuming the County’s old zoning ordinance was ‘void for vagueness,’ which it was not, the County did not prosecute May for violating it; instead, she was prosecuted for violating a newer ordinance that no one has argued is vague,” the County’s attorney argues in briefs. “Moreover, the old ordinance was not ‘vague,’ but prohibited May from renting her house on a short-term basis. As such, May had no constitutionally grandfathered right to continue renting her house on a short-term basis under the new ordinance prohibiting such. For these reasons, the trial court’s ruling dismissing the County’s citation against May must be reversed, and May’s previous sentence should be reinstated,” the County contends.

May’s attorney argues that the trial court’s dismissal of her criminal prosecution should be upheld for two reasons: 1) the judge was “*correct on the merits* in ruling that May had a vested right to continue renting her home on a short-term basis after Morgan County prohibited rentals of that length in October 2010;” and 2) a reversal of the trial court’s dismissal of the prosecution would subject May to double jeopardy “because the trial court was required to apply undisputed record facts to its legal conclusions in order to permit the court to dismiss the case, which was therefore a dismissal on the merits.” (Double jeopardy under the U.S. Constitution prohibits defendants from being prosecuted more than once for the same offense.) The trial court determined May was lawfully renting her property on a short-term basis prior to the enactment of the 2010 ordinance and therefore had a vested or “grandfathered” right to continue renting in that manner following the passage of the ordinance. The trial court determined that the pre-2010 ordinance when she started her short-term rentals was “void for vagueness” as it did not clearly criminalize the rental of residences for less than 30 days. Therefore May “had a vested right to continue her short-term renting after the 2010 amendment,” the attorney argues. “The pre-2010 ordinance is void for vagueness because it did not inform a person of ordinary intelligence that renting a home for less than 30 days would subject the owner to criminal sanctions.” Also, there is no record of anyone ever having been prosecuted under the pre-2010 zoning ordinance for renting on a short-term basis.

ARGUMENTS (S18X1623): May’s attorney argues that if the state Supreme Court reverses the trial court’s dismissal order, her conviction also must be reversed based on a number of errors. “May’s constitutional rights have been flagrantly ignored by Morgan County and the trial court,” her attorney argues in briefs. “The trial court erred by convicting May without holding a trial as to guilt or innocence; by finding May guilty of violating a zoning ordinance

where there is no evidence on the record of her guilt; by failing to accord May the right to confront adverse witnesses; and by admitting prejudicial hearsay evidence into the record during sentencing that had a direct and significant adverse impact upon May. Each of those errors requires that the judgment of the trial court be reversed.”

“May’s complaints about her trial do not justify the reversal of the trial court’s rulings on the issues raised,” the County’s attorney argues in this cross-appeal. “May stipulated to a bench trial, relying almost exclusively on the record from her previous civil trial as the ‘basis of the record in this case,’ and she should not be heard to complain now that she somehow never received a trial.” May “never objected to the bench trial; she never sought to submit additional testimony or evidence, and she did not move for a continuance to request extra time to prepare, if needed,” the attorney argues. “As such, she has waived any such objections.” The record she insisted be the “basis” of this case “contains ample evidence to support her conviction beyond a reasonable doubt.”

Attorney for County: Christian Henry

Attorney for May: C. Wilson DuBose

PARKER V. THE STATE (S18A1589)

A man is appealing his murder conviction in **Jones County** for the shooting death of a friend after a night of drinking moonshine.

FACTS: James Don Parker and his neighbor, Alan Helmuth, had worked together for Georgia Power and been good friends for about seven years. They. The night of Feb. 10, 2014, after returning from a trip to Gatlinburg, TN, Parker invited Helmuth to his home on Stallings Road in Haddock, GA, to share a bottle of “Ole Time Moonshine” Parker had bought at a Gatlinburg distillery. Helmuth told his wife he was going to Parker’s home for a visit and would be back later that night. Parker was about 5 feet, 8 inches tall and weighed about 230 pounds; Helmuth was a lot taller, about 6 feet, 4 inches tall, but also weighed about 230 pounds. Helmuth was a diabetic who at the age of 61, had recently retired due to a heart valve replacement. The next morning at about 7:00, Helmuth’s wife discovered her husband had not returned home, and she was unable to reach him on his cell phone. About the same time, Parker woke up his neighbor and told her to call police. The neighbor later testified that Parker smelled of alcohol and looked as if he’d been in a fight or accident. His face and eyes were swollen, and he had cuts across his eyebrows, nose, and one the side of his head. He was covered in dried blood. The neighbor called police.

At the scene, officers with the Jones County sheriff’s department found Parker outside in 43-degree rainy weather, wearing only blue jeans and boots. Parker told them, “I think my best friend’s dead in there on the floor.” First responders examined Parker on the scene for his injuries. In addition to facial swelling, he had bruising, scratches, and slight injuries to his left hand and both arms, as well as scratches to his lower back, shoulder blade and chest. But first responders determined that while there was some trauma above Parker’s eyes, there was no active bleeding, and they attributed his pupils not dilating to his being intoxicated. Parker admitted he had been drinking and told officers he had drunk a quart of moonshine that night.

Inside Parker’s home, officers found Helmuth on the living room floor in a pool of blood. It was clear there had been a fight in the kitchen. Blood was splattered all over the kitchen walls, floor, refrigerator and counter. Plates were broken and a trash can had been knocked over.

Helmuth had been shot twice in the head, and investigators later determined that the Marlin .22 rifle found on the floor inside the bedroom was the murder weapon.

After Parker was indicted for malice murder and felony murder, his attorney filed a motion stating he was immune from criminal prosecution under the law because he had been justified in shooting Helmuth in self-defense. The trial court rejected the motion. At trial, Parker testified in his own defense that Helmuth had attacked him without provocation at the back door of his house as Helmuth was preparing to leave. Parker claimed Helmuth had beaten him and knocked him into his bedroom, where Parker grabbed the rifle and shot Helmuth in self-defense as Helmuth charged him. Following the January 2015 trial, the jury rejected Parker's version of events as being inconsistent with the physical evidence and the medical condition of the victim. The jury convicted Parker of malice murder and felony murder for killing Helmuth, and he was sentenced to life in prison. Parker now appeals to the state Supreme Court.

ARGUMENTS: Parker's attorney argues the trial court violated the state Supreme Court's 2010 decision in *State v. Hobbs* by removing language from Parker's requested jury instruction on "good character." In *Hobbs*, the Georgia Supreme Court ruled that, "When instructing on good character, the trial court is expected to tell the jury that good character is a substantive fact which may create reasonable doubt leading to an acquittal." Under *Hobbs*, the trial court's removal of language agreed on by the parties, as was the case here, is reversible error. "First, the specific language requested was legally correct, supported by the evidence, and the instruction as given lacked the minimal elements," the attorney argues in briefs. "Second, the erroneous instruction was harmful. Third, as given, the good character instruction is inadequate even under the *Hobbs* dissent." Parker's requested "good character" instruction was supported by "overwhelming evidence of Parker's positive reputation for truthfulness and non-violence," the attorney contends. Five witnesses called by the defense had testified to Parker's non-violent nature, positive reputation in the community, and character for truthfulness, including Helmuth's wife. "This is a rare case with no motive, involving two best friends," Parker's attorney argues. "The evidence against Parker was by no means overwhelming. Parker was eight inches shorter than Helmuth. Helmuth's right hand was mangled from hammering Parker, and Helmuth had no bruises, cuts, or fractures to support the State's theory of mutual combat." "Thus, because the deficient good character instruction went to the heart of Parker's trial defense, and the evidence of malice was underwhelming, the erroneous refusal of Parker's requested instruction is reversible error. This Court must reverse." The trial judge also erred by intimating his opinion on the ultimate issue before the jury. This Court has ruled that state law is violated when jury instructions "assume certain things as fact and intimate to the jury what the judge believes the evidence to be." In this case, the judge instructed jurors that, "A person who fatally wounds another, even in self-defense, is not entitled to hasten the victim's death by continuing to pump bullets into the victim's body." This instruction was highly damaging to Parker's case because it suggested the judge's opinion on a disputed fact, and it intimated that even assuming Parker's self-defense testimony was true, self-defense was barred as a matter of law because more than one shot was fired." Finally, Parker received ineffective assistance of counsel from his trial attorney in violation of his constitutional rights. Among other things, the trial attorney failed to call an expert witness in crime scene analysis and blood pattern analysis, Parker's attorney argues.

The State, represented by the District Attorney's and Attorney General's offices, argues the trial judge properly charged the jury on "good character" evidence. The trial court properly gave the pattern jury instruction on good character and no error has been shown. The trial court also did not violate state law in its charge to the jury. The judge gave the instruction with the consent of Parker's attorney. "The charge did not intimate that a crime had been committed or that Appellant (i.e. Parker) was responsible, nor did it negatively reflect upon his self-defense claim," the State argues. Furthermore, there was evidence at trial to support a finding that Helmuth had been immobilized by the first shot and that Parker had continued to shoot him while he was lying on the ground. Finally, Parker received effective legal counsel at trial, the State contends.

Attorney for Appellant (Parker): Matthew Winchester

Attorneys for Appellee (State): Stephen Bradley, District Attorney, Dawn Baskin, Sr. Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Meghan Hill, Asst. A.G.