Supreme Court of Georgia
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SUMMARIES OF OPINIONS

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SAVAGE V. STATE OF GEORGIA ET AL. (S15A0277)
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HOBGOOD V. STATE OF GEORGIA ET AL. (S15A0279)

The Supreme Court of Georgia has unanimously upheld a superior court judge's ruling that authorized up to $397 million in bonds to build a new Braves baseball stadium.

In today's 43-page opinion, **Justice David Nahmias** writes for the Court that "we conclude that the intergovernmental contract is valid; that the issuance of the bonds will not violate the Georgia Constitution's debt limitation clause, gratuities clause, or lending clause or Georgia's revenue bond laws; and that the process used to validate the bonds was not deficient. We therefore affirm the trial court's judgment validating the stadium project bonds."

According to briefs filed in the case, in 2013, representatives of **Cobb County**, the Cobb-Marietta Coliseum and Exhibit Hall Authority, and the Atlanta National League Baseball Club, Inc. began discussing plans to build a 41,500-seat stadium for the Braves. On May 27, 2014, the Cobb County Board of Commissioners approved the issuance of the bonds by the Authority, and the parties signed several agreements which are the basis of the project. The new stadium will be built on land acquired by the Authority and will be a public-private partnership with an estimated cost of $622 million. The Authority will issue up to $397 million in bonds to pay the public share of building the new stadium, which will be located in the Cumberland area near the interchange of I-75 and I-285 in northwest Atlanta. The new "SunTrust Park," as it has been named, will replace Turner Field located in downtown Atlanta. In addition to borrowing up to $397 million to cover $368 million in construction costs plus borrowing costs and interest on the debt, the County plans to raise $14 million for transportation improvements and $10 million from

businesses in the Cumberland Community Improvement District. The Braves will contribute $230 million. As issuer of the bonds, the Authority will retain title to the stadium, the stadium site and certain parking areas until the bonds are fully retired and then it will convey title to the County. Under the agreements, the Braves have an exclusive license to use the stadium for 30 years, with the option to renew for an additional five. At the end of that period, the Braves would have an option to purchase the stadium at 50 percent of fair market value. Total debt service for the bonds is estimated to be about $25 million annually. For the first 30 years, the Braves will pay $6.1 million each year in licensing fees, which will be contributed to bond payments.

Three Cobb residents – attorney T. Tucker Hobgood, Larry Savage, and Richard Pellegrino – opposed the authorization of the bonds and were permitted to intervene in the bond validation hearing. They argued a number of things, including that authorization of the bonds first required approval by taxpayers. Following a July 7, 2014 bench trial – before a judge with no jury – the Cobb County Superior Court validated the bonds, finding that a referendum was not a prerequisite to the Authority's issuance of the bonds and that the bond proposal was sound, feasible and reasonable, which is the standard to be met in a bond validation proceeding. Hobgood, Savage, and Pellegrino then appealed to the Georgia Supreme Court, arguing the trial court erred in validating the bonds. While each submitted briefs enumerating various errors, their primary contentions on appeal were that the agreement in which the County agrees to pay for the bonds and the Authority agrees to issue the bonds is not a valid intergovernmental agreement; that validating the bonds violates the debt clause and gratuity clause of the Georgia Constitution; that the project is an improper use of public tax money for a private facility; and that the bonds cannot be authorized without a public referendum.

Today's opinion addresses each of their challenges, including that the Intergovernmental Agreement is invalid. But Hobgood, Savage, and Pellegrino are wrong, the high court concludes. For a number of reasons, "the Intergovernmental Agreement is valid under the intergovernmental contracts clause of the Constitution," the opinion says.

The opinion points out that "it is evident that the lawyers and officials for Cobb County, the Cobb-Marietta Coliseum and Exhibit Hall Authority, and the Braves parties relied on the prior decisions of this Court interpreting Georgia's Constitution and revenue bond law when structuring the financing for the new Braves stadium project, including in particular the issuance of revenue bonds by the Authority secured in part by an intergovernmental contract. There is nothing wrong with that," the opinion says. And while "aspects of the deal structure at issue may push the law about as far as it can go, it does not cross the line into illegality."

However, the Court emphasizes that "we do not discount the concerns [Hobgood, Savage, and Pellegrino] have raised about the wisdom of the stadium project and the commitments Cobb County has made to entice the Braves to move there. But those concerns lie predominantly in the realm of public policy entrusted to the County's elected officials for decision, not in the realm of constitutional or statutory law. And to the extent the concerns affect whether the bond proposal is sound, feasible, and reasonable, we defer to the trial court's findings on those factors, which were supported by evidence in the record."

"If the stadium deal does not fulfill the high expectations that have been set for it, there may be a significant political price to pay for those who negotiated and signed onto it," today's opinion concludes. "But under the law of Georgia as construed in the precedents of this Court,

we cannot say that the trial court erred in validating the bonds or that the validation process was deficient. Accordingly, we affirm the trial court's judgment."
Attorneys for Appellants (Hobgood, Savage, Pellegrino): T. Tucker Hobgood, David Rutherford, Larry Savage (representing himself "pro se"), Gary Pelphrey
Attorneys for Appellees (County, Authority): Thomas Curvin, Matthew Nichols, J. Kevin Moore, John Moore, Deborah Dance, Linda Brunt, Blake Sharpton, Lesly Murray

O'CONNELL V. THE STATE (S15A0344)

The Supreme Court of Georgia has unanimously upheld the murder conviction and life prison sentence given to Brenda O'Connell, who was 15 years old when she and her sister, Catherine O'Connell, were charged with killing their adoptive mother.

In this high-profile **Gwinnett County** case, **Justice Carol Hunstein** writes for the Court that the evidence "was sufficient to authorize a rational jury to find appellant [i.e. Brenda] guilty beyond a reasonable doubt of the crimes of which she was convicted." On Jan. 21, 2014, this Court also upheld the murder conviction and life prison sentence given to Catherine.

According to the facts at trial, Catherine was 11 years old when Muriel O'Connell adopted her from a Guatemalan orphanage. A few years later, Muriel adopted a second daughter, Brenda, from the same orphanage. The girls were the same age, had known each other at the orphanage, and quickly formed a strong bond with each other. But their relationship with their mother gradually deteriorated. According to briefs filed in the case, there were confrontations over cell phone bills and boyfriends, and Muriel told friends she feared for her life. State prosecutors said Muriel believed the girls were trying to poison her by putting diethyl ether, a compound found in car starter fluid, in her vodka bottle.

The night of Aug. 6, 2006, the girls went to a neighbor's house. The neighbor later testified that when he answered the door, Brenda, who had a brown and green sash tied around her neck, collapsed on the floor gasping for air. He said her actions "seemed kind of staged." After Catherine told him their mother had tried to choke Brenda, the neighbor went to the girls' home where he found Muriel's body on the bathroom floor with a butcher knife in her hand. When police arrived, both Brenda and Catherine gave statements saying their mother had attacked Brenda with a knife, and Catherine had intervened to defend her sister. They said Catherine had grabbed her mother around the neck, causing Muriel to faint. The girls claimed Muriel had abused and mistreated them since they came from the orphanage. But Brenda eventually admitted to police that she had placed the knife in Muriel's hand after she was dead. An autopsy revealed that Muriel had sustained multiple head injuries while still alive, and had died from strangulation. A medical examiner who had evaluated both girls testified he found no injuries substantiating their claim of self-defense. Brenda did not have injuries consistent with strangulation, and Catherine's minor scrapes and bite marks appeared self-inflicted.

In October 2008, the girls were tried as adults, a jury convicted them of murder and aggravated assault, and they were sentenced to life in prison.

In today's unanimous 6-page opinion, which involves Brenda's appeal to the state Supreme Court, the high court rejects the first two arguments raised by Brenda's attorney, which are identical to those raised by Catherine's attorney in her appeal: that during jury selection, the State racially discriminated by striking a prospective juror, and that the trial court erred by refusing to allow in evidence of her traumatic upbringing in Guatemala.

"For the same reasons that we concluded that Catherine's enumerations of error were without merit, we conclude that these two enumerations of appellant are without merit," the opinion says.

In her appeal, Brenda's attorney additionally argued that the trial court erred in refusing to instruct jurors that they could consider whether she was guilty of involuntary manslaughter as opposed to the more serious charge of murder. Under Georgia Code § 16-5-3, a "person commits involuntary manslaughter in the commission of an unlawful act when he causes the death of another human being without any intention to do so by the commission of an unlawful act other than a felony."

"The trial court declined to give the charge, and appellant now contends that Catherine's testimony that she strangled her mother in an attempt to pull her off appellant, without any intent to kill her, was evidence of the misdemeanors of reckless conduct and simple battery, requiring the trial court to give the requested charge on unlawful act involuntary manslaughter," the opinion says. "We conclude, however, that even if the trial court erred in failing to charge on felony involuntary manslaughter, with battery and reckless conduct as the underlying misdemeanors, the error was harmless, because there was overwhelming evidence that was inconsistent with the co-defendants' version of events that they caused their mother's death unintentionally." Rather the evidence "supports the State's case that the co-defendants acted with malice in killing their mother," the opinion says. "Judgment affirmed."

Attorney for Appellant (O'Connell): Edwin Wilson

Attorneys for Appellee (State): Daniel Porter, District Attorney, Daniel Mayfield, Chief Asst. D.A., Christopher Quinn, Asst. D.A.

JONES V. BOONE (S15A0521)

The Supreme Court of Georgia has unanimously ruled that Mayor Mary Ann Whipple Lue of Gordon, GA did not have the authority to appoint a new city attorney following a vote to fire the man who had held the position for more than 35 years.

Today's decision in this locally high-profile **Wilkinson County** case is the second this month issued by the Georgia Supreme Court in a case involving a contentious dispute over several actions Lue has taken since becoming mayor last year.

According to the Gordon City Charter, the local government's authority "shall be vested in a city council to be composed of a mayor and six council members." The mayor has the power to "appoint and remove, for cause," all officers, department heads, and employees of the city "with confirmation of appointment or removal by the council." The City Charter states that "the affirmative vote of four councilmembers shall be required for the adoption of any ordinance, resolution, or motion." The mayor is permitted to vote in the case of a tie. At a May 21, 2014 city council meeting, Lue made a motion to remove Joseph A. Boone, who had served as city attorney for several decades. Three city council members voted in favor of the motion, two against, and one abstained. After determining she had a vote because the abstention counted as a negative vote, the mayor voted in favor of terminating Boone, bringing the vote to the four affirmative votes required by the City Charter. Subsequently there was a motion to give the mayor the authority to appoint an interim attorney, and the vote was the same: three in favor, two against, and one abstention. Again the mayor determined she had a vote and cast a yes. The next

day, the mayor sent out a letter announcing the appointment of Ronny E. Jones as the new interim city attorney.

In September 2014, Boone sued, filing a petition for what is called a "writ of quo warranto," which is used to challenge an individual's right to hold a public office. Boone argued he was still city attorney because Jones was never confirmed by the city council as required by the City Charter and the mayor did not have the authority to vote because there was no tie. Jones responded that Boone was no longer city attorney as he had resigned from that position at the May 21, 2014 city council meeting when he was voted out of office. Following a hearing, the Jasper County trial judge ruled in favor of Boone, finding that Jones "is not the appropriately appointed city attorney of Gordon, Georgia." The judge ruled that the question of whether Jones appropriately holds the appointment of city attorney "is a question of law and, therefore, a jury trial is not required under the laws of the State of Georgia." And, the judge stated: "It is the finding of this court that the city attorney serves at the pleasure of the city council and the mayor's vote was used inappropriately and was not valid under the Code of the City of Gordon." Because the judge determined Lue did not have the power to appoint Jones as city attorney, he granted Boone's petition for a writ of quo warranto.

In today's decision, **Justice Carol Hunstein** writes that "we affirm the order granting the writ of quo warranto," and "we find no authority permitting the mayor to count the council member's abstention from voting as a negative vote, thereby creating a tie."

In its 2007 decision in *Merry v. Williams,* the Georgia Supreme Court ruled that the requirement of a specific number of affirmative votes exhibits a legislative intent that abstentions not be counted with the majority of votes cast. The high court further determined they could not be counted as negative votes. While Jones argued in his appeal that the mayor had the authority to treat an abstention as a negative vote, he "cites no act, law, charter provision, or rule of procedure granting either the mayor or the city council such authority," today's opinion says.

"Accordingly, in the absence of any clear statutory, charter provision, or rule of procedure authorizing the mayor to treat an abstention as an actual vote by a council member, either in the affirmative or negative, we hold that the council member's abstention from voting on the May 21, 2014 motion to delegate to the mayor the power to appoint a city attorney was, in fact, no vote at all. Therefore, there was no tie vote on the motion and Mayor Lue was not authorized to cast a vote in its favor. The sole authority to appoint a city attorney thus remained in the city council." The Court finds no merit in Jones' other challenges.

Attorney for Appellant (Jones): Ronny Jones, pro se
Attorney for Appellee (Boone): James Green

DAVID STONE V. ANNA STONE (S15F0064)

Under a 5-to-2 decision by the Georgia Supreme Court, only parents may share legal custody of a child.

With today's decision, the high court has reversed a **Gwinnett County** juvenile court ruling that granted joint custody of a now 10-year-old boy to his father and his maternal grandmother. The boy's mother struggled with drug addiction following his birth, and the child has lived with his grandmother most of his life.

But in 2013, after a court found that his father was a fit parent, the father petitioned the court for sole custody, arguing that Georgia law does not authorize joint custody between a

parent and a non-parent third party and challenging the grandmother's right to continue to have physical custody of the child. Today, the high court has ruled in his favor, finding that under the law, only parents who are deemed fit have the legal right to raise their child.

"Because Georgia statutory law supports joint custody arrangements only between parents, we must reverse the award of joint legal custody in this case," **Justice Harold Melton** writes for the majority.

According to the facts of this case, which has involved several courts, in 2005 David and Anna Stone had a baby boy. The parents, who were not married, moved in with Anna's mother, Sandra Webb. The mother had a history of drug abuse, and the Department of Family and Children Services became involved in protecting the child. Six months after moving in with Webb, the couple married and moved with their baby into their own home. But they struggled; he worked out of state and she continued abusing drugs and was arrested. Webb became the child's primary caretaker. In March 2011, the couple divorced and Anna was awarded primary physical custody of her little boy; mother and son lived with Webb. In October of that year, Webb was granted temporary guardianship of the boy with the consent of both David, because he worked out of state, and Anna, because she needed inpatient drug treatment. In March 2013, Webb petitioned for custody in Gwinnett Superior Court. Meanwhile, Anna left Georgia to be with David, instead of attending outpatient drug treatment following her inpatient treatment. In April 2013, David and Anna remarried. But two months later, David filed for divorce in Gwinnett County Superior Court. The court allowed Webb to intervene in the custody case, which was transferred to the juvenile court. Throughout all this, the child remained with his grandmother, who remained his primary caretaker. In January 2014, the Gwinnett juvenile judge awarded joint legal and joint physical custody to the child's father and grandmother. The father then appealed to the state Supreme Court. (On appeal, a guardian ad litem assigned to represent the child has argued that it is in his best interest that his grandmother be awarded either joint or sole custody.)

In today's majority opinion, the high court finds that "our legislature has clearly indicated that joint custody arrangements do not include third parties when one or both parents are suitable custodians." Georgia Code § 19-9-3, which lays out general guidelines for custody arrangements, "shows that joint custody considerations remain with the parents of the child." The statute states: "In all cases in which the custody of any child is at issue *between the parents*, there shall be no prima-facie right to the custody of the child in the father or mother. There shall be no presumption in favor of any particular form of custody, legal or physical, nor in favor of *either parent.*" The majority points out that the same statute "goes on to state an express desire to preserve sharing of *rights* between parents and *visitation* with parents and grandparents. "Quite explicitly, the statute includes grandparents with parents for purposes of contact (visitation) with the minor child, but, when rights and responsibilities (custody) are in consideration, the statute excludes grandparents and encourages sharing between the parents only," the majority opinion says. Throughout, the statute "pairs 'rights and responsibilities' solely with the parents, and grandparents are excluded."

A separate statute, Georgia Code § 19-7-1, does permit a grandparent to win custody of a child if his parent or parents lose their parental rights and the court "determines that an award of custody to such third party is for the best interest of the child." The statute says: "There shall be a rebuttable presumption that it is in the best interest of the child or children for custody to be

awarded to the parent or parents of such child or children, but this presumption may be overcome by a showing that an award of custody to such third party is in the best interest of the child or children."

"This statute indicates that there are only three groups capable of exercising parental control: a parent, parents or third parties of a limited class," today's majority opinion says. "A group comprised of a parent and a third party is not mentioned because it is *not* a combination who may be empowered with joint control over a child." Furthermore, "construing the Code as authorizing the State to require a fit and capable parent to share custody of his child with anyone except the child's other parent would raise significant constitutional concerns."

"In light of the foregoing, the trial court in this case had no power to grant joint custody to Husband and Grandmother, and that award must be vacated," the majority concludes. However, today's opinion emphasizes that Georgia statutes promote the interaction of "loving grandparents" with a minor child, and provide "a mechanism for a grant of visitation rights to grandparents when necessary to ensure and preserve this contact." "However, in situations where a parent is suitable to exercise custody over a child, the statute does not allow that parental custody to be limited by a joint custody arrangement with a grandparent or, for that matter, any other person."

In the dissent, **Justice Carol Hunstein** argues that the majority's "strict reading of the statute" ignores the statutory requirement that the "sole issue" for determining "any action involving the custody of a child between the parents or either parent and a…grandparent" is "what is in the best interest of the child." "According to the evidence presented to the trial court, the best interests of the child mandated joint legal custody to Husband and Grandmother," says the dissent, which is joined by Justice Robert Benham.

The dissent points out that the number of grandparents raising their grandchildren has steadily increased and that in 2011, grandparents were the primary caregiver for about 3 million children. "As I have previously recognized, 'In reality, many children today are being raised not by their parents but by other family members with a strong attachment to the child and who have lovingly and responsibly acted in the role of the child's parent.' In light of this trend, it is impractical and shortsighted to conclude that joint legal custody must be limited to parents."

"The result of the majority's opinion is that a grandmother, who has been the primary caretaker and the sole source of stability and security for almost the entire life of her grandson, will no longer have any legal right to participate in his care," the dissent says. "It is apparent from the trial court's order that custody in Husband would only be in the child's best interest, and not cause long-term harm, if it were predicated on the concurrent exercise of legal custody by Grandmother." The dissent urges the Legislature to "reconsider its limited definition of 'joint legal custody'" as stated in Georgia Code § 19-9-6 (5).

Attorney for Appellant (Father): Alan Mullinax
Attorney for Appellee (Grandmother): Lawrence Washburn, III

ESHLEMAN V. KEY (S14G1173)

The Supreme Court of Georgia has reversed a Georgia Court of Appeals decision and ruled that a **DeKalb County** police officer cannot be held liable for injuries suffered by a neighborhood boy who was bitten by her police dog because she is protected by official immunity.

In November 2011, 11-year-old Chandler Key was playing football in the front yard of his neighbor's home when he was bitten by a police dog. The dog, trained to apprehend criminal suspects, was owned by the DeKalb County Police Department and assigned to Officer Lynn Eshleman after she completed canine handler school. Under department policy, canine handlers were responsible for the care and maintenance of the dogs. Eshleman, who lived in Walton County in Key's neighborhood, kept the dog, named Andor, at her home when she was not working. After noticing that neighborhood children were peering over the fence into her yard, Eshleman spoke with them and their parents, cautioning them not to look over the fence because the act antagonized Andor, according to briefs filed in the case. She also warned them that if they "ever…see him out, he happens to escape the fence or something, to just stand still." When she was later asked what it was about the children's actions that could put them in danger, Eshleman replied, "Well, when you run, you become prey to a dog."

On Nov. 6, 2011 Eshleman, who was off-duty, was preparing to take Andor with her to visit a friend. She placed the dog in a kennel in the back of her truck, swung the door of the kennel shut and "assumed" it was closed. But she had neglected to secure the crate's door. When she stepped away to retrieve a water bottle, Andor jumped from the truck and ran into the yard where the boys were playing. As Key tried to run away, the dog chased him, latched onto his arm and dragged him to the ground, injuring him.

Key's father sued Eshleman, alleging she was liable for negligence because she had failed to properly restrain the canine. According to Chandler's father, the boy suffered a gaping laceration and puncture wound and had to be treated at the hospital with injections and stitches. Clearly visible scars remain. The boy has also suffered mental trauma, his father claims. In response, Eshleman argued she was entitled to official immunity because in caring for the canine, she had been performing her duties as a police officer. Eshleman admitted she had not securely closed the door of the kennel and that the canine had gotten out of her truck. She did not deny that the dog then bit the boy. However, she argued Key could not recover damages because of the official immunity. Eshleman filed a motion for "summary judgment," which a trial judge grants upon concluding there is no need for a jury trial because the facts are undisputed and the law clearly falls on the side of one of the parties. The trial court, however, denied her motion. Eshleman then appealed to the Court of Appeals, which upheld the trial court's ruling.

At issue in this case is the difference between "discretionary" and "ministerial" duties. Discretionary acts are those requiring personal deliberation, decision-making, and judgment. Ministerial duties, on the other hand, are absolute, simple, and involve merely the execution of a specific task or direction. Under the doctrine of public official immunity, officials are afforded greater protection when they are faced with a situation that requires them to make a judgment call, so that they can make that decision without fear of being sued. They are offered less protection when they are performing simple, automatic tasks governed by clear rules. Under the Georgia Supreme Court's 2013 decision in *Roper v. Greenway,* county law enforcement officers such as Eshleman are entitled to official immunity for the negligent performance of discretionary acts within the scope of their authority, but they have no immunity if they act with malice or intent to injure, or if they negligently perform a ministerial act.

While the Court of Appeals agreed with Eshleman that her actions at the time of the incident in caring for Andor were within the scope of her official duties, "she has not shown that the act from which the alleged liability arose – proper restraint of the canine by securely closing

the kennel door – was discretionary." Furthermore, the Court of Appeals found, there was some evidence that Eshleman's duty to properly restrain the dog was ministerial. The appellate court held that a ministerial duty may be established by a statute, and that under Georgia Code § 51-2-7, a "person who owns or keeps a vicious or dangerous animal of any kind and who, by careless management or by allowing the animal to go at liberty, causes injury to another person," may be liable to the injured person. "Because Andor was a police canine, specially trained to apprehend suspects, there was some evidence that 'the animal had a propensity to do the act which caused the injury and that the defendant knew of it,'" the Court of Appeals opinion says. "Where the relevant facts pertaining to official immunity are in dispute, resolution of the factual issues is for the jury." Therefore, under the Court of Appeals opinion, the lawsuit against Eshleman could go forward. Eshleman then appealed to the state Supreme Court, which agreed to review the case to determine whether the Court of Appeals was wrong in ruling that § 51-2-7 creates a ministerial duty in this case.

In today's unanimous opinion, **Justice Keith Blackwell** writes that the Court of Appeals was wrong.

"[W]e will assume that Eshleman, having been assigned responsibility for the care and maintenance of Andor, knew the dog to be a 'vicious or dangerous animal,'" the opinion says. "Assuming these things, it follows that Eshleman absolutely owed a duty to manage and restrain Andor so as to prevent the dog from injuring others." However, "the important question in the context of official immunity is not merely whether an officer owed a duty of care, but rather, whether the official owed a duty that is particularized and certain enough to render her duty a ministerial one."

"The duties that Eshleman was alleged to have violated were not ministerial ones because, although the duties reflected in [state law] and the county ordinance may be definite, they do not require merely the carrying out of a specified task," the opinion says. "They require instead an exercise of personal deliberation and judgment about what is reasonable in the particular circumstances presented. The trial court, therefore, erred when it denied the motion for summary judgment on the ground of official immunity, and the decision of the Court of Appeals affirming that denial must be reversed."

Attorneys for Appellant (Eshleman): Duane Pritchett, Kendrice Smith
Attorneys for Appellee (Key): Andrew Jones, M. Chase Swanson

SIMS V. THE STATE (S15A0182)

The Supreme Court of Georgia has upheld the murder conviction and life prison sentence given to James Revera Sims, II in connection with the death of his girlfriend's 3-year-old son, Cayden Allen, in **Rockdale County**.

In today's unanimous opinion, **Justice Carol Hunstein** writes for the Court that the "evidence is sufficient to enable any rational trier of fact to find appellant [i.e. Sims] guilty beyond a reasonable doubt of the crimes for which he was convicted."

According to the facts of the case, on the afternoon of April 8, 2011, Cayden's mother left for work, leaving her 3-year-old son in Sims' care. At 6:10 p.m., Sims called 911 and requested an ambulance for the little boy. City of Conyers firemen, police and emergency medical staff were dispatched to Sims' apartment on South Main Street in Conyers where they found the little boy lying on his back on the living room sofa, in his underwear. His eyes were

open, there was a lump on his forehead, and he was unresponsive. He was breathing in a shallow, labored fashion that sounded like snoring. By the time the ambulance got him to Rockdale Medical Center, Cayden was completely unresponsive and in a coma. Doctors found bruises on his forehead and a CT scan confirmed that Cayden had suffered multiple brain injuries consistent with an inflicted injury. Within an hour, he was airlifted to Egleston Children's Hospital in Atlanta, where he remained on life support. There, physicians found numerous bruises and scrapes on Cayden's scalp, forehead, and face, as well as bruises on his hip, knees, legs, and genitalia. The examining physician concluded that the injuries were consistent with multiple blunt impacts to the head and "shaken baby" syndrome.

Sims told police that Cayden had been watching a movie in his room, and when he went to check on him, he discovered Cayden had wet himself. He asked Cayden why he had not told him that he needed to go to the bathroom, and Cayden then said he needed to go and put his hand out to Sims. Sims said he took Cayden's hand and turned to walk out of the room when the child slipped and fell backwards. Sims said the little boy then began choking and jerking on the floor. Sims re-enacted his version of events for a law enforcement officer in Cayden's room, and the officer recorded a video of the reenactment on his iPhone. Sims did not say what exactly Cayden's head struck, but the floor was carpeted, and there was a foam play mat in the area where Sims claimed Cayden had fallen. The child's mother said that before she had left for work that day, her son had appeared healthy and was behaving normally.

Based on the inconsistencies between Sims' story and Cayden's apparent injuries, the officer asked Sims to come to the Conyers Police Department for an interview. He informed Sims that he was not under arrest, and Sims agreed to go to the station, where the lieutenant and another officer interviewed him.

On April 11, Cayden was declared brain dead and removed from life support. The medical examiner concluded that Cayden's cause of death was blunt force head trauma injuries and the manner of death was homicide. Sims was charged with murder.

In September 2012, a jury convicted Sims of malice murder, aggravated battery and cruelty to children in the first degree. He was sentenced to life in prison plus a consecutive prison sentence of 10 years. Sims then appealed to the Supreme Court.

In his appeal, Sims' attorney argued that the trial judge made several errors, including that the judge was wrong to deny Sims' motion to suppress the video recording the officer made of Sims with his iPhone. Under state law, it is illegal for anyone "through the use of any device, without the consent of all persons observed, to observe, photograph, or record the activities of another which occur in any private place and out of public view." Sims argued the officer failed to obtain a warrant permitting him to use a surveillance device inside Sims' home.

However, today's opinion says, even "assuming arguendo that admitting the video recording was in error, it was harmless because it is highly probable that the recording did not contribute to the jury's verdict in light of the overwhelming evidence of guilt. Moreover, the video recording was cumulative of the videotaped statement appellant gave at the police department, his own testimony at trial, and crime scene photographs depicting the victim's room." With today's opinion, the high court has rejected all of Sims' remaining arguments.

Attorney for Appellant (Sims): Beau Worthington

Attorneys for Appellee (State): Richard Read, District Attorney, Roberta Earnhardt, Sr. Asst. D.A., Dabney Kentner, Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Jason Rea, Asst. A.G.

FLEMING V. THE STATE (S14G1811)

Under an opinion today by the Georgia Supreme Court, a woman has lost her appeal of an **Athens-Clarke County** court ruling and failed in her effort to have her sentence shaved by the amount of time she spent in a drug court program before she was terminated for failing to comply with its terms.

In today's unanimous opinion, **Justice Carol Hunstein** writes that based on the plea deal to which the woman agreed, "we hold that no sentence credit for participation in a drug court program is warranted in this particular case."

Katherine Fleming was indicted in April 2010 on two counts of Financial Identity Fraud and two counts of Financial Transaction Card Fraud. In March 2011, she withdrew her not guilty plea and pleaded guilty as part of a plea agreement negotiated with the prosecutor. As part of the agreement, she enrolled in the Western Judicial Circuit Felony Drug Court Program, and her sentence was deferred. Under the terms of the agreement, if she successfully completed the program, she would be sentenced to eight years on probation. However, if she failed to complete the program, she agreed to a sentence of 10 years with the first four in confinement. Under either scenario, she would be required to pay $1,750 in restitution to the victim.

After more than two years in the drug program, Fleming was terminated by the trial court for failing to comply with the program's terms and conditions. On May 8, 2013, the trial court sentenced Fleming under the terms of the plea deal to 10 years with the first four in confinement. The trial court declined her request for credit for time served in the drug program, which she failed to complete, ruling that because the plea agreement was silent about the issue of credit for time served, it contemplated that whatever sentence was imposed would begin as of the date of sentencing. Fleming appealed to the Georgia Court of Appeals, which in June 2014 upheld the lower court's ruling. Fleming then asked to appeal to the state Supreme Court, which agreed to review the case, asking the parties to address under what circumstances a defendant may receive credit for participation in a drug court program.

"We hold that credit towards Fleming's sentence for her time spent in the drug court program is not warranted because such credit was not part of her plea agreement, the relevant statutes do not provide for credit in this case, and allowing credit would discourage defendants from successfully completing the drug court program," today's opinion states.

The opinion points that the court deferred sentencing while Fleming participated in the drug program, and she was neither under a sentence nor confined while she was in the program. Her plea agreement did not specify that her eventual sentence would be adjusted in any manner to give her credit for the time that she would spend in the program. "Instead, it stated simply and clearly what her sentence would be based solely on her eventual success or failure in the program," the decision says. "Thus, the trial court correctly followed the terms of the plea agreement, to which Fleming had agreed, in sentencing her to confinement and not awarding her any credit for time served in the drug court program."

Attorney for Appellant (Fleming): Benjamin Pearlman

Attorneys for Appellee (State): Kenneth Mauldin, District Attorney, Brian Patterson, Chief Asst. D.A.

ELBERT COUNTY ET AL. V. SWEET CITY LANDFILL, LLC, ET AL. (S15A0489)

The Supreme Court of Georgia has ruled in favor of **Elbert County** and reversed a lower court's decision that would have allowed a proposal for a solid waste landfill to move forward.

With today's unanimous decision, **Presiding Justice P. Harris Hines** writes that the Elbert County Superior Court made several errors, and it is sending the case back to the trial court for further proceedings.

Sweet City Landfill, LLC, wants to operate a 270-acre landfill on one of three sites in Elbert County, according to briefs filed in the case. Sweet City sought a "local compliance letter" from Elbert County, which would state that the solid waste landfill satisfied local zoning laws and the local solid waste management plan. Under the Georgia Comprehensive Solid Waste Management Act, the local compliance letter is a prerequisite for then applying to the state Environmental Protection Division. In November 2009, Sweet City filed with the County a document called "Application and Agreed Minimum Operating Conditions," also known as a "Host Agreement," which included a request for a Special Use Permit. At the time, Elbert County ordinances required the special permit for operation of a solid waste landfill. However, the County was in the process of amending its ordinances, the effect of which was to exempt a "waste to energy" solid waste facility. Sweet City then sought to amend its application to qualify as a "waste to energy" project and thus be exempted from the Special Use Permit requirement. When the County instead decided to proceed with a waste disposal facility operated by Plant Granite, LLC, which in the County's view was a "waste to energy" facility, Sweet City sued. Sweet City contended that while the County required it to obtain a Special Use Permit, the County did not require Plant Granite to obtain such a permit. In October 2011, Sweet City and the County entered into an agreement to put on hold their legal disputes while they sought common ground on Sweet City's Special Use Permit application.

At a meeting July 9, 2012, the Elbert County Board of Commissioners voted 5-to-0, "not to enter into a 'Host Agreement' with Sweet City Landfill, LLC" and to terminate the agreement to put on hold the legal disputes. Less than three weeks later, the County adopted a zoning ordinance which would essentially preclude Sweet City's planned landfill. Sweet City did not try to appeal the July 9, 2012 vote in superior court, nor did it seek further relief from the County. Rather, in March 2013, it again sued the County, challenging its solid waste ordinance as unconstitutional for violating the Commerce Clause and the Equal Protection Clause. Sweet City also sought a "writ of mandamus" to force the County to allow Sweet City to proceed with the landfill. The County filed a motion to dismiss the lawsuit, arguing the trial court lacked authority because Sweet City had failed to appeal the decision to the superior court within 30 days of the Board of Commissioners' July 2012 vote, and because the landfill company went straight to court without first exhausting its administrative remedies, such as appealing to the County. Sweet City then filed a motion for "summary judgment," which a court grants upon determining a jury trial is unnecessary because the facts are undisputed and the law falls squarely on the side of one of the parties.

On Sept. 11, 2014, the Elbert County Superior Court ruled in Sweet City's favor and issued an order finding that the County's solid waste ordinance violated the Commerce Clause of

the U.S. Constitution, and that the July 9, 2012 action by the Board of Commissioners deprived Sweet City of the right to Equal Protection under both the U.S. and Georgia constitutions. The trial court found that the County's intent in enacting the solid waste ordinance was "to ban all municipal solid waste landfills in Elbert County." The trial court also determined that the July 9, 2012 Board action was a "siting decision" that required notice to the public under Georgia law, and that the public had not been notified. As a result, the trial court found the July 9, 2012 vote was void from the beginning and was "thus unappealable." The superior court implied that the Board's action was not final, concluding that it "only declined to enter into a host agreement with Sweet City and took no action with respect to Sweet City's Special Use Permit application." However, while Sweet City had not exhausted all administrative remedies before seeking judicial review, the trial court denied the County's motion to dismiss the case on that ground, ruling that Sweet City did not have to exhaust its administrative remedies because doing so would be futile. The County and county officials then appealed to the state Supreme Court.

In today's opinion, the Court addresses each of the trial court's rulings, finding a number of errors. For instance, the ordinance does not, on its face, discriminate against interstate commerce in violation of the Constitution's Commerce Clause, the opinion says. The trial court's order says that the "stated legislative intent of the Elbert County Solid Waste Ordinance as of 2009 and present is to ban all municipal solid waste landfills in Elbert County." But "this ignores the record before the trial court," the opinion says. Rather, the stated intent of the ordinance "is to promote the safety and welfare of the County residents, preserve County resources regarding County-maintained roads, and protect the natural resources of the County." Sweet City argued that if all other Georgia counties enacted similar ordinances, the cumulative effect would significantly impact interstate commerce. "But this argument is simply speculative, and there is no evidence that the enactment of ordinances with the same siting criteria in the other 158 counties of Georgia would, in fact, produce an effective ban on the location of solid waste facilities," the opinion says.

The trial court also erred in ruling in favor of Sweet City on its claim that it was deprived of equal protection by the County's determination that while Sweet City was required to have a Special Use Permit, Plant Granite was not. The trial court never should have addressed the issue, today's opinion says, as Sweet Water failed to first obtain a final decision from the Board of Commissioners before seeking review by the court.

Attorneys for Appellants (County): Bill Daughtry, Brandon Bowen, Robert Walker, Normal Fletcher, A. Franklin Beacham III, Lee Carter

Attorneys for Appellees (Sweet City): Andrew Welch, III, Lajuana Ransaw

PHILLIPS ET AL. V. HARMON ET AL. (S14G1868)
HARMON ET AL. V. PHILLIPS ET AL. (S14G1893)
HENRY MEDICAL CENTER V. PHILLIPS ET AL. (S14G1895)

A mother whose baby was born brain-damaged will get a new trial in her medical malpractice lawsuit against medical providers under a decision today by the Supreme Court of Georgia.

In today's unanimous opinion, written by **Presiding Justice P. Harris Hines**, the high court has upheld a Georgia Court of Appeals ruling that communication between the **Henry County** trial judge and the jury outside the presence of the parties and their attorneys was

reversible error and warrants a retrial. At the same time, the Supreme Court has reversed the part of the ruling related to a jury instruction about the destruction of evidence, and it is sending the case back to the Court of Appeals for further proceedings.

According to the facts of the case, Santhonia Hector entered Henry Medical Center, Inc. on Oct. 29, 2006 where she gave birth to a son, Lee V. Phillips, IV. She later filed a medical malpractice lawsuit against Deborah E. Haynes, M.D., an obstetrician, Marcia Harmon, a certified nurse midwife, Eagles Landing OB-GYN Associates, P.C., Eagles Landing OB-GYN Associates II, LLC, and Henry Medical Center, Inc. Hector alleged in her suit that due to the medical providers' negligence, her baby suffered oxygen deprivation shortly before birth, resulting in severe, permanent neurological injuries, including spastic quadriplegia, blindness, and an inability to speak.

The case went to trial and on Sept. 6, 2012 after about a day and a half of deliberations, the jury returned a verdict in favor of the medical providers. Hector's attorneys requested a new trial, alleging that the trial judge had erred by engaging in a communication with the jury when neither the parties nor their attorneys were present (called "ex parte" communication), and by refusing to give their requested jury charge on "spoliation" of evidence. Spoliation refers to the destruction of evidence necessary for pending litigation by someone who has the responsibility to preserve it.

The attorneys learned about the alleged ex parte communication between the judge and jury several weeks after the trial, when two jurors contacted them about potential juror misconduct. During that conversation, the attorneys learned for the first time that the trial judge had responded to a note from the jury without disclosing to anyone its contents or his response. According to affidavits by the two jurors, on the second day of jurors' deliberations, they sent a note to the judge indicating they could not reach a unanimous verdict. The judge responded with a written note instructing them to "continue deliberating." Subsequently, the attorneys asked the judge to ensure that both his note and the jury's were filed with the clerk of court. After realizing that the court reporter did not have a copy of the jury's note, the judge, on his own, entered an order supplementing the court record. The order stated that three of four notes delivered to the judge during deliberations had been preserved and made part of the record, but that the note regarding the jury's inability to reach a unanimous verdict was not one of them. The order stated that the missing note read: "What happens if we can't reach a unanimous verdict?" For a number of reasons, the judge did not believe at the time that it was necessary to consult with the lawyers about his response to the jury, which he said he wrote on the same piece of paper the jury had used. Hector's attorneys then filed a motion asking the judge to recuse himself, which he did, and the case was reassigned to another judge. Following a hearing, that judge rejected the attorneys' claim that the trial judge's "ex parte" communication with the jury was reversible error and ruled that the plaintiffs were not entitled to a new trial. In denying the motion for a new trial, the judge did note that the evidence in the case was "close" and would have supported a verdict for either side. Hector appealed, and the Court of Appeals reversed the trial court's decision, concluding that the unique circumstances surrounding the ex parte communication in this case warranted a new trial.

Today's Supreme Court opinion says the Court of Appeals was correct. As the Court of Appeals noted, in 2012, the Georgia Supreme Court in *Kesterson v. Jarrett,* "steadfastly reaffirmed the right of a natural party to be present in the courtroom when the party's case is

being tried." It is a right that is "deeply rooted in the law of this Nation and, if anything, even more embedded in the law of this State."

"In sum, the unique circumstances of this case, which include the untimely and serendipitous disclosure of the ex parte communication to Plaintiffs or their counsel; Plantiffs' inability to make the actual note or response a part of the record; the differing recollections about the nature and timing of the ex parte communication; the failure to resolve the perceived conflicts; and the inability to make a determination that a verdict for Defendants was demanded, regardless of any effect of the ex parte communication on the jury, support Plaintiffs' entitlement to a new trial," the opinion says.

As to the issue of "spoliation," Hector's attorneys argued that Henry Medical Center destroyed "critical evidence," anticipating they might be the subject of a lawsuit. The evidence at issue was printed paper strips of the electronic monitoring of the baby's heart rate which may have contained a nurse's handwritten notes. Routinely, the hospital maintained those strips for 30 days post-delivery, then destroyed them. Central to Hector's case was her allegation that the defendants had acted negligently in monitoring and responding to Phillips' heart decelerations and signs of fetal distress, and she considered those paper slips relevant to her case. At trial, Hector's attorneys requested that the judge instruct the jury that at the time the hospital destroyed the printed paper copy of the fetal heart rate tracing, it was aware of the potential for litigation. The attorneys asked the judge to instruct jurors that Hector was entitled to a presumption that the printed paper strips of the fetal heart rate tracing would have been harmful to the hospital's case. The trial court refused to give the jury instruction, and Hector appealed that decision as well. But the Court of Appeals upheld the trial court on that issue, concluding that Henry Medical Center did not have formal notice of "pending or contemplated" litigation at the time it destroyed the paper strips, and consequently, the trial court did not abuse its discretion in refusing to give Hector's attorneys their requested jury instruction on spoliation. In their appeal to the state Supreme Court, Hector's attorneys argued that requiring a written "notice of claim" to trigger the duty to preserve evidence for litigation is contrary to Georgia law, and it was error to refuse to give their requested charge because Henry Medical Center's actions after the birth showed that it was aware of the possibility of litigation when it destroyed the records.

In today's opinion, the high court finds that the Court of Appeals failed to apply the correct analysis in determining that there was no abuse of discretion by the trial court in refusing to give Hector's requested charge on spoliation of evidence. "It is undisputed that at the time the strips were destroyed, Henry Medical Center had not received express or actual notice from Plaintiffs that litigation was being planned, pursued, or pending," the opinion says. "[T]he duty to preserve relevant evidence arises when litigation is reasonably foreseeable to the party in control of that evidence, and thus while actual notice of litigation from the plaintiffs would clearly make such litigation foreseeable, other circumstances may show that the defendant…actually or reasonably should have anticipated litigation, even without notice of a claim being provided by the injured party/plaintiff."

"Here, the trial court's exercise of discretion in ruling that Defendants had no duty to preserve the paper fetal monitor strips, and the Court of Appeals' upholding of that ruling, appear to rest on the legally incorrect premise that a defendant's duty to preserve evidence required notice of a claim or litigation *from the plaintiff*, i.e., actual notice, without regard to other circumstances, such as the type and extent of the injuries (severe injuries to a newborn

child after an unexpectedly difficult delivery), the high damages that can flow from such injuries, the frequency of litigation in these circumstances, and the defendant's internal investigation and notification to its counsel and insurer. Consequently, the judgment of the Court of Appeals in regard to the spoliation issue cannot be upheld…"

The Supreme Court is remanding the case for the courts to use the appropriate test in determining whether there was evidence of spoliation by the medical providers that would require the requested jury charge.

"Accordingly, the judgment of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded to the Court of Appeals for proceedings consistent with this opinion."

Attorneys for Phillips: Jonathan Parrish, Wayne Grant, Kimberly Grant
Attorneys for Harmon: Michael Bailey, Anna Fretwell
Attorneys for Henry Medical Center, Inc.: John Hall, W. Henwood, Mark Wortham, Nathan Gaffney

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

* Earnest Earl Dailey, Jr. (Richmond Co.)	**DAILEY V. THE STATE (S15A0587)**
* Levi Jerome Marshall, Jr. (Chatham Co.)	**MARSHALL V. THE STATE (S15A0624)**
* Michael Thomas Morris, Jr. (Bartow Co.)	**MORRIS V. THE STATE (S15A0488)**
* Flavio Garay Pena (Gwinnett Co.)	**PENA V. THE STATE (S15A0430)**