Supreme Court of Georgia
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SUMMARIES OF OPINIONS

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WATSON V. THE STATE (S15G0385)

Based on a judge's improper instruction to jurors, the Supreme Court of Georgia has reversed a man's conviction for the sexual battery of his young daughter. However, the high court has left undisturbed Patrick Watson's conviction for the child molestation of his daughter's friend, which was not an issue in this appeal.

"Because the erroneous jury instruction here effectively relieved the State of its burden to prove an essential element of the crime of sexual battery, the instruction cannot be said to have been harmless," **Justice Carol Hunstein** writes in today's unanimous opinion. "Accordingly, Watson's convictions for sexual battery must be reversed."

In 2008, Watson was tried in **Camden County** for molesting two of his daughters, K.P. and J.W., and a third girl, M.S., who was one of his daughter's friends. According to briefs filed in the case, Watson's daughter, who was 14 years old at the time of trial, testified that she had been living with her father since she was 11. She said that on several occasions, when she was 11-13 years old, he examined her breasts by touching them under her clothing. She said he did this even though she told him it made her feel uncomfortable. On several other occasions, K.P. said he touched her pubic area to see if she was shaving it. Again, she testified she told him that made her feel uncomfortable, according to the briefs. K.P. testified that on Nov. 11, 2007, when her friend, M.S., was spending the night, Watson entered her bedroom wearing a towel and asked if the girls were sexually aroused. She said he then sat on the bed and touched K.P.'s upper thigh. K.P. told this to police the following day. M.S., who was 15 at the time of trial, testified that when her friend's father came into the bedroom that night wearing only a towel, she was lying on her stomach on the bed. She said Watson lay across her legs, touched her breasts, and then

placed his hand on her buttocks. M.S. testified that she jumped off the bed and Watson then put his hand down her pants, touching her vagina. The next day, M.S. reported the incident to a friend, relative and police. Watson was indicted for child molestation involving his daughter and child molestation involving her friend.

At issue in this appeal is the state's sexual battery statute and the instruction the trial judge gave to jurors about the law before their deliberations. After instructing the jury on the definition of child molestation, the judge instructed the jury on sexual battery, which is a "lesser-included" offense of child molestation. Georgia Code § 16-6-22.1 states that "a person commits the offense of sexual battery when he or she intentionally makes physical contact with the intimate body parts of another person without the consent of that person." The judge read to jurors what the statute said, but then added that "under Georgia law a person under the age of 16 lacks legal capacity to consent to sexual conduct."

Following the trial, the jury convicted Watson of two counts of sexual battery against his daughter, as the less serious offense included in child molestation, with which Watson was originally charged. The jury, however, found Watson guilty of the more serious offense of child molestation against his daughter's friend. Watson was sentenced to 20 years to serve 15 in prison and five on probation for the conviction of child molestation. He was sentenced to another 10 years on probation for the two sexual battery convictions involving his daughter. On appeal to the Georgia Court of Appeals, Watson argued a number of points, but the appellate court rejected all his arguments and upheld his convictions and sentence. Watson then appealed to the state Supreme Court, which agreed to review the case to determine whether the Court of Appeals erred by characterizing Watson's challenge to the sexual battery statute as a constitutional challenge which he failed to raise for the first time at trial, thereby forfeiting his right to raise it on appeal. And the high court asked the parties whether prosecutors were required under the statute to show a lack of consent by a victim who is under the age of 16 to establish the crime of sexual battery.

Regarding the first question, "we disagree with the Court of Appeals' characterization of Watson's overbreadth argument as a constitutional challenge that was waived," today's opinion says. "Watson does not challenge the constitutionality of the sexual battery statute," but rather challenges any interpretation of the statute which removes the requirement that the State prove lack of consent, even if the alleged victim is under the age of 16. "Watson's argument that the trial court's construction of the statute would potentially criminalize benign conduct, to support his position favoring a narrower construction of the statute, does not equate to a constitutional challenge on overbreadth grounds," the opinion says.

As to the second matter, the question is whether the victim's age may alone establish lack of consent. Under current law, the opinion says, "a victim under the age of 16 cannot legally consent to sexual intercourse, sexual acts, or other sexual contact, and proof that a victim was younger than age 16 at the time of an alleged offense involving sexual contact – absent any specific statutory language to the contrary – will constitute conclusive proof of the lack-of-consent element of such offense."

"The offense at issue here, however – despite its denomination as 'sexual' battery – does not require any sexual contact at all," the opinion says. Rather it involves "non-consensual, intentional physical contact with a victim's intimate body parts. That an individual younger than 16 is legally incapable of consenting to sexual contact does not necessarily mean that such

individual is legally incapable of consenting to physical contact with her intimate body parts." Were this Court to rule otherwise, the crime of sexual battery could include such acts as a physician examining the breasts of a 15-year-old patient or the changing of a baby's diaper. "We decline to construe the sexual battery statute in a manner that would criminalize a wide range of apparently innocent conduct," the opinion says. "Instead, we construe the statute to require actual proof of the victim's lack of consent, regardless of the victim's age. Those cases that have held to the contrary are hereby overruled."

Here, the judge's instruction that an underage victim is not legally capable of consenting to 'sexual conduct' "did not belong in the jury instruction regarding sexual battery, because sexual battery as defined in our Code does not necessarily involve sexual conduct," the opinion says. "Insofar as the jury instruction suggested that an underage victim is not capable of consenting to the contact constituting sexual battery, the instruction was misleading and thus erroneous."

In a concurrence, **Justice David Nahmias** writes to emphasize that today's decision does not preclude a retrial. While the Court has reversed the two sexual battery counts against Watson, "when this case is returned to the trial court, the State may be entitled to retry him on those two counts, this time using the correct jury instructions."

"The Court's opinion does not decide whether or not the evidence presented at Watson's trial was legally sufficient for a properly instructed jury to have found him guilty beyond a reasonable doubt of the sexual battery counts, although I note that Watson's counsel conceded at oral argument before this Court that the evidence was legally sufficient and that a retrial would therefore be permissible," the concurrence says.

Attorney for Appellant (Watson): Noah Pines
Attorneys for Appellee (State): Jackie Johnson, District Attorney, Andrew Ekonomou, Asst. D.A.

SHIRLEY V. THE STATE (S15G0671)

With a decision today by the Georgia Supreme Court, a **Gwinnett County** man charged with sexual exploitation of children has succeeded in his claim that the trial court was wrong in failing to suppress certain evidence from being seen by the jury when his case goes to trial. The evidence in question involves images seized from Michael Scott Shirley's computers, which were described only as "child pornography" in the affidavit police presented to obtain a search warrant.

In today's unanimous opinion, which reverses a Georgia Court of Appeals ruling, **Justice Harold Melton** writes that the affidavit was flawed because it failed to provide probable cause for the search and the evidence seized must therefore be suppressed.

According to the facts of the case, in January 2011, the FBI's Safe Child Task Force received information from certain unspecified German authorities whose investigation had led to a website they said was being used to distribute child pornography. The German authorities informed the FBI that they had captured various "internet protocol" (IP) addresses that were accessed on the site, including one from which 150 full and thumbnail-sized image files had been accessed on July 22, 2009. In response to a federal administrative subpoena, AT&T Internet Services identified the IP address as belonging to Michael Scott Shirley and being located at his home in Lawrenceville, GA. On Feb. 18, 2011, two police officers, including Detective D.A.

Schad, went to Shirley's home but received no answer. They left a business card and later that evening, Shirley left two voicemail messages for one of the officers. On Feb. 21, 2011, Shirley went to the Lawrenceville police department for an interview. He asked that his wife not be interviewed due to her stress level. During the interview, Shirley stated that he did not look at pornography on the internet, and that he had one desktop computer and one laptop that he had purchased for his son. When asked what he knew about someone accessing a German website to view child pornography, Shirley invoked his right to remain silent until he could speak with an attorney.

In the search warrant affidavit, Detective Schad listed "Possession of Child Pornography" as the offense at issue, based on Georgia Code § 16-12-100 (b) (8), which states: "It is unlawful for any person knowingly to possess or control any material which depicts a minor or a portion of a minor's body engaged in any sexually explicit conduct." The detective described in the affidavit his knowledge of the use of computers as an instrumentality for obtaining and storing child pornography, and he sought a warrant to search Shirley's residence and any computers and electronic devices at the house that could possibly contain child pornography. The magistrate judge signed the warrant, indicating on the warrant that she did not consider the officer's oral testimony in granting it. Police then executed the warrant on Feb. 1, 2011.

In January 2012, based on a sample of images retrieved from Shirley's computers, a Gwinnett County grand jury indicted Michael Scott Shirley on numerous counts of Sexual Exploitation of Children, which is the name given to Georgia Code § 16-12-100. Shirley's attorney filed a motion to suppress the images. Following a hearing, the trial court denied the motion. Shirley appealed, and the Court of Appeals upheld the trial court's ruling. Shirley then appealed to the state Supreme Court.

"To properly consider this case, we must carefully look at the actual language contained in the affidavit accompanying the warrant application," today's opinion says. But this affidavit was void of facts and only contained conclusions. "An affidavit must allow a magistrate to make an independent determination of probable cause based upon facts, and wholly conclusory statements will not suffice," the opinion says.

Here, the affidavit provided no names of the German authorities who provided information to the FBI, no description of the FBI Task Force that passed the information to Georgia police, and no way to determine whether German authorities, in saying the website was "used to distribute Child Pornography," based their description on German law or some other law. "This is highly problematic, as there is no indication that anyone, other than the nebulous German authorities, actually viewed any part of the website in question," the opinion says.

"Certainly, if there were some indication in the application that the FBI had separately viewed the website in question and confirmed its contents as containing 'child pornography,' or at least some reliable source had provided a description of the pictures contained on the website, this case might have a different result," the opinion says. "As it is, however, the warrant application is insufficient to support probable cause, and the trial court should have granted Shirley's motion to suppress."

Attorney for Appellant (Shirley): Eric Crawford
Attorneys for Appellee (State): Daniel Porter, District Attorney, Richard Armond, Asst. D.A.

GONZALEZ V. HART, WARDEN (S15A0884)

The Supreme Court of Georgia has thrown out a man's conviction and life prison sentence that he received for kidnapping his ex-girlfriend during a violent assault. He argued that after he was convicted, the state Supreme Court substantially changed the law on kidnapping and under its precedent-setting decision, he could no longer be found guilty of that crime.

According to the evidence at trial, Arquimides Gonzalez had a violent relationship with his former girlfriend, Christina Deleon-Lopez. On one occasion, Gonzalez threw her against a wall and choked her. Another time, according to briefs filed in the case, Gonzalez followed Lopez to her friend's house and demanded that she leave with him. While he was driving Lopez toward her apartment, she told him she no longer wanted to be with him, and he pushed her out of the moving vehicle. As a result, she was left in a coma with broken bones and damaged internal organs.

Based on separate incidents that occurred on April 9 and June 4, 2005, a **Gwinnett County** grand jury formally charged Gonzalez with kidnapping with bodily injury, aggravated assault, and aggravated battery. The kidnapping charge stemmed from the April 9 incident. According to the record, when Gonzalez arrived at Lopez's apartment, he saw a man's shirt hanging up, and he and Lopez began to argue. While in her bedroom, Gonzalez hit her multiple times in the face, threw her onto the bed and choked her. Lopez ran from the room and as she was moving toward the apartment door, he grabbed her by the hair and threw her against the door. Gonzalez then immediately left the apartment with Lopez's phone. She used her neighbor's phone to ask a friend to call police. When the friend and police arrived at the apartment, they found Lopez cowering in the corner of her bedroom, trembling and crying and unable to speak to any of them. She was taken by ambulance to the hospital where a physician found bruising and significant swelling on her head and face, abrasions to her neck and throat, and a "big goose egg" on the back of her head. At trial, Gonzalez admitted he had assaulted Lopez but denied he had retained or kidnapped her.

The jury found him guilty of kidnapping, aggravated assault, aggravated battery and family violence battery. Gonzalez was sentenced to life in prison for kidnapping and an additional 81 years for the other charges. On appeal, the Georgia Court of Appeals upheld his convictions but sent the case back to the trial court for resentencing with direction to merge two of the crimes. On remand, his sentence was changed to life plus 41 years.

At issue in this appeal is the kidnapping conviction and the law on "asportation" – a legal term that means the forced movement of another person without that person's consent. Prior to 2008, only the slightest movement of an alleged victim had to be shown to satisfy the asportation element required to prove the crime of kidnapping. But in its November 2008 decision in *Garza v. State*, the state Supreme Court overruled prior law regarding the need for only slight movement and established four factors to determine whether the asportation element was met: the duration of the movement, whether it occurred during a separate offense, whether such movement was an inherent part of that separate offense, and whether the movement itself posed a significant danger to the victim independent of the danger caused by the separate offense.

In May 2010, Gonzalez, representing himself "pro se," filed a petition for a "writ of habeas corpus," challenging his Gwinnett County convictions. (Habeas corpus is a civil proceeding that allows already convicted prisoners to challenge their conviction on constitutional grounds in the county where they're incarcerated, which in this case was Ware County. They

generally file the action against the prison warden, who was Darrell Hart.) Among his claims, Gonzalez argued he received ineffective assistance from his appeal attorney for failing to challenge the evidence as insufficient to convict him of kidnapping under *Garza*. He also claimed his life sentence was unconstitutionally "cruel and unusual" because under *Garza*, the evidence did not support the conviction of kidnapping. The habeas court ruled against him, and he then appealed to the state Supreme Court, which agreed to review the case to determine whether the habeas court correctly applied the *Garza* decision to this case.

In today's unanimous opinion, **Presiding Justice P. Harris Hines** writes that the habeas court did not. "What must be kept in mind is the purpose of the *Garza* test, which is to determine whether the movement in question served to substantially isolate the victim from protection or rescue, the evil which the kidnapping statute was originally intended to address," the opinion says.

The habeas court found that the asportation element was met by the act of Gonzalez grabbing the victim by the hair and pulling her back from the door, which presented a significant danger to Lopez independent of the aggravated assault, and which allowed Gonzalez to exercise additional control over her and further isolate her from rescue.

"However, the habeas court misapplied *Garza* in reaching such conclusions," today's opinion says. "First, there is no evidence to support a finding that the movement of pulling the victim back by the hair was anything other than of minimal duration." Rather, the pulling of her hair "was part and parcel of one violent event." "The alleged kidnapping, i.e. the grabbing of the victim's hair, is inseparable from the family violence battery of throwing the victim against the wall as that is how Gonzalez accomplished such criminal act."

"Furthermore, there is no evidence that pulling the victim by the hair presented a significant danger to her that was independent of the family violence battery, as she was not isolated or somehow exposed to an independent danger outside of the one to which she was already being subjected from the family violence battery itself."

"Accordingly, under *Garza*, the evidence was insufficient to show the necessary kidnapping element of asportation," the opinion says. "Consequently, the judgment of the habeas court must be reversed, and Gonzalez's conviction for kidnapping with bodily injury and the life sentence must be vacated. Judgment reversed and case remanded with direction."

Attorneys for Appellant (Gonzalez): Sarah Gerwig-Moore, William Noland
Attorneys for Appellee (State): Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Elizabeth Haase, Asst. A.G.

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Among 12 opinions released today in which the high court has upheld murder convictions, four of the victims were infants or toddlers; a fifth was 14 years old. Those cases follow:

<u>SMITH V. THE STATE</u> (S15A0882)

The Georgia Supreme Court has upheld the life prison sentence given to Courtland Smith after a **Douglas County** jury convicted him of the murder of his girlfriend's 2-year-old son, Jaydon Patton.

In today's unanimous opinion, **Justice Carol Hunstein** writes that the evidence "was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that Smith was guilty of the crimes of which he was convicted."

According to the evidence at trial, Smith lived with Ayanna Patton and her young children, Jaydon and a school-aged daughter. The morning of March 10, 2009, Patton put her daughter on the school bus then left for work, leaving Jaydon in Smith's care at their home in Douglasville. Between 1:30 and 2:00 that afternoon, Smith drove to where Patton worked, summoned her outside, and said the little boy was unresponsive. The couple then drove Jaydon to the local hospital from which he was airlifted to Egleston Children's Hospital in Atlanta where he died later that day. Emergency medical personnel discovered the toddler had brain swelling, retinal hemorrhages, a leg fracture, and numerous bruises and scrapes on his head and face. Physicians questioned Smith about what had happened to Jaydon that day and previous days, but Smith offered little information. They then contacted law enforcement officers, and that night Smith was interviewed at the Douglas County sheriff's office. During the interview, which was videotaped, Smith said he'd been alone in the house with Jaydon for a short time when he found the little boy unresponsive. He said he shook and slapped the child to revive him. When confronted with the physician's opinion that Jaydon had suffered abusive head injuries, Smith denied he'd intentionally harmed the child. After an hour of questioning, Smith was read his *Miranda* rights and put under arrest, at which time he invoked his right to remain silent. At trial, the critical care physician who had tended to Jaydon testified he had concluded the toddler's injuries resulted from strikes to the head or severe shaking or both. The medical examiner ruled the cause of death as blunt force trauma to the head and torso.

Following a March 2011 jury trial, Smith was convicted of three counts of felony murder, based on the underlying felonies of aggravated battery and first and second degree child cruelty. He was sentenced to life plus 20 years in prison. He appealed to the Georgia Supreme Court, arguing that his statement to law enforcement should not have been admitted at trial because the investigator failed to read him his *Miranda* rights until the end of the interview.

But in today's opinion, the high court rejects his argument. "Law enforcement officers are required to give *Miranda* warnings prior to questioning only where the subject is in police custody, having either been 'formally arrested or restrained to an extent associated with such an arrest.'"

Here, Smith drove himself voluntarily to the sheriff's office and was not in custody at the time of the interview. He was not handcuffed and was free to leave at any point. It was not until the end of the interview the officer concluded he had enough information to justify Smith's arrest, at which time he read him his rights to remain silent and to have an attorney. "Accordingly, the trial court properly admitted Smith's statement at trial," the opinion says.

While there was no error in the jury's verdicts, the high court has corrected an error in Smith's sentence. In addition to sentencing Smith to life in prison for felony murder based on aggravated battery, the trial court imposed a 20-year concurrent term for the same aggravated battery. "Because the aggravated battery merges into the felony murder predicated thereon, the trial court erred in sentencing Smith on aggravated battery," the opinion says, and that 20-year concurrent prison sentence has been thrown out. However, his life sentence and 20-year consecutive sentence for child cruelty remain intact.

Attorney for Appellant (Smith): J. Scott Key

Attorneys for Appellee (State): Brian Fortner, District Attorney, James Dooley, Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Christian Fuller, Asst. A.G.

NOEL V. THE STATE (S15A1170)

In a second case involving the murder of a baby, the Georgia Supreme Court has upheld the convictions of Rodney Noel, who was found guilty in **Fulton County** of killing his girlfriend's 9-month-old son, Terrell Williams.

According to the evidence at trial, in 2007, Noel and his girlfriend, Crystal Williams, drove from Chicago to Atlanta so Noel could renew pain medication prescriptions for a bad back. With them was Terrell, a happy, healthy baby. By the time they arrived in Atlanta, however, Noel had missed his Friday afternoon doctor's appointment and they had to stay in an Extended Stay Motel for the weekend. On Saturday, Williams left the baby with Noel while she went to buy groceries, according to briefs filed in the case. When she returned, the baby was crying and his lip was swollen and bleeding. Noel told her Terrell had fallen out of his car seat.

That Monday, March 26, 2007, Noel went to his doctor's appointment, returning in the early afternoon. When he returned, Williams fed Terrell some formula and ice cream, then left him again with Noel so she could go downstairs and do laundry for the trip home. While she was gone, a maid for the motel heard the baby screaming. While cleaning the room next to Noel's, she also heard Noel yell at the baby to "shut up," then she heard a thump and no more crying. Due to the commotion, the maid knocked on Noel's door and asked if everything was all right. When Noel cracked the door, she saw Terrell in the car seat, and Noel said everything was fine. A few minutes later, another witness saw Noel bent over the baby, screaming for help. About that time, Williams returned from the laundry room to find her baby unconscious in the doorway of their room. The witness called 911 and attempted CPR on Terrell. When paramedics arrived, the baby's eyes were fixed and dilated. He was transported to Children's Hospital at Scottish Rite where on April 1, 2007, the baby was removed from life support and died.

Initially, Noel told police he had heard Terrell choking when he got out of the shower. He then said he had been sleeping and awoke to hear the baby choking. He claimed he tried to shake Terrell and do CPR and when that failed, he put him in the shower and then called for help. At the hospital, however, Noel said he had never shaken the baby and merely "jostled" his car seat.

At trial, the State's medical experts testified that Terrell's injuries were the result of quick, violent shaking of the child's head – Shaken Baby Syndrome – along with impact to his head. An autopsy revealed the baby died from a combination of brain injuries. In addition, he had bruises consistent with being grabbed at his thigh and possibly swung in the air by his leg. He had hemorrhaging of the optic nerve and too many retinal hemorrhages to count. Even the expert testifying for the defense conceded that the blunt impact injuries to the baby's head were unlikely to have been caused by an accident as there were multiple impacts.

In September 2009, a jury found Noel guilty of felony murder, cruelty to children, aggravated assault, and aggravated battery, and he was sentenced to concurrent terms of life in prison. The jury acquitted him of malice murder. Noel then appealed to this Court, arguing that the evidence was insufficient to convict him, and the trial judge had failed to instruct jurors that they could consider whether Noel had been justified in shaking the baby after hearing him

choking. Noel also argues the court should have charged the jury on accident, claiming the jury could have found he "accidentally" killed the baby.

In today's unanimous opinion, written by **Chief Justice Hugh Thompson**, the high court has rejected Noel's arguments. "Viewed in the light most favorable to the verdict, we find the evidence was sufficient to enable a rational jury to find appellant guilty beyond a reasonable doubt of all the offenses for which he was convicted," the opinion says.

However, the Court is sending the case back to the trial court after discovering it erred in sentencing Noel to more than one life prison term for felony murder when there was only one victim. The trial court's error "resulted in appellant being sentenced improperly to three life terms in prison for the murder of one victim and left unresolved sentences for two of the non-murder felonies of which appellant was legally convicted," the opinion says. "Accordingly, appellant's sentences are void and we remand for resentencing."

Attorney for Appellant (Noel): Timothy Mays

Attorneys for Appellee (State): Paul Howard, Jr., Paige Whitaker, Joshua Morrison, Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Meghan Hill, Asst. A.G.

AKHIMIE V. THE STATE (S15A0733)

The Georgia Supreme Court has also upheld the murder conviction and life prison sentence Krystol Akhimie received in **Cobb County** related to the child abuse killing of her 7 ½ week old infant son, Brian Berry, Jr.

According to the facts at trial, in October 2007, Akhimie lived at a home in Mableton with her new baby, 14-month old daughter, and a number of others, including her mother, her mother's fiancé, and another man. Akhimie was the baby's sole caregiver except when the newborn's father, Brian Antoine Berry, was visiting. He had begun staying at the house about two days a week. During those times, Berry, Akhimie, their baby and the 14-month-old all slept in the basement on a mattress on the bare concrete floor.

On Oct. 31, 2007, emergency personnel responded to a 911 call to the house on Donford Drive where they found Berry holding the infant while trying to put the baby's pants on. The emergency personnel took the baby from him and after determining the infant had no pulse and was not breathing, they began performing CPR. They also noticed the baby had bruising on his face and his leg appeared swollen. They could not revive the infant, who was transported to the hospital where he was declared dead.

The medical examiner who performed the autopsy determined the baby had died from blunt head trauma. He said the injury, which resulted in brain and retinal hemorrhaging, likely was caused by the baby's head being slammed against a flat, hard surface. There was also evidence of other injuries caused by violent shaking. At the hospital, x-rays and further examination revealed the infant had suffered a number of injuries and severe medical ailments during his short life. His left thigh bone was fractured and separated, potentially caused by twisting and pulling. This injury was more than a week old and showed signs of healing, according to briefs filed in the case. The baby also had rib fractures in various stages of healing. He had fluid in his lungs, severe anemia, signs of heart failure and fresh facial bruises. Typically a baby with these types of injuries would have cried a lot or acted very lethargic. It would have

been obvious to the people around him that there was something wrong with the infant and that he needed medical care, yet Akhimie admitted she had not taken him to the doctor since birth.

In the course of the investigation, law enforcement officers executed a search warrant for the home where Akhimie and Berry lived and spoke with the numerous people who lived there. They determined that Akhimie and Berry were the only two people with access to the baby leading up to his death.

In March 2007, Akhimie and Berry were indicted for malice murder, felony murder and four counts of cruelty to children in the first degree. Following a joint trial in May 2011, Akhimie was found not guilty of malice murder but guilty of felony murder and all the counts of cruelty to children. Berry was acquitted of all charges but one count of cruelty to children in the first degree.

In her appeal to the state Supreme Court, Akhimie argued in part that she was one of many people living in the home and the evidence, which was purely circumstantial, was insufficient to convict her.

But in today's unanimous opinion, written by **Presiding Justice P. Harris Hines**, the high court disagrees. "Here, the evidence included, but was not limited to, the facts that Akhimie and Berry were their child's sole caregivers and were the only ones with access to him in the timeframe of the fatal injury," the opinion says. In addition, Akhimie was the primary caregiver and Berry was not a full-time resident of the home; the fatal head blow would have caused immediate and obvious symptoms; the baby had suffered a number of violent injuries since birth yet at no time did anyone seek medical help for him; and several people had observed that the mother was indifferent to her baby's cries and care.

"Here, the jury could reasonably infer that Akhimie inflicted the infant's fatal injury and some or all of the other injuries herself, and that she and Berry shared a common criminal intent to fail to seek medical aid for the child," today's opinion says. "Based upon the evidence, the jury was not required to find that the hypothesis that Berry or someone else in the home committed the crimes acting alone was a reasonable one. Instead, the evidence was sufficient under *Jackson v. Virginia* to authorize a rational trier of fact to find Akhimie, either directly or as a party to Berry's criminal activity, guilty beyond a reasonable doubt of the crimes of which she was convicted." The high court has rejected Akhimie's other arguments.

"Judgments affirmed. All the Justices concur."

Attorney for Appellant (Akhimie): Edwin Wilson

Attorneys for Appellee (State): D. Victor Reynolds, District Attorney, Maurice Brown, Asst. D.A., Amelia Pray, Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Christian Fuller, Asst. A.G.

BROWN V. THE STATE (S15A0992)

In a fourth case involving the death of a young child, the Georgia Supreme Court has unanimously upheld the murder conviction and life prison sentence Corey Allen Brown received in **Liberty County** for his role in the death of Prince Davis, Jr., a 2-year-old boy in the care of Brown and his girlfriend.

According to the facts at trial, Brown and Andrea Wilson, his live-in girlfriend and co-defendant, agreed to take in the little boy while his mother, who was Wilson's cousin, was incarcerated. The baby was in the couple's exclusive care for the next nine months. Those who

had previously taken care of Prince described him as a normal, happy baby with a healthy appetite in spite of having occasional flare-ups of asthma. Brown and Wilson, however, told investigators Prince was sickly, threw tantrums and refused to eat. Brown said they believed the baby was possessed by demons, and they often prayed over him and tried to force him to swallow "prayer oil."

On Jan. 16, 2007, Brown rode his bicycle to a job site about two miles from home, signing in for work at 5:15 p.m. According to Wilson, sometime after he left, she was outside with the toddler and put a Bible on his stomach before she noticed "his head slumped back like he was sleepy." She took him inside and put him in a car seat while she went to heat up some oatmeal. When she returned, she said she found the baby had fallen out of his car seat and was not breathing. She picked him up and ran to a neighbor's house for help. Paramedics arrived within 10 minutes of the 911 call, but the child was not breathing and had no pulse. Prince was transferred to the hospital, but he could not be revived and was pronounced dead at 8:00 p.m.

In February 2007, Brown was formally charged with murder and cruelty to children in the first degree. While the State originally filed notice it would seek the death penalty, it later decided to seek a sentence of life in prison with no chance of parole. Brown and Wilson were indicted separately, but in 2010, they were tried together.

At trial, the forensic pathologist who performed the autopsy testified that Prince died sometime between 4 and 6 p.m., and the cause of death was battered child syndrome. Contributing factors were malnutrition, medical neglect, and chronic and acute blunt force trauma. These factors acted in concert and no isolated injury alone caused his death. The presence of ketone bodies in the baby's urine indicated starvation. At the time he died, Prince weighed only 21 pounds. The medical examiner testified that the toddler's lack of sustenance made it harder for his body to recover from all the physical abuse he endured. Other than the oatmeal, investigators found no food suitable for a child in the home, and the couple admitted they had never sought medical treatment for Prince. In addition, the child had suffered more than 160 different injuries, 44 of which were inflicted during the last two hours of his life. The injuries included bruises and scars all over his body, bruised kidneys, a gangrenous toe (caused by an immersion burn at least a week before his death), blunt force trauma to the brain, and bruised and swollen genitalia.

The defense's medical expert, however, put the time of death at 6:30 p.m. – after Brown had left for work. While he agreed the baby was malnourished and had many injuries that were not accidental or self-inflicted, the combination of the injuries and malnourishment would not have caused his death. Pointing to Wilson's statement at trial that she believed "if I didn't put the Bible on him, to be honest, this wouldn't have happened," and to evidence of a fresh bruise on the toddler's abdomen, the defense expert concluded the cause of death was compression asphyxiation, which the medical examiner disputed.

Brown did not testify at trial, but Wilson did, saying she had seen Brown beat the toddler on numerous occasions but was afraid to intervene because he had been abusive to her. Wilson's cousin also testified that he had seen Brown hit Prince at least twice while he was visiting. Both testified that Brown would hit the baby in the middle of his back by making a chopping motion with his hand. He also beat the child hard with a belt.

Following trial, both Brown and Wilson were convicted of murder and child cruelty and sentenced to life without parole. In May of this year, this Court upheld Wilson's convictions and prison sentence. With today's opinion, it has upheld Brown's.

In his appeal, Brown argued among other things that the evidence at trial was insufficient to convict him. But in today's opinion, **Justice David Nahmias** writes that the state's high court has rejected all his arguments, finding that "when viewed in the light most favorable to the verdict, the evidence presented at trial and summarized above was sufficient to authorize a rational jury to find Appellant guilty beyond a reasonable doubt of the crime for which he was convicted, and in particular to find that Appellant's participation in depriving Davis of necessary sustenance was a proximate cause of the child's death."

Attorney for Appellant (Brown): Clare Nolan

Attorneys for Appellee (State): Tom Durden, District Attorney, Melissa Poole, Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Elizabeth Haase, Asst. A.G.

SCHMIDT V. THE STATE (S15A1150)

In this locally high-profile case, the Georgia Supreme Court has unanimously upheld the murder conviction and prison sentence of life without parole given to a young man who was 14 years old when he shot and killed another 14-year-old in Harlem, GA.

According to the facts of the case, Lacy Aaron Schmidt and Alana Calahan, an eighth grader at Harlem Middle School, lived near each other on Miles Road in **Columbia County** on Georgia's eastern border. Schmidt became friends with Alana, and he was a frequent guest at the Calahan home. About a week before the crime, Schmidt entered the Calahan house without anyone there. Alana was the first to come home. Her mother asked Schmidt how he'd gotten in, and he said the door had been left unlocked, but she didn't believe him. She later testified that she was angry at Schmidt for entering the home and yelled at him. She told him that in the future he could not come to the house unless she or her husband was there. He was also banned from coming to the house before 5 p.m. on week days.

Two guns – a shotgun and a handgun – were kept in the Calahan house in the parents' bedroom. The Calahan children were not permitted to enter the bedroom or touch the guns.

On Jan. 31, 2011, Alana's sister waited in the family's Dodge pickup truck to pick up Alana after school at the school bus stop, which was too far from the house for the kids to walk home. After dropping off Alana at home, her sister returned to the bus stop to pick up their younger brother. Investigators later estimated the sister was gone about 10 minutes. While she was gone, Alana was sitting at the computer next to the sliding back door when Schmidt entered the house, shot Alana in the back of the neck and dragged her to the woods. Alana died from the wound.

When Alana's sister returned, she noticed Schmidt's shoes inside the house, along with Alana's shoes. It was common practice for family and friends to take off their shoes when entering the house. She also noticed that the chair Alana had been sitting in when the sister had left was knocked over and there was blood all over the carpet. At that point, Schmidt came through the front door and said someone had taken Alana and he didn't know what to do. Schmidt then went outside with Alana's sister and brother, ostensibly to look for Alana. He quickly said he spotted her and led the siblings to Alana's body. The sister later said she did not

believe he could have seen Alana's body from where they had stood. When Schmidt approached Alana's body, he tried to pull a stick out of her hair. He then "started freaking out saying, oh my god, now my prints are on her and they're going to think I killed her." While trying unsuccessfully to revive Alana, the sister called police. When they arrived, Alana's sister and brother were crying hysterically, but Schmidt "didn't seem like there was a care in the world," and he showed no emotion. Police brought in Schmidt and the sister to question them as witnesses, as they initially thought they were actively looking for a suspect based on Schmidt's story. But one of the investigators thought Schmidt's conduct was suspicious, because his attempt to cry lacked tears and appeared disingenuous. After telling at least five different stories, Schmidt admitted he'd taken Alana's father's handgun from the master bedroom and said he had accidentally shot Alana as he stood behind her attempting to unload it. But a ballistics expert later testified that it would have required 13 pounds of pressure to make the weapon fire. Investigators searched Schmidt's house where they found a gun box, 9 mm ammunition, and an owner's manual to the 9 mm handgun taken from the Calahan house. They determined Schmidt would not have had enough time to bring the gun box to his home after shooting Alana, and he would have had to have brought it home beforehand. In a book bag in his closet, investigators found other items taken from the Calahan home, including an iPod, RCA MP3 player, and a digital camera.

In a February 2012 jury trial, when Schmidt was 15, he was convicted of malice murder, felony murder while in the commission of aggravated assault, possession of a firearm during the commission of the crime, and theft by taking a handgun. He was sentenced to life in prison with no chance of parole. Schmidt then appealed to the Georgia Supreme Court, arguing that the trial judge was wrong in failing to instruct jurors that they could consider him guilty instead of the less serious charge of involuntary manslaughter, that his trial attorney had been ineffective in violation of his constitutional rights, and that his sentence was "cruel and unusual punishment" also in violation of his constitutional rights.

But in today's opinion, written by **Presiding Justice P. Harris Hines**, the high court has rejected all his arguments. And it finds that the evidence "was sufficient to enable a rational trier of fact to find Schmidt guilty beyond a reasonable doubt of the crimes of which he was convicted."

Attorney for Appellant (Schmidt): Terry Taylor
Attorneys for Appellee (State): Ashley Wright, District Attorney, Joshua Smith, Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Youn, Asst. A.G.

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

* Chad Ashley Allen (Walton Co.)	**ALLEN V. THE STATE (S15A1273)**
* William Earnest Barron (Gwinnett Co.)	**BARRON V. THE STATE (S15A1321)**
* Jeremy Kenneth Crawford (Pike Co.)	**CRAWFORD V. THE STATE (S15A0895)**

* Jarmal Hill (Fulton Co.)	**HILL V. THE STATE (S15A0891)**
* Daryl A. Jones (Bibb Co.)	**JONES V. THE STATE (S15A1001)**
* Kenneth Fred Ponder (Terrell Co.)	**PONDER V. THE STATE (S15A0785)**
* Jacques Shockley (Fulton Co.)	**SHOCKLEY V. THE STATE (S15A0876)**

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

* Tesha Nicole Clemmons	**IN THE MATTER OF: TESHA NICOLE CLEMMONS (S15Y1234)**
* Steven Salcedo	**IN THE MATTER OF: STEVEN SALCEDO (S15Y1146)**

The Court has accepted a petition for voluntary discipline and ordered the **90-day suspension** of attorney:

* Clifford E. Hardwick, IV	**IN THE MATTER OF: CLIFFORD E. HARDWICK, IV (S15Y1425)**

The Court has ordered the **suspension until reprimand administered** of attorney:

* Peggy Ruth Goodnight	**IN THE MATTER OF PEGGY RUTH GOODNIGHT (S14Y0094)**