Supreme Court of Georgia
Jane Hansen, Public Information Officer
244 Washington Street, Suite 572
Atlanta, Georgia 30334
404-651-9385
hansenj@gasupreme.us

SUMMARIES OF OPINIONS

Published Monday, October 5, 2015

Please note: *Opinion summaries are prepared by the Public Information Office for the general public and news media. Summaries are not prepared for every opinion released by the Court, but only for those cases considered of great public interest. Opinion summaries are not to be considered as official opinions of the Court. The full opinions are available on the Supreme Court website at* www.gasupreme.us .

HARRELL V. THE STATE (S15A1045)

The Supreme Court of Georgia has reversed the judgment against a **Dodge County** man who was convicted of intimidating court officers and animal cruelty.

In today's unanimous opinion, **Presiding Justice P. Harris Hines** writes for the Court that the acts of intimidation against the court officers did not constitute "true threats" of violence and therefore were protected by the First Amendment's right to free speech. Furthermore, the opinion says, all the charges should not have been tried together because there was no proven connection between them.

According to the facts of the case, Lister W. Harrell was charged with violating the state law that deals with a Landlord's Duties to Tenants by allegedly cutting off a tenant's electricity. When he did not appear for court, an arrest warrant was issued. In April 2013, Harrell called Dodge County Court Clerk Rhett Walker. Walker testified that Harrell said "that if I didn't have that bench warrant lifted by such and such a time that day that he was going to turn my world upside down." Walker testified the call "concerned me" and he had to "try to keep from getting a little nervous because I knew from what was going on that he may not have been stable mentally." And Walker stated, "I felt intimidated." Deputy Chief Clerk Tammy Graham testified that she learned from friends and family that Harrell had posted on Facebook a false statement that Graham had engaged in group sex with him and others. While no such video existed, Harrell claimed he would provide access to a video depicting the group sex if the bench warrant was not lifted. The posting was read to the jury. Around the same time, Harrell called Shirley Webb, his former girlfriend and the mother of his children. The two previously had been engaged in

litigation, mostly regarding domestic issues. Harrell called Webb and left a voicemail that she would find a "dead pussy" in her mailbox. In a second voicemail, he accused Webb of engaging in group sex and threatened to release a video of the sex acts on the Internet. Sid Carter, Webb's current boyfriend, testified that after hearing the voicemail he went to the mailbox and found the dead cat stuffed inside. He said that while he was still at the mailbox, Harrell drove by, slowed down and pointed at the mailbox, which was by then closed. In addition to the testimony, both voicemails were played for the jury.

Harrell was arrested and in June 2013, he was indicted on two felony counts of Intimidation of a Court Officer and one felony count of Aggravated Cruelty to Animals, which charged that Harrell "did knowingly and maliciously cause death to a cat." Harrell was eventually released on bond, but his bond was later revoked when he was charged with several unrelated felonies that included Aggravated Stalking (regarding his daughter) and Driving Under the Influence. At trial, Harrell testified he did not kill a cat or put a dead cat into a mailbox on April 16, 2013. He admitted making the phone call to Graham, making the Facebook postings, and lying about Graham, but he denied any threats or intimidation. In June 2014, a jury found Harrell guilty of misdemeanor Cruelty to Animals and to both counts of intimidating a court officer. He was sentenced to six years in prison followed by six years on probation. Harrell then appealed to the state Supreme Court.

Georgia Code § 16-10-97 makes it illegal for a person to try to intimidate through "any threatening action, letter or communication" an officer of the court. Harrell argued on appeal the statute is unconstitutional because it prohibits speech that is protected by the First Amendment of the U.S. Constitution.

Today's opinion points out that "a state can criminalize some speech made with the intent to intimidate another without running afoul of the First Amendment," based on the U.S. Supreme Court's 2003 decision in *Virginia v. Black.* "However, we conclude that Georgia Code § 16-10-97 (a) (1) was unconstitutionally applied to Harrell."

The U.S. Supreme Court stated in *Black* that, "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." The U.S. Supreme Court noted in *Black* that "true threats" are statements in which the speaker "means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals."

In Harrell's statements to Graham, "nothing in the communications threaten an unlawful act of violence to her as required by *Black*," today's opinion says. And while Walker testified he "felt intimidated" by Harrell's Facebook posting and telephone call, there was "no reference to any form of violence in Harrell's communications, nor even an intimation of such."

As a result, "his speech cannot be considered to constitute 'true threats,' and thus does not constitute any proscribable act of intimidation," the opinion says, and his convictions for violating § 16-10-97 must be reversed.

Harrell also argued on appeal that he should not have been tried on the animal cruelty charge in the same proceeding in which he had to answer the charges of intimidating court officers. He stated the trial court erred in denying his motion to sever the charges, "and we agree," today's opinion says. "Although the acts were alleged to have been committed in close proximity of time, the record is devoid of any indication that they were committed in pursuit of

some common scheme or that they had some connection. As alleged, they were simply separate crimes of different character, committed 13 days apart."

While the State argued that Harrell's threatening communications were intended to intimidate Walker, Graham and Webb in relation to court cases involving him, the State presented no statement or testimony "that would allow an inference that there was any case existing between Webb and Harrell at the time of the acts alleged," the opinion says. "And, there was no evidence that Harrell's motive for contacting Webb was to attempt to intimidate her into any action."

"Rather, there was simply no connection shown between the alleged animal cruelty and the alleged crimes of endeavoring to intimidate court officers," the opinion says. "As there was no showing that the crimes alleged were based on the same conduct, were part of a single scheme or plan, or were a series of connected acts, joinder was not authorized."

"Further, the failure to sever the counts must be considered harmful error," the opinion says. The charges of endeavoring to intimidate a court officer "should not even have been presented to a jury." "The prejudicial effect of having to defend the charge of animal cruelty when joined with dissimilar, unconnected charges is exacerbated when those charges are not themselves properly presented for prosecution."

Attorney for Appellant (Harrell): Thomas Jarriel

Attorneys for Appellee (State): Timothy Vaughn, District Attorney, Christopher Gordon, Asst. D.A.

THOMAS V. THE STATE (S15A0796)

In this **Cobb County** case, the Georgia Supreme Court has upheld the murder conviction and life prison sentence given to a man for the shooting death of a transsexual prostitute.

In today's unanimous decision, **Justice Carol Hunstein** writes for the Court that the evidence against Dorville Thomas was "sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that Thomas was guilty of malice murder."

According to the facts, Kalvin McGee was a self-described transsexual with long hair and a "soft feminine voice" who advertised escort services under the name of "Meeya" in transsexual sections of websites and magazines. McGee met with clients at an apartment he shared with a roommate. The night of Jan. 9, 2009, the roommate was on his way home and called McGee, who said he had a client coming over. When the roommate arrived home soon after, he found the apartment set up with candles burning and music playing, which was McGee's ritual when he entertained clients. The roommate later said he found it strange that the apartment door was unlocked and that the door to McGee's side of the apartment was open. But believing McGee was there with a client, the roommate went to his room. Around midnight he texted McGee to see if he was still with the client, but he received no response. He eventually went into McGee's room where he found McGee dead on the floor and bloodstains on the mattress and on the floor. McGee was killed by two gunshots – one to the jaw and another to his chest. The roommate ran to a gas station and called police, who later recovered bullets from the wall behind the headboard and in the bottom of the mattress. Investigators were unable to find McGee's cell phone, which he used to communicate with clients. They also couldn't find the cash he was known to keep in his room as he always required clients to pay him up front. After obtaining McGee's phone records, police determined that McGee had received a call from Thomas the night of the murder.

Upon a search of Thomas's home, officers discovered a .32 caliber revolver, which was later determined to be the murder weapon, wrapped in a towel and hidden in the ceiling.

During questioning by police, Thomas initially said he was at home the night of the murder, but later admitted that he was at McGee's apartment and that his gun "went off." Thomas said he went to the apartment after purchasing marijuana, believing McGee was a woman. He carried a gun for protection, he said, whenever he bought marijuana. According to McGee, he was lying next to McGee on the bed when he realized McGee was not fully female, and he promptly tried to leave. He said an agitated McGee saw the gun in his back pocket and reached for it. Thomas then pulled the gun out of his pocket, and the two tussled on the bed, with Thomas on top of McGee. Thomas said that during the struggle, the gun went off three times, and McGee slid onto the floor. Thomas told investigators he never paid McGee.

In March 2010, a jury convicted Thomas of malice murder and felony murder, and he was sentenced to life in prison. He then appealed to the state Supreme Court, arguing that the evidence was insufficient to support the verdict, that the judge wrongly refused to instruct the jury as he requested, and that his trial attorney was ineffective.

In today's opinion, the high court has rejected all his arguments and finds no errors on the part of the trial court. While Thomas argued there was no evidence that he acted with malice, "It is for a jury to determine from all the facts and circumstances whether a killing is intentional and malicious," the opinion says. "Here, the jury heard evidence McGee clearly advertised himself as 'transsexual' and that Thomas was armed when he went to McGee's apartment." And although jurors heard Thomas's statement that there was a struggle for the gun, they also heard expert evidence that the gunshot wound to McGee's chest came after he had already been shot and probably did not come during a struggle. "The evidence was sufficient to support the jury's verdict," the opinion says.

The state Supreme Court has also rejected Thomas's claim that the trial judge erred in refusing to instruct jurors that they could consider the shooting an "accident" or they could consider whether he was guilty of the less serious crime of involuntary manslaughter. He also challenged the language the judge used in his jury instruction on voluntary manslaughter. But the Court finds these arguments "without merit," the opinion says. Finally, the Court has rejected his contention that his trial attorney was ineffective in violation of his constitutional rights.

"Judgment affirmed," the opinion states. "All the Justices concur."

Attorneys for Appellant (Thomas): Peter Odom, M. Katherine Durant
Attorneys for Appellee (State): D. Victor Reynolds, District Attorney, Daniel Quinn, Sr. Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Vicki Bass, Asst. A.G.

CLAYTON COUNTY BOARD OF COMMISSIONERS ET AL. V. MURPHY (S15A0995)

The Supreme Court of Georgia has unanimously reversed a lower court's ruling requiring the **Clayton County** Board of Commissioners to reinstate a man they first fired and later terminated as part of a reduction in force in which a number of positions were eliminated.

According to the facts of the case, Joseph L. Murphy began working for Clayton County in 1997 as an electrical inspector for the building department. He rose to chief building inspector and was eventually promoted to Assistant Director of Community Development for the County at an annual salary of $70,000. In this position, he supervised the day-to-day operations of the

zoning, building, and planning divisions and nearly all the inspectors employed by the County. In November 2007, Murphy received a separation notice and disciplinary action form signed by Commission Chairman Eldrin Bell stating that he was being fired for alleged violations of civil service rules due to conflicts of interest. Specifically, Murphy owned a private business, JLM Electrical Contractors, which did work for Clayton County. The Commissioners terminated Murphy for allegedly inspecting electrical work done for the County by his company, which violated an order by the Director of Community Development prohibiting inspection of electrical work performed by a related party. Murphy appealed his termination to the Clayton County Civil Service Board, which in July 2008 reversed the County's order terminating Murphy and ordered he be paid lost wages and benefits. Finding that "the penalty of discharge was excessive and disproportionate to the conduct" with which Murphy was charged, the Civil Service Board reduced his punishment to a 30-day suspension without pay and ordered his reinstatement. The County appealed in Clayton County Superior Court, which in January 2009 held a hearing. Meanwhile, prior to the superior court's decision, the County Board of Commissioners in June 2009 implemented a reduction in force (RIF), eliminating positions, including that of Assistant Director of Community Development. According to the County, the job was one of 18 eliminated in a cost-cutting reorganization of the Department of Community Affairs, which saved the County more than $190,000. In August 2009, the superior court dismissed the County's petition that sought to appeal the ruling of the Civil Service Board. The County then offered Murphy back pay for the period between his termination and the reduction in force. Murphy, however, declined and demanded a job with the County.

Murphy was never re-employed by the County, and in August 2011, he sued by filing a petition for a "writ of mandamus," asking the superior court to force the Board of Commissioners to do their duty and put him back to work. (A court issues a writ of mandamus to compel a government official to perform his/her duties.) Murphy also asked the court to order additional back pay. The County filed a motion to dismiss the action. Following a 2014 hearing, the trial court again ruled in Murphy's favor, granting the writ of mandamus and ordering that Murphy "be awarded employment as specified in the civil service rules." The Board of Commissioners then appealed to the state Supreme Court.

In today's opinion, written by **Justice Keith Blackwell**, the high court agrees with the Board of Commissioners that the trial court erred in granting Murphy a writ of mandamus because it is "premised on a misunderstanding and misapplication of the County's civil service rules and regulations."

Civil Service Rule 9.204 states that employees who have been terminated as a result of a reduction in force must be offered employment for a period of two years if there is a position available of the same "nature of that which the laid off employee previously occupied." "But Rule 9.204 does not require the Board to recreate an eliminated position, and Murphy does not appear to argue otherwise," the opinion says. "As a result, the trial court erred to the extent that it held that Murphy has a clear legal right under Rule 9.204 to reinstatement to his position as Assistant Director."

While the writ of mandamus did not specify the job the County was required to give Murphy, it did note that Murphy had given evidence that he was qualified for "numerous" positions that had been available during the two years following the reduction in force. "But Rule 9.204 does not require that a former employee be offered employment to any position for which

he is 'qualified,'" the opinion says. "Instead, it requires that he be offered employment to new or open positions that are being filled and that are 'of the nature of that [job] which the laid off employee had previously occupied.'"

"While there may have been available jobs 'of the nature' of Murphy's job as Assistant Director, we see nothing in the record establishing that an available job was sufficiently similar to Murphy's prior job as to provide him with a 'clear legal right' to that job," today's opinion says. "And because the grant of a writ of mandamus requires the petitioner to establish a clear legal right, the trial court erred when it granted the writ."

Attorneys for Appellants (Board): Jack Hancock, M. Michelle Youngblood
Attorneys for Appellee (Murphy): Steven Frey, Mark Forsling

****

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

* Eddie Matthew Amos (Cobb Co.)	**AMOS V. THE STATE (S15A1143)**
* Ronnie Lee Berrian (Richmond Co.)	**BERRIAN V. THE STATE (S15A0784)**
* Jarvis Amartis Butts (Cobb Co.)	**BUTTS V. THE STATE (S15A1192)**
* Leonard Leroy Dillard (Jefferson Co.)	**DILLARD V. THE STATE (S15A0853)**
* Phillip Hayes Drayton (Ben Hill Co.)	**DRAYTON V. THE STATE (S15A0832)**
* Marial Markeith Fulcher (Screven Co.)	**FULCHER V. THE STATE (S15A0743)**
* Alphonso Moore (Colquitt Co.)	**MOORE V. THE STATE (S15A1211)**
* Marico Young (DeKalb Co.)	**YOUNG V. THE STATE (S15A0747)**

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

* Dennis S. Childers	**IN THE MATTER OF: DENNIS S. CHILDERS (S15Y1540) (S15Y0057, S15Y0058, S15Y0059, S15Y0060)**
* Paul R. Koehler	**IN THE MATTER OF: PAUL R. KOEHLER (S15Y1852)**
* William Charles Lea	**IN THE MATTER OF: WILLIAM CHARLES LEA (S15Y1899)**
* Joel David Myers	**IN THE MATTER OF: JOEL DAVID MYERS (S15Y1230, S15Y1231)**
* John R. Thompson	**IN THE MATTER OF: JOHN R. THOMPSON (S15Y1620)**

The Court has accepted a petition for **voluntary surrender of license** – tantamount to disbarment – from attorneys:

* Tony L. Axam	**IN THE MATTER OF: TONY L. AXAM (S15Y1433)**
* Jin Choi	**IN THE MATTER OF: JIN CHOI (S15Y1812, S15Y1813, S15Y1814)**

The Court has accepted a petition for voluntary discipline and ordered the **suspension pending termination of appeal** of attorney:

* W. Burrell Ellis, Jr.	**IN THE MATTER OF: W. BURRELL ELLIS, JR. (S15Y1785)**

The Court has accepted a petition for voluntary discipline and ordered the **12-month suspension** of attorney:

* Tony C. Jones	**IN THE MATTER OF: TONY C. JONES (S15Y1641)**

The Court has accepted a petition for voluntary discipline and ordered the **2-month suspension and public reprimand** of attorney:

* Hugh O. Nowell	**IN THE MATTER OF: HUGH O. NOWELL (S15Y1288)**

The Court has accepted a petition for voluntary discipline and ordered a **Review Panel reprimand** of attorney:

* Thomas J. Ford, III	**IN THE MATTER OF: THOMAS J. FORD, III (S15Y1787)**

The Court has granted a **certification of fitness for readmission** to the practice of law in Georgia from the following attorney who was previously disbarred:

* Alvin Lamont Kendall	**IN THE MATTER OF: ALVIN LAMONT KENDALL (S15Z1802)**