Supreme Court of Georgia
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SUMMARIES OF OPINIONS

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BORDERS ET AL. V. CITY OF ATLANTA ET AL. (S15A0816)

The Supreme Court of Georgia has ruled in favor of the City of Atlanta in a class action lawsuit filed by Atlanta firefighters, police and other city employees over pension reform.

In today's unanimous opinion, the high court has upheld a **Fulton County** Superior Court ruling and rejected the employees' claim that a 2011 local ordinance modifying the amount they must contribute to their pensions is unconstitutional.

The local ordinance at issue "did not alter Plaintiffs' pension benefits, but rather modified their pension obligations, and in no manner divested Plaintiffs of their earned pension benefits, so as to implicate constitutional concerns," **Presiding Justice P. Harris Hines** writes for the Court in today's opinion.

According to briefs filed in the case, the City of Atlanta provides retirement benefits through three plans: the General Employees' Pension Plan, the Police Officers' Pension Plan and the Firefighters' Pension Plan. Each plan provides eligible members with a monthly income upon retirement for life. Prior to Nov. 1, 2011, employees contributed 7 percent of their annual salary to their pension plan or 8 percent if they designated a beneficiary. They agreed to the contribution when they enrolled in their plan by signing an enrollment card at the onset of their employment. The pension plans contained a provision that stated: "The receipt of an applicant's executed enrollment or application card by the commissioner of finance or his agent shall constitute the irrevocable consent of the applicant to participate under the provisions of this act, as amended, or as may hereinafter be amended."

In June 2011, the City enacted an ordinance that amended the three pension plans. Under the ordinance, beginning Nov. 1, 2011, plan members would contribute 12 percent of their

annual salary to their pension plan or 13 percent if they had designated a beneficiary. The ordinance stated the contributions could eventually be increased up to 17 percent or 18 percent of their annual compensation – if the City's required contribution to the pension plans ever reached 35 percent of the City's total payroll cost. City officials have said this "pension reform" was necessary to preserve the sustainability of the pension system without layoffs, tax increases or a reduction in city services. The ordinance did not change the amount of pension benefits members would receive upon retiring but did shift some of the burden for paying for the plans from the City to employees.

On Nov. 14, 2013, employees filed a class action lawsuit against the City, the Mayor, and the Atlanta City Council, claiming that by requiring them to pay more into their pension plans, the City breached their employment contracts with the City and violated the clause in the Georgia Constitution that prohibits the passage of any law "impairing the obligation of contract." Stephen Borders is president of the Atlanta Professional Firefighters Union and the main named plaintiff. The class certified by the Superior Court is made up of all police officers, firefighters and other City employees who became members of one of the City's pension plans before Nov. 1, 2011 but who had not yet retired. The class included 6,079 employees, according to the briefs.

In January 2014, the City filed a motion to dismiss the lawsuit or grant it "summary judgment," which a judge does after deciding that a jury trial is unnecessary because the facts are undisputed and the law falls clearly on the side of one of the parties. The employees also requested summary judgment in their favor. In November 2014, the trial court ruled in favor of the City, finding that "Home Rule" amendments to the Constitution, which delegated certain powers to cities and municipalities, authorized the City to modify the pension plans, including by increasing the employee contribution amount. It also found that the retirement plans clearly provide for subsequent modification or amendment, and that the City's enrollment provisions authorized the City to amend the plans without breaching the plaintiffs' employment contracts or violating the Constitution's "impairment clause." In February 2015, the employees filed an "extraordinary motion for new trial," after finding newly discovered evidence. The motion was based on a 2009 letter from then Atlanta Mayor Shirley Franklin to the President of the City Council, which stated: "As you will recall from previous discussions on pensions, the City cannot legally decrease the benefits provide [*sic.*] to current City employees." But the trial court denied the employees' motion, finding that the letter was of no legal relevance. The employees then appealed to the Georgia Supreme Court.

Today's 23-page opinion points out that the Constitution provides "home rule" for municipalities by giving the General Assembly "the authority to delegate its power so that matters pertaining to municipalities may be dealt with without the necessity of action by the General Assembly." The state Constitution also gives municipalities the authority to modify their retirement or pension systems by giving them the "power to maintain and modify heretofore existing retirement or pension systems." In addition, the General Assembly has enacted statutes that give municipalities the authority to establish retirement systems for their employees "and to provide the method or methods of financing such systems." The legislation "explicitly contemplates that a municipal corporation's provision of retirement or pension benefits to its employees be read in conjunction with the terms of local law and ordinances, that is, that such provision of benefits be supplemented by local law such as that contained in the Code of the City of Atlanta," today's opinion says.

In terms of whether the ordinance constitutes a breach of the plaintiffs' employment contracts and therefore amounts to a violation of the Constitution's impairment clause, the high court agrees with the trial court. The superior court judge "aptly stated" that, "where the legislation establishing a pension plan itself provides that the plan may be subject to modification or amendment, the participant does not acquire a vested contractual right in an unchanged plan and the plan may be amended without breaching employment contracts or violating the Impairment Clause."

"Simply, in the present case, there was no breach of the employment contracts or the Impairment Clause in the manner urged by Plaintiffs, and therefore, such alleged breach and impairment fail to provide a basis upon which to find that the ordinance is unreasonable," today's opinion concludes. "Furthermore, inasmuch as the increases in pension contributions pursuant to the ordinance and amendment were not retroactive and the ordinance and amendment do not alter benefit formulas, calculations of pension benefits, or the actual benefit amounts payable to the participants at the time of retirement, such circumstances likewise do not negatively impact the ordinance….Accordingly, we conclude that the superior court properly granted summary judgment in favor of defendants on Plaintiffs' claims of breach of contract and unconstitutional impairment of contract."

Attorneys for Appellants (Borders): John Bell, Jr., Lee Brigham
Attorneys for Appellees (City): Cathy Hampton, Robin Shahar, Seth Eisenberg

MARTIN V. THE STATE (S15P0675)

The Supreme Court of Georgia has unanimously upheld the death sentences given to DeKelvin Martin for the 2002 murders of his girlfriend's 12-year-old son and her elderly grandparents.

In this **Fulton County** death penalty case, "we conclude that Martin's sentences of death were not imposed under the influence of passion, prejudice, or any other arbitrary factor," **Presiding Justice P. Harris Hines** writes in today's opinion.

According to the evidence, at the time of the crime, Martin and Tymika Wright had been dating five years and were living with her grandparents, Travis Ivery, 83, and Ila Ivery, 77. The Ivery's were in failing health, and Wright helped take care of them. Wright's children, 12-year-old Savion and 2-year-old Christin, also lived with them. Savion was Wright's son from a previous marriage; Christin was Martin's son. The night of Sept. 30, 2002, Martin went out with friends, consumed a lot of alcohol and cocaine, and arrived home at 1:30 a.m. When Wright rejected his sexual advances, he pulled a knife out of the dishwasher and threatened to kill everyone in the house. After he dragged Wright at knifepoint to a couch, she talked him out of hurting her, he apologized and he put down the knife, which she subsequently hid while he wasn't looking. Later, Martin again approached Wright for sex, and she agreed in the hope he would then go to sleep. When Martin could not maintain an erection, he accused her of being unfaithful, and in a rage, he began to choke her. After she broke free, the two struggled in the hallway and she screamed for help. Savion came from his bedroom, and Martin began stabbing the boy in his neck. When Wright got between Martin and her son, yelling for Savion to run, she herself was stabbed. When Wright's grandmother came to the aid of Wright and Savion, Martin stabbed the elderly woman multiple times. And when Wright's grandfather tried to intervene, Martin also began stabbing him over and over. As Wright attempted to get Martin off her

grandmother, she again yelled for Savion to run. The child took three or four steps before collapsing on the floor. During the attack, Wright begged Martin not to hurt Christin, who was on the floor, laying his head on Savion. At some point, Martin grabbed Wright and took her to a room while their 2-year-old held onto his mother's leg. Martin then made her perform oral sex while he held a knife to her. Eventually, Martin ordered Wright into the car and the couple left the home after Martin disabled the phones as Wright's grandmother was trying to call police. While in the car, Martin actually agreed to let Wright stop the car and call police, as they had left their toddler at the house. Wright then called 911 from a pay phone and told the operator there had been a stabbing. She returned to the car and drove toward the Ben Hill area as Martin instructed. Eventually, Martin told Wright he was going to let her go so she could take care of their son. He then got out of the car and left. Wright quickly drove back to the house.

In response to Wright's 911 call, police arrived at the house where they found Christin crawling back and forth near Savion, "as if he was checking on his brother," according to testimony at trial. Police found Wright crying and "hysterical," with stab wounds to her face and back. Christin was in a bloody nightshirt and seemingly in shock. According to testimony, the toddler was wide-eyed, emotionless and had a "death grip" on his uncle, not wanting to let go. First responders found Savion's body covered in blood, lying in the hallway in a fetal position, dressed in underwear and a sock. They found Travis Ivery lying on his back in bed, covered in blood and gasping for air. He died on the way to the hospital. They found Ila Ivery on the floor of a bedroom holding a telephone and an asthma inhaler. She was having difficulty breathing and died almost four months later as a result of her stab wounds.

Martin was charged with three counts of murder, rape, cruelty to children, and other crimes. The State announced it would seek the death penalty. And in January 2005, Martin pleaded guilty to all 16 counts in the indictment. In a bench trial – before a judge with no jury – Martin was sentenced to death. In 2006, Martin filed a motion asking to withdraw his guilty plea, and another judge allowed him to do so based on the trial court's failure to fully inform him that by pleading guilty, Martin would waive his constitutional rights to be tried by a jury, to confront his accusers, and to not be compelled to testify and incriminate himself. The State appealed, but this Court dismissed the appeal. In 2008, a jury trial was held to determine Martin's competence to stand trial. The jury found him competent. In 2009, Martin was retried before a jury and found guilty. The jury found a number of aggravating circumstances, which qualified him for the death penalty, and after recommending the death sentence, Martin was again sentenced to death for the murders of Savion Wright and Travis Ivery. He was sentenced to life in prison for the murder of Ila Ivery, a consecutive life prison sentence for rape, and he received additional sentences for cruelty to children and other crimes. Martin then appealed to the state Supreme Court.

In his appeal, Martin's attorneys argued that more than a dozen errors were made in Martin's trial, and that the judgments should be reversed and the case remanded for a new trial. In today's 72-page opinion, the high court has addressed each of their arguments and rejected them all.

In the first argument addressed by this court, his attorneys challenge the sufficiency of the evidence related to his rape conviction. However, today's opinion states that upon "our review of the record, including the review of the evidence of rape…, we conclude that the evidence presented at trial was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt that Martin was guilty of all of the charges of which he was convicted."

Martin also argued that the judge presiding over his first motion for a new trial erred by removing the defense attorneys who had represented him throughout his first trial. But, "we conclude that the presiding judge did not abuse his discretion in ruling…that the relevant ethical rule justified the disqualification of Martin's original lawyers," the opinion says. Other arguments include jury selection issues. (Martin argued that the trial court was wrong in excusing one prospective juror and refusing to excuse two others based on their views on the death penalty.) They include issues raised during the guilt/innocence phase of the trial. (Martin argued that the instruction to the jury on the verdict of "guilty but mentally ill" was improper, and that the prosecutor made several improper statements during closing arguments.) The arguments include issues raised during the sentencing phase of the trial. (Martin claimed that the trial court erred by allowing victim impact testimony from Tymika Wright at his retrial in 2009, after Wright had died, that was "false, unsworn, and hearsay.") While the Supreme Court agrees with Martin that some of the victim impact statements were objectionable, "we hold, particularly in light of the overwhelming evidence and the nature of Martin's crimes, that there is no reasonable probability that the objectionable portions of the testimony led to the jury's decision to impose a death sentence," the opinion says. Finally, Martin's arguments include issues related to the review of his sentences to death.

"Considering both the murders for which Martin has been sentenced to death and Martin as a defendant, we find that the death sentences imposed in his case were not disproportionate punishment within the meaning of Georgia law," today's opinion says. "The cases cited in the Appendix support this conclusion, because each shows a jury's willingness to impose a death sentence for the commission of multiple murders, whether committed in one or more than one transaction."

Attorneys for Appellant (Martin): Bidish Sarma, Ty Alper, Thomas Clegg, Maurice Kenner
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KEMP, SECRETARY OF STATE, V. MONROE COUNTY ET AL. (S15A1251)
BIBB COUNTY V. MONROE COUNTY ET AL. (S15A1252)

The Supreme Court of Georgia has ruled in favor of Secretary of State Brian P. Kemp and Bibb County by reversing a Fulton County court decision regarding a land boundary dispute between Bibb and Monroe counties.

In today's opinion, **Chief Justice Hugh Thompson** writes that the trial court erred by prohibiting the Secretary from holding a hearing and considering new evidence before determining where the boundary lies, as he is required by law to do.

While the trial court was "authorized to direct the Secretary to make a determination as to the true boundary line, it was not authorized to direct the Secretary as to the manner in which evidence was to be received or the process by which the Secretary was to make his decision," the opinion says. "We therefore reverse the trial court's order and remand to the trial court for proceedings consistent with this opinion."

The precise location of the boundary line between **Bibb County** and **Monroe County** has been in dispute for many years, and this is the second time the case has come to the state Supreme Court. Georgia Code § 36-3-20 stipulates that when there is a boundary dispute, the

"Governor shall appoint some suitable and competent land surveyor…to survey, mark out, and define the boundary line…." If a county then challenges the surveyor's line, another statute (§ 36-3-24) provides that the "Secretary of State shall determine from the law and evidence the true boundary line in dispute between the respective counties." Ten years ago, at Monroe County's request, Gov. Sonny Perdue appointed a surveyor – Terry M. Scarborough – to survey and define the boundary between the counties. Scarborough filed his survey and plat in 2009 with the then-Secretary of State, as the law requires. Bibb County challenged Scarborough's line, arguing in part that the initial point for the boundary should be an area on the Ocmulgee River called Waller's Ferry rather than the area called Turrentine's Ferry, as Scarborough's survey denoted. A Special Assistant Administrative Law Judge conducted a three-day hearing to consider Bibb County's challenge, during which the judge heard from nine witnesses and considered more than 150 exhibits and findings of fact and conclusions of law that were submitted by the counties, according to briefs filed in the case. Following the hearing, the judge recommended the Secretary approve the Scarborough survey, finding it to be "an accurate description of the true boundary line between Bibb County and Monroe County." After reviewing the evidence and hearing arguments, however, the Secretary rejected the survey, finding that there was inconclusive evidence as to the location of Waller's or Turrentine's Ferry, and finding that the survey would leave an "island" of Bibb County entirely surrounded by Monroe County. The Secretary did not establish a definitive boundary line.

Monroe County subsequently filed a petition for judicial review in Fulton County, but the trial court dismissed the petition, saying it lacked authority over what it said was a political decision that was not subject to judicial review. Monroe County then filed a petition for a "Writ of Mandamus," which is issued to compel a government officer to perform his mandatory duties. The trial court issued the writ of mandamus, compelling the Secretary of State to adopt the Scarborough survey's boundary line. The Secretary of State and Bibb County then appealed to the state Supreme Court.

On March 10, 2014, this Court reversed the lower court's decision and sent the case back to Fulton County after ruling that while the trial court could order Kemp to determine the true boundary line between Bibb and Monroe counties, it could not require Kemp to pick a particular boundary. "In this instance, the Secretary has a mandatory duty to consider the relevant law and evidence and to render some decision identifying the boundary line," the high court wrote in its opinion. However, "it is not proper either to prescribe how that action is taken or to preordain its result." The Supreme Court held that the process for receiving evidence and reaching a decision was in Kemp's discretion and stated that whether "there has been any gross abuse of discretion in the Secretary's conduct of the proceedings is a question the trial court may elect to address on remand."

In response to the Supreme Court's decision, Kemp notified the counties and Scarborough that he would consider new evidence from both sides, advising them he would hold a hearing in August 2014.

Monroe County objected in superior court to Kemp's plan to consider additional evidence, arguing that the Secretary should be limited to the record that existed on June 30, 2011, when he closed the record in the case. Prior to closing the record, the Secretary had held a hearing in May 2011 where the counties each presented their arguments. Scarborough did not attend, as he had said he would not attend any proceedings until he received Bibb County's

portion of his fee, which he had not received at that point. When the surveyor did receive Bibb County's share of his fee, he offered to make a presentation to the Secretary in support of his survey, but the Secretary declined the offer.

In July 2014, the superior court issued its order on the scope of the proceedings, ordering Kemp to determine the boundary line but prohibiting him from considering additional evidence in a second hearing. The trial court also found that Kemp's prior decision not to consider Scarborough's addendum evidence was a gross abuse of discretion. "To allow another evidentiary hearing suggests bias in favor of Bibb County, is fundamentally unfair, and undermines the statutory process," the trial court concluded. It stated that the Secretary "is, otherwise, free to use his discretion…to determine the true boundary line between Bibb County and Monroe County and is ordered to do so within a reasonable time." The judge said that re-opening the record was prohibited under the law and referred to the Supreme Court's first decision in this case, which stated that the "Secretary has already exercised his discretion…by referring the matter to a Special Assistant Administrative Law Judge before whom substantial evidence, including tax maps and historical documents, has been developed, and by undertaking additional investigation, personally visiting the alternative terminating points argued for by each of the counties." Allowing the Secretary to permit additional evidence would run counter to the Supreme Court's "explicit directions," the trial court concluded, and would also run counter to the specific method established by the legislature in the Georgia Code. Secretary Kemp and Bibb County again appealed to the state Supreme Court, which agreed to review the case to determine whether the trial court erred by prohibiting the Secretary from holding a new hearing or considering additional evidence before making his final decision.

In today's opinion, the high court finds that the trial court did err. For one thing, it misconstrued the high court's first decision in the matter as a ruling intended to "expressly preclude the Secretary from allowing the record to be reopened and new evidence developed."

"This was not our intent," today's opinion says. The Supreme Court's first decision in the case "was not intended, either explicitly or implicitly, to address the manner in which the Secretary was authorized to proceed in the exercise of his discretion as he continued to perform his statutory duties…," the opinion says. "Thus, to the extent the trial court felt constrained by *Bibb County I* to conclude that the Secretary was without authority to hold another hearing and receive new evidence, the trial court erred."

As for the trial court's ruling that the Secretary no longer had the discretion to hold hearings because he had already held a hearing and closed the record, "We disagree," the opinion says. "Contrary to the trial court's order, we find nothing in the process announced by the Secretary that contravenes his broad statutory discretion, and more specifically, we find nothing in the language of the statutory scheme that indicates a legislative intent to preclude the Secretary from exercising his discretion to re-open the evidence on remand or that imposes upon the Secretary the obligation to receive evidence and determine the boundary line within a single hearing."

"As for the trial court's finding that the Secretary's decision to hold another hearing at which the parties would be allowed to present new evidence was generally 'unfair,' that is a question for the legislature, not the courts," the opinion says. The high court points out that "to the extent either party wishes to challenge the Secretary's final decision or the process by which it ultimately is made, it will be entitled to mandamus relief if it can be shown that the Secretary,

in performing his statutory duties, acted arbitrarily and capriciously or grossly abused his discretion."

"Judgment reversed and case remanded."

Attorneys for Appellant (Kemp): Samuel Olens, Attorney General, Britt Grant, Solicitor General, W. Wright Banks, Jr., Mary Jo Volkert, Sr. Asst. A.G.
Attorneys for Appellant (Bibb): Virgil Adams, D. James Jordan, Dawn Lewis Charles Cork, III
Attorneys for Appellee (Monroe): Letitia McDonald, Jessica Sabbath, Carolyn Burch, Michael Dillon, Benjamin Vaughn

WETZEL V. THE STATE (S15A0650)

The Supreme Court of Georgia has reversed the computer pornography and child exploitation conviction of a former **Oconee County** teacher's aide who electronically sent nude pictures of his genitalia to a 15-year-old girl.

At the same time, it has upheld the 24-year-old man's conviction for electronically furnishing obscene material to a minor.

In today's unanimous opinion, **Justice David Nahmias** describes Jeremy Michael Wetzel's conduct as "highly inappropriate" and "reprehensible." But prosecutors for the State were wrong to tell jurors that they could decide if in their opinion, his conduct should be deemed "an unlawful sexual offense against a child," as the phrase is used in Georgia Code § 16-12-100.2 (d) (1).

"Because the State misled the jury on this point and the trial court's jury instructions did nothing to correct that misinformation, Wetzel's conviction on Count 1 [computer pornography] must be reversed. Wetzel's challenges to his conviction on Count 3 [furnishing obscene material to a minor], however, are meritless, so we affirm that conviction."

According to the facts at trial, in the fall of 2011, S.B.J. was a 15-year-old sophomore at North Oconee High School where Wetzel worked as a paraprofessional in the special needs classroom. He also coached baseball and helped with the HERO Club, in which students worked with special education students. S.B.J. first met Wetzel when she joined the HERO Club in the fall of her sophomore year. Wetzel and S.B.J. began making contact outside school via Facebook. In November 2011, they began communicating via text messages on her cell phone and through messages on her sister's iPod Touch to and from his cell phone. Around Nov. 16, Wetzel's messages became more sexual in nature and he sent a text to S.B.J. asking her what size penises she had seen. He then attempted to send her photos of his erect penis via his cell phone, but after running into difficulty, he sent two emails to her from his own Hotmail address to her Gmail address. S.B.J. testified that a couple of days later, he sent her more pictures and asked via text message, "What do I get in return." S.B.J. testified she then took two pictures of herself topless and sent them electronically to Wetzel. The communication between them continued for a few more days, ending when Wetzel indicated he wanted to resume his relationship with a former girlfriend. In December 2011, S.B.J. showed the photos of Wetzel to two of her friends, who reported them to a teacher. After school administrators interviewed Wetzel and the girl, and she showed the principal the emails with the nude photos, school officials fired Wetzel, called police, and Wetzel was arrested later that day. Two days later, the police obtained a search warrant for Wetzel's house and identified his bathroom as the background of the pictures. At trial, S.B.J. testified that she and Wetzel never had any physical contact.

Following a four-day trial in May 2013, Wetzel was convicted of violating the Computer or Electronic Pornography and Child Exploitation Prevention Act of 2007 (Georgia Code § 16-12-100.2 (d)) and for electronically furnishing obscene material to a minor. He was acquitted of child molestation. Wetzel was sentenced to eight years, with two to be spent in prison.

Wetzel appealed to the Georgia Court of Appeals, which issued an opinion upholding the trial court's verdicts. But it later vacated its opinion and transferred the case to the state Supreme Court after determining that Wetzel had raised constitutional issues. At issue in this case is Georgia Code §16-12-100.2 (d). At the time of Wetzel's alleged violation in 2011, the version of that law which applied in this case, stated: "It shall be unlawful for any person intentionally or willfully to utilize a computer on-line service or Internet service…to seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure or entice a child…to commit any illegal act described in Code Section §16-6-2, relating to the offense of **sodomy** or aggravated sodomy; Code Section §16-6-4, relating to the offense of **child molestation** or aggravated child molestation; Code Section §16-6-5, relating to the offense of **enticing a child for indecent purposes**; or Code Section §16-6-8, relating to the offense of **public indecency** or to engage in any conduct that by its nature is an unlawful sexual offense against a child." Wetzel then appealed to the Georgia Supreme Court, arguing that "to engage in conduct that by its nature is an *unlawful sexual offense* against a child" is not a separate offense under §16-12-100.2 (d) (1) and therefore the indictment was void.

In today's 31-page opinion, the high court points out that State prosecutors improperly argued that, "contrary to basic principles of law and due process," the "phrase, 'unlawful sexual offense against a child,' did not require the State to allege or even identify a statutory sexual offense that rendered Wetzel's conduct with S.B.J. unlawful. Instead, the State asserted, if the jury decided, as the 'voice of the community,' that it believed Wetzel's conduct was 'offensive,' then he had committed an 'unlawful sexual offense.'"

"But it is a bedrock principle of Georgia law that only the legislature can prescribe what conduct will be deemed criminal, and it is also fundamental that a person may be found guilty only of crimes that were defined before he committed the allegedly illegal acts," today's opinion says. "And to leave no doubt, the General Assembly has said directly, 'No conduct constitutes a crime unless it is described as a crime in this title or in another statute of this state.'"

"[W]e now hold that in saying that a person violates §16-12-100.2 (d) (1) by using an electronic device to seduce, etc. a child in order 'to engage in any conduct that by its nature is an unlawful sexual offense against a child,' the General Assembly was requiring the State to allege and prove that the defendant's conduct violated another specific criminal law, not allowing the jury in each case to decide retroactively whether it believed the conduct at issue was 'offensive,'" the opinion says. "The State's belated arrival at this conclusion, however, resulted in the jury convicting Wetzel on Count 1 of the indictment after being misled about what it needed to decide to find him guilty of that charge."

Furthermore, in its instruction to the jury, the trial court "accepted, or at least acquiesced in, the State's obdurate refusal to identify any offense outside §16-12-100.2 (d) (1) as the relevant 'unlawful sexual offense against a child.'" Rather, the trial court left the jury without "any inkling of the underlying offense on which Count 1 was allegedly based…." "And given the reprehensible – even if not criminal – nature of Wetzel's conduct, and the resulting likelihood that the jury improperly found him guilty in accordance with the improper argument made by the

State, we cannot say that this instructional error was harmless," the opinion says. "Accordingly, we reverse Wetzel's conviction on Count 1."

However, the high court has rejected Wetzel's argument that the evidence presented at trial was insufficient to support his conviction on Count 3 – electronically furnishing obscene material to a minor. At the time of his alleged violation in 2011, "electronically furnishes" was defined in the statute as "allowing access to information stored in a computer, including making material available by operating a computer bulletin board." Wetzel argued there was no evidence that he electronically furnished his nude pictures to S.B.J. through the operation of a "computer bulletin board." However, the statute is "properly read to prohibit providing obscene materials to minors not only through operating a computer bulletin board but also through any other method of 'allowing access to information stored on a computer,'" the opinion says. "Sending an email is one of those other methods." The Supreme Court has also rejected Wetzel's contention that his conviction on Count 3 must be reversed because the State failed to prove he should have known that S.B.J. was under the age of 18. Given that the majority of high school students are under 18 in November of a given school year, "the jury could reasonably conclude that, absent evidence to the contrary, a high school paraprofessional like Wetzel knew or should have known that S.B.J. was under 18 at the time of the crime."

Attorney for Appellant (Wetzel): Michael Wetzel

Attorneys for Appellee (State): Kenneth Mauldin, District Attorney, Kristopher Bolden, Asst. D.A

TWITTY V. THE STATE (S15A0906)

The Supreme Court of Georgia has unanimously reversed the murder conviction and life prison sentence given to a man in **Richmond County** for binding a man's hands and feet, stuffing him in the trunk of a car, shooting him in the head, and dumping him into the Savannah River. His body was found by a fisherman.

In today's opinion, written by **Justice Keith Blackwell**, the high court finds that at the trial of Demetric Twitty, prosecutors for the State failed to prove "venue" – or the location where the crime was committed, as required by law.

"After reviewing the record in the light most favorable to the verdict, we must conclude that the State failed to prove venue beyond a reasonable doubt," today's opinion says.

According to the facts, in July 2006, Ian Mosley and a friend left Spartanburg, SC, where Mosley lived, for Gaffney, SC, to purchase Lortab pills from Kelly Roberts. Demetric Twitty, acting as Roberts' "guy," brought Mosley the pills, which turned out to be fake. Mosley and his friend then followed Twitty to a nearby store to confront him about the fake pills. Twitty became aggressive, suggesting he was carrying a gun, so Mosley and his friend left. About a week later, on the afternoon of July 24, 2006, Mosley again went to visit friends in Gaffney. He had borrowed someone else's credit card and was driving his own white Lexus sedan. Mosley was last seen in Gaffney around 5:00 p.m., sitting in his car in the parking lot of a church. According to the State, sometime late that afternoon, Twitty and Roberts kidnapped Mosley, tied him up, and put him in the trunk of his own car.

Driving Mosley's white Lexus, Twitty and Roberts arrived that night in Milledgeville, GA, at the home of Edward Reeves, another co-defendant with Mosley still in the trunk. After a short conversation, the three left to get beer, but instead, Roberts drove them to the Lock and

Dam, a park in Augusta, and backed the car down a boat ramp that was in or near the park. Twitty pulled Mosley out of the trunk and told him to "give him the numbers." Mosley recited what sounded like a credit card number. Twitty then fired three shots, one to Mosley's head, and dumped him into the Savannah River. The next morning, a local fisherman found Mosley's body. His hands were tied behind his back with a shoelace and his feet were bound at the ankles by duct tape. In addition to stealing his car, phone and bank records showed that Twitty and Roberts had also taken Mosley's cell phone and credit card and used them the night of the crime and the days that followed.

Following a December 2007 jury trial, Twitty, who was tried separately, was convicted of malice murder, unlawful possession of a firearm during the commission of a crime, and unlawful possession of a firearm by a convicted felon. He was sentenced to life plus 20 years in prison. Twitty then appealed to the state Supreme Court, arguing only that the State failed to prove that venue properly lay in Richmond County.

"Upon our review of the record and briefs, we agree that the State failed to prove venue, and for that reason, the judgment of the trial court is reversed," today's opinion says.

In a criminal case, venue is a fact the State must prove beyond a reasonable doubt. Venue determines where a criminal case must be tried and under Georgia law, is "the county where the crime was committed," or "the county in which the cause of death was inflicted." If that cannot be determined, the law says venue is considered to be "the county in which the death occurred." "If a dead body is discovered in this state and it cannot be readily determined in what county the cause of death was inflicted, it shall be considered that the cause of death was inflicted in the county in which the dead body was discovered," Georgia Code § 17-2-2 states.

In this case, the shooting of Mosley, which was the cause of his death, occurred on a boat ramp in or near the Lock and Dam park, according to statements by Twitty and his co-defendant, and there was no evidence that the cause of death was inflicted anywhere other than the boat ramp.

"Proper venue for the murder lay, therefore, in the county in which the boat ramp is situated," the opinion says. "The State failed, however, to adduce any evidence identifying that county." While the State points to evidence that Mosley's body was found in Richmond County, the county in which a body is found establishes venue for a homicide only when "it cannot be readily determined in what county the cause of death was inflicted," according to Georgia law. Here, it was determined that the boat ramp was where the cause of death was inflicted. And while the State points to the involvement of Richmond County law enforcement officers as proof of venue, "their involvement proves nothing about the location in which the cause of death was inflicted, especially when evidence shows clearly that the cause of death was inflicted somewhere other than the place in which the body was found."

"The boat ramp to which all of the evidence pointed as the scene of the crime was known to investigators, but no one at trial asked those investigators about the county in which the boat ramp was located," today's opinion says. "Accordingly, we must reverse the judgment below."

"As we have explained before, however, our reversal of a judgment of conviction because the State failed to adequately prove venue is no bar to retrial."

In a footnote, the Supreme Court acknowledges that, "For all we know, the entire Lock and Dam park, and every boat ramp in its vicinity may be located in Richmond County. And perhaps the jurors – residents of Richmond County – would have known as much from their

everyday lives and their common knowledge of the community that they share. Nevertheless, that fact is not established by the trial record, and defendants may not be convicted of crimes based on extra-judicial knowledge rather than evidence of such essential facts admitted at trial." The footnote points out that both the state Supreme Court and the Court of Appeals "continue to see cases like this one in which venue becomes a serious issue on appeal, apparently unnecessarily." "Accordingly, this Court strongly urges trial courts to begin giving an appropriate charge on venue tailored to the facts of the case."
Attorney for Appellant (Twitty): Tyler Conklin
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., Vicki Bass, Asst. A.G.

THE STATE V. ALLEN ET AL. (S14G1765)

In a split 4-to-3 decision, the Georgia Supreme Court has ruled that when the case of two men charged with illegal drug possession goes to trial, the jury will be allowed to hear evidence that police found nearly 10 pounds of marijuana in their car.

Today's majority decision reverses a Georgia Court of Appeals opinion, which had upheld a **Henry County** court ruling that the drug evidence should be suppressed because the officer illegally prolonged the traffic stop.

In today's majority decision **Justice David Nahmias** writes that, "it is clear in this case that the computer records check on the stopped car's passenger was part of the authorized mission of the traffic stop, and it is also clear that the officer conducted the records check and the stop as a whole with reasonable diligence. Accordingly, the stop was constitutional, and Scott and Allen's motion to suppress should have been denied."

According to the facts, on Sept. 13, 2012, Henry County Officer Nicholas Jackson was stationed on I-75 to monitor southbound traffic when he saw a 2012 Nissan Altima cross from the center lane into the "fast" left lane and then back, which constituted a "lane infraction." As the car passed, the officer saw the driver reach over and point his finger at the passenger's face as if in an argument. Concerned the driver was distracted, Jackson followed the car and initiated a traffic stop. He approached the car and noticed that the driver, Patrick Delroy Scott, and the passenger, Dorian Maurice Allen, seemed nervous, observing that each man's carotid artery was pulsating at a high rate, according to briefs filed in the case. But Jackson saw no contraband in plain sight, nor did he detect any suspicious odors. Jackson told the men he'd stopped them for lane infractions and asked if they were fighting. Scott said no, and the officer told him he was writing him a courtesy warning for the lane infractions. He obtained Scott's driver's license and Allen's South Carolina identification card, then had Scott get out the car to "make sure he wasn't intoxicated." He also conducted a pat-down search of Scott. Finding no signs of intoxication or impairment and no weapon, Jackson engaged in general conversation with Scott while he wrote the warning. By the time he finished, the stop had taken about 8 minutes. After completing the warning, Jackson spoke into his shoulder-mounted radio and asked dispatch to run a computer check on the men's identification. Jackson had not yet returned their identification cards. Seconds later, dispatch radioed back that Scott's Georgia license was "crystal clear," but the check on Allen's out-of-state identification card took longer. Jackson explained he was waiting to hear back about Allen's identification and asked Scott for consent to search the car. Scott gave

an ambiguous answer, which Jackson took as a denial. At that time, the officer retrieved his drug dog from the back of his car, and had him walk around the Altima, at which time the dog gave a positive odor response. It was now about 11 ½ minutes into the stop. The dog's alert provided Jackson with probable cause to search the car. While he was searching the car, dispatch got back with Allen's history, stating his identification card was clear. During the search, Jackson found a large box wrapped in Christmas paper in the trunk. Inside he found about 10 pounds of marijuana wrapped in plastic.

Allen and Scott were indicted for possession of more than an ounce of marijuana, punishable by up to 10 years in prison. Both men pleaded not guilty and their attorneys filed identical motions to suppress the discovery of the marijuana, arguing it was found only due to their illegal detention. They argued the traffic stop was unconstitutionally prolonged by the records check on Allen. An audio-video recording of the traffic stop was played at the suppression hearing. Based on the video and the testimony of Jackson, who was the sole witness, the trial court concluded that Scott and Allen were being illegally detained at the time the drug dog reacted because by then, "the police investigation of the traffic violation which justified the stop had been concluded and a warning citation had been issued." Also, there was "no valid law enforcement purpose to conduct a check on Allen's identification," and "the officer had no basis to hold either the driver or the passenger" while doing so. The State appealed, but the Court of Appeals, in a split 4-to-3 decision, upheld the Henry County court ruling, finding that the evidence "showed that the officer – having accomplished the tasks related to his investigation into lane infractions and having no reasonable, articulable suspicion of criminal activity aside from the traffic violation – unreasonably prolonged the duration of the traffic stop when he initiated the computer check." The State then appealed to the Georgia Supreme Court.

"We have no quibble with the facts of this case as found by the trial court or as recounted by the Court of Appeals, but those courts erred in applying the established law of traffic stops to those facts," today's majority opinion says.

The U.S. Supreme Court ruled this year in *Rodriguez v. United States* that, "the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission' – to address the traffic violation that warranted the stop, and attend to related safety concerns." It further stated that the mission of a traffic stop involves both addressing the traffic violation that warranted the stop and attending to "related safety concerns," which involve both roadway and officer safety. "Traffic stops are 'especially fraught with danger to police officers,' so an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely…," *Rodriguez* says.

"Thus, a marginally burdensome inquiry that promotes the officer's safe completion of the traffic-stop mission, and is not done merely to facilitate a detour into some non-mission related task, is a permissible part of the traffic stop," today's 29-page majority opinion says.

Scott and Allen did not dispute what Jackson did during the stop until he requested a computer records check on Allen. However, "it certainly enhances an officer's safety during a traffic stop to know if anyone in the stopped car – driver or passenger – may pose a particular threat due to an outstanding arrest warrant or a criminal record showing violent offenses," the majority opinion says. And this court has spoken to the point, "holding squarely that identification checks of both drivers and passengers are generally permitted as an officer safety measure during a traffic stop." Furthermore, "courts throughout the country have held that an

officer generally may reasonably inquire about the identities of persons detained at the scene of a traffic stop and take reasonable steps to quickly verify their identities and to check their criminal histories and for warrants."

"Under these precedents, Officer Jackson's computer records check on Allen was an ordinary officer safety measure incident to the mission of the traffic stop, and it therefore could permissibly extend the stop for a reasonable amount of time," today's majority opinion says. Therefore, the trial court erred in concluding it was unlawful to extend the detention of Scott and Allen while conducting a computer check of Allen's identification.

The Court of Appeals also erred in determining that computer checks unreasonably prolong the stop if they are done once "the tasks related to the investigation of the traffic violation and processing of the traffic citation have been accomplished." The sequence of the officer's action during a traffic stop isn't the point, this court's majority opinion says. Instead, "the primary question is whether the activity at issue was related to the mission of the stop."

The U.S. Supreme Court stated in *Rodriguez* that a dog sniff of a traffic-stopped vehicle "is not fairly characterized as part of the officer's traffic mission," because it "is a measure aimed at 'detect[ing] evidence of ordinary criminal wrongdoing.'"

"Consequently, prolonging a traffic stop in order to conduct an open-air dog sniff renders the seizure unlawful, even if that process adds very little time to the stop," today's majority opinion says. "The Supreme Court has clearly held, however, that conducting an open-air dog sniff around a vehicle during a traffic stop does not itself violate the Fourth Amendment, and…it can be lawfully done so long as it does not lengthen the stop at all." In this case, the dog sniff was done while another task related to the mission of the traffic stop – the check of Scott's and Allen's identification – was conducted, so the dog's sniff added no time at all to the stop.

The majority concludes that both the trial court and the Court of Appeals "erred in concluding that the traffic stop at issue violated Allen's and Scott's Fourth Amendment rights and in ruling that the resulting drug evidence must be suppressed." Joining the majority are Chief Justice Hugh Thompson, Presiding Justice P. Harris Hines, and Justice Keith Blackwell.

In the dissent, **Justice Robert Benham** writes that in this case, "it is clear that the officer had effectively completed his traffic investigation prior to deploying his drug dog and, as such, his search of the vehicle was unlawful." Also quoting the U.S. Supreme Court's *Rodriguez* decision, the dissent says that a "seizure justified only by a police-observed traffic violation 'become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a ticket for the violation."

While the U.S. Supreme Court has noted that the incidental inquiries accompanying a traffic stop include checking the *driver's* license and any outstanding warrants against the *driver*, Allen was a passenger, did not have a driver's license, was not driving the vehicle, "and so his status was not critical to the mission of road safety," the dissent says. "In fact, the majority opinion concedes that the United States Supreme Court has never affirmatively held that a passenger's status is a required inquiry in any traffic investigation or that such inquiry may prolong the stop after the mission of the traffic stop has been resolved. Indeed, the Supreme Court has stated that 'the Fourth Amendment tolerate[s] certain unrelated investigations' only if they do not 'lengthen the roadside detention.'"

Here, "the majority opinion justifies the officer's actions in prolonging the stop as to Allen's identification card, and the deployment of the drug dog while waiting for Allen's

information to be returned by the dispatcher, by focusing on case law which highlights the need to support officer safety when conducting traffic investigations," the dissent says.

"There is no doubt that officers have difficult jobs and that conducting traffic stops can be dangerous. Officer safety, however, is not a panacea for Fourth Amendment violations," the dissent says. "And in this case in particular, the focus on officer safety is irrelevant due to the absence of any evidence that officer safety was ever a concern during this incident."

"Rather, the officer used the inquiry into Allen's information as an excuse to extend the detention beyond the reasonable time it took the officer to investigate the traffic stop and impermissibly detoured his mission into an investigation of criminal activity for which he had no reasonable suspicion or probable cause," the dissent says. Furthermore, the U.S. Supreme Court ruled in *Rodriguez* that a "drug sniffing dog has no purpose in an investigation concerning traffic violations," the dissent says. "Prolonging the time it reasonably takes to complete a traffic stop in order to conduct an open air sniff by a drug dog is unlawful without exception."

"Once the determination of whether a traffic infraction occurred has been completed, the mission is over, the detainees should be immediately released, and the need for safety checks expires concurrently," the dissent says. "Because I believe the officer unlawfully extended the traffic stop in this case, I would uphold the decision of the Court of Appeals affirming the trial court's granting the motions to suppress." Joining the dissent are Justices Carol Hunstein and Harold Melton.

Attorneys for Appellant (State): Jim Wright, District Attorney, Blair Mahaffey, Chief Asst. D.A.

Attorneys for Appellees (Allen): William Puckett, Holly Veal

NGUYEN ET AL. V. SOUTHWESTERN EMERGENCY PHYSICIANS, P.C., ET AL. (S15G0621)

The Supreme Court of Georgia has unanimously ruled in favor of some **Dougherty County** medical providers who were sued by the parents of a baby who suffered permanent brain damage after she was treated and released from a local hospital emergency room.

With today's opinion, written by **Justice David Nahmias**, the high court has upheld a ruling by the Georgia Court of Appeals and determined that the issue must proceed to trial and be decided by a jury. At issue is whether the hospital medical staff provided the baby with "emergency medical care," which under Georgia law gives medical providers a greater degree of protection from liability.

According to the facts of the case, on July 7, 2007, 6-month old Keira Pech fell off a bed at her babysitter's home and hit her head on a suitcase. The baby's mother – Thu Carey Nguyen – was called. Alarmed by a large, reddish purple swollen area on the right side of the baby's head that the mother said was the size of an "apple" or "another head," she took the infant to Phoebe Putney Memorial Hospital emergency room in Albany, where at 5:50 p.m., the baby was seen by a triage paramedic. The baby's father, Khoeun Pech, joined them at the hospital. After the paramedic noted a hematoma on the baby's head, at 6:02 p.m., she was seen and examined by Michael Heyer, a physician's assistant employed by Southwestern Emergency Physicians, P.C. After conducting a routine series of neurological and musculoskeletal exams, Heyer diagnosed a "moderate" sized scalp contusion, recorded her condition as "stable," and concluded it was not necessary to call in the attending emergency room doctor or order radiology studies. The baby

was discharged at 6:10 p.m. Three days later, Keira was brought back to the hospital by ambulance after she stopped breathing while at her babysitter's home. A CT scan revealed a large "subdural hematoma," a collection of blood inside her skull, which was putting substantial pressure on her brain. She was immediately taken to surgery where her skull was opened to remove the blood and relieve the pressure. She was transferred to the pediatric Intensive Care Unit at the Medical Center of Central Georgia where the treating neurosurgeon concluded that the subdural hematoma had been developing for days or weeks. As a result of the subdural hematoma, the baby suffered permanent brain damage. According to her parents, she is now 8 years old and unable to walk or talk.

Keira's parents filed a medical malpractice lawsuit against the hospital, the emergency room physician, the physician's assistant and Southwestern Emergency Physicians. They alleged the medical providers breached the standard of care and negligently failed to adequately examine the infant during her first visit to the emergency room and obtain the imaging necessary to reveal the developing subdural hematoma early enough to prevent catastrophic damage.

Key to this case is the emergency medical care statute, Georgia Code § 51-1-29.5 (c), which states that in a lawsuit involving the provision of emergency medical care, "immediately following the evaluation or treatment of a patient in a hospital emergency department, no physician or health care provider shall be held liable unless it is proven by clear and convincing evidence that the physician or health care provider's actions showed *gross* negligence." Gross negligence is commonly defined as the failure to exercise even the slightest amount of care, as opposed to ordinary negligence, which is the less serious failure to use ordinary care. This provision of the statute provides a measure of greater protection from lawsuits for those medical personnel who provide emergency medical care in a hospital setting. The same statute defines "emergency medical care" as "bona fide emergency services provided after the onset of a medical or traumatic condition manifesting itself by acute symptoms of sufficient severity, including severe pain, such that the absence of immediate medical attention could reasonably be expected to result in placing the patient's health in serious jeopardy…."

Keira's parents filed a motion for "summary judgment" on the ground that because emergency providers who saw Keira on July 7 did not believe her symptoms presented a medical emergency, she did not receive "emergency medical care" as defined in the statute, and therefore the medical providers can be held liable for ordinary negligence in the case. In other words, they argued, the protection of the gross negligence standard in the emergency medical care statute does not apply to them. The medical providers argued they did provide emergency medical care through examining, triaging, and diagnosing the baby and therefore they are liable only if there is clear and convincing evidence they were grossly negligent. The trial court ruled in the parents' favor, agreeing that the baby received no emergency medical care and granting their motion for partial summary judgment. (The granting of "summary judgment" means the judge determined there was no need for a jury trial because the facts of the case were undisputed by the parties, and the law clearly was on their side.) However, on appeal, the Georgia Court of Appeals reversed the trial court's ruling, finding that the Georgia Supreme Court has previously ruled that emergency room personnel provide "bona fide emergency services" to a patient when they examine and diagnose the patient. Furthermore, "nothing in the record before us suggests that the physician's assistant who evaluated Keira in the emergency room was not acting in good faith when he diagnosed her as suffering from a mere 'contusion,'" even if his diagnosis was

eventually proved incorrect. As a result, the Court of Appeals ruled that the case must go to trial and a jury must determine whether or not Keira received emergency medical care when she first went to the emergency room. Keira's parents then appealed that ruling to the state Supreme Court, which agreed to review the case.

Today's Supreme Court opinion states that "the 'bona fide emergency services' element precludes a health care provider from benefitting from the protections of the ER statute with regard to care that, viewed objectively, was not emergency service, such as giving routine flu shots at a clinic set up in an ER. But medical services commonly provided in an emergency department, like evaluating, classifying, and treating patients who come in asserting that they require emergency care, will generally be 'bona fide emergency services,' even if the result of those services is that the patient is diagnosed as not needing (or no longer needing) emergency treatment."

The evidence shows that "Keira was given 'bona fide emergency services,' when that phrase is properly understood to focus on the services provided rather than, as the trial court erroneously understood it, to focus on the providers' belief that Keira did not require emergency care," the opinion says. "Keira was examined and diagnosed by two health care providers tasked with triaging and treating patients in the emergency department. The fact that she was given a non-emergency ranking…does not prevent these evaluations from being 'bona fide emergency services' under the ER statute."

Furthermore, evidence "that an infant fell on her head and suffered a bruise that had swollen to the size of her head (or even the size of an apple) shortly before being brought to the ER is evidence that a jury could find to be 'acute symptoms of sufficient severity…such that the absence of immediate medical attention could reasonably be expected to result in placing the [infant's] health in serious jeopardy,'" the opinion says. "Of course, a jury might also disbelieve Nguyen's description of Keira's head injury, which seems at the least exaggerated and is contradicted by testimony from two medical professionals that is supported by contemporaneous medical records. Nevertheless, that is a determination to be made by a jury, not a court applying the summary judgment standard of review."

"In sum, the record shows a genuine issue of material fact as to whether the heightened proof standards set forth in Georgia Code § 51-1-29.5 (c) apply in this case, and the trial court therefore erred in granting summary judgment on this issue. Accordingly, we affirm the Court of Appeals' judgment reversing the trial court's grant of partial summary judgment to the parents."
Attorneys for Appellants (Nguyen): Paul Phillips, Ralph Scoccimaro
Attorneys for Appellees (Southwestern): C. Richard Langley, Jeffrey Braintwain, Erica Jansen

WILLIAMS V. THE STATE (S15A0939)

The Georgia Supreme Court has unanimously upheld the murder conviction and life prison sentence a man received in **Bartow County** for the death of his 14-month-old baby girl who died after ingesting cocaine.

In today's opinion, **Justice Robert Benham** writes that "we find the evidence sufficient…to authorize the jury to find appellant guilty beyond a reasonable doubt of possession of cocaine with intent to distribute on the evening in question as charged in the indictment."

According to the facts, Anthony Tawon Williams and Stephanie Stephens lived in a rental home on Hattie Street in Cartersville with their toddler daughter, Jewell Williams, and four

other children. According to witnesses, the couple sold crack-cocaine and "loose" cocaine from their home, typically keeping it under an arm of the living room couch or in Stephens' purse. One witness testified that while Stephens sometimes ordered the children out of the room during a drug deal, Jewell, an inquisitive toddler, would typically come back into the room before the drug deal was done, according to briefs filed in the case.

According to state prosecutors, the night of June 15, 2007, Gwendolyn Wheeler came to the couple's home to purchase crack cocaine, as she had done many times before. She and other witnesses said Williams often served as the "lookout man" while Stephens made the transaction. Later that night, Jewell apparently found the drug and ate it. Early the next morning, emergency personnel responded to a 911 call to the home where they found Jewell in severe distress. According to the medical personnel, the baby had a very weak pulse and an irregular, gasping breathing pattern that is often related to cardiac arrest and death. Jewell was transported to the local hospital where she was pronounced dead. An autopsy showed the toddler had died from acute cocaine toxicity. Back at the home, Williams showed an officer with the Cartersville-Bartow County Drug Task Force the exact spot where he said Jewell had ingested the drug. He claimed that earlier that day, a woman had brought the drug into their home and mistakenly left it behind. The officer noticed a crystal substance on the floor in front of the couch, and the contents of a vacuum cleaner plugged into the wall nearby later tested positive for cocaine.

In September 2008, a Bartow County grand jury indicted Williams and Stephens for felony murder, cruelty to children, contributing to the deprivation of a minor, possession of cocaine and possession with the intent to distribute cocaine. In October 2008, a fugitive task force arrested the couple in Atlanta. At a joint trial in 2009, Williams' attorney argued there was no evidence Williams was inside the home or knew that cocaine was being sold inside the night Jewell ate the drug. Rather he said he was outside on the front porch visiting with a friend. Following a hearing, the trial court allowed four women to testify they had visited the home numerous times to buy cocaine, most often from Stephens but sometimes from Williams. After prosecutors presented their case, the defense made a motion for a directed verdict by the judge in Williams' favor, arguing that the "similar transaction evidence" from the four witnesses was insufficient to make him a party to the crime. Following a four-day trial, the jury found both Williams and Stephens guilty of all charges. Williams, who was sentenced to life in prison, has appealed to the state Supreme Court.

In his appeal, Williams' attorney argues the trial court made up to nine errors, including by admitting the testimony from the four witnesses who said they had purchased drugs at the couple's home. The attorney argued this "similar transactions" evidence "impermissibly" placed Williams' character at issue and ultimately "contributed to his convictions on insufficient evidence."

But in today's opinion, "We reject appellant's assertion that the similar transactions evidence was improperly admitted into evidence because it was introduced solely for the improper purpose of placing his character at issue." Rather the trial court held a hearing and found the testimony of each witness was admissible because "the prior transactions described by each witness were sufficiently similar to the crime charged so that proof of the former tended to prove the latter, and the trial court further found the relevance of the similar transactions evidence outweighed the inherent prejudice it creates," the opinion says.

Williams also argued the evidence was insufficient to support his conviction for possession of cocaine with intent to distribute, which formed the basis of his felony murder charge and life prison sentence. He argued the only evidence presented to support the possession with intent to distribute charge was the similar transactions testimony of witnesses.

Again, the high court has rejected his arguments. With regard to possession, even if the evidence did not show that Williams himself possessed drugs the night his daughter ingested cocaine, the jury could have reasonably concluded that he jointly possessed the drugs with Stephens, with whom he lived. As to the intent to distribute, the testimony was sufficient for a jury to conclude that sometimes Williams sold cocaine directly and sometimes he served as the lookout. "From the testimony of witnesses about prior similar transactions, a jury could reasonably conclude appellant was a party, along with his co-defendant, to the ongoing enterprise of possession of cocaine with intent to distribute, and thus was guilty beyond a reasonable doubt of possession of cocaine with intent to distribute on the night in question," the opinion says. "In fact, the indictment charged appellant with the offense of felony murder as a party to the crime with his co-defendant."

Williams' attorney also argued the evidence was insufficient to permit a jury to find him guilty of felony murder based on the drug charge because possession with intent to distribute is not the type of felony which by its nature creates a foreseeable risk of death.

"We disagree," today's opinion says. "In this case, the evidence shows appellant possessed cocaine in his home where his five children lived, including the 1-year-old victim."

"Under the circumstances present in this case, the evidence is sufficient to support appellant's conviction for felony murder arising out of possession of cocaine with intent to distribute," the high court concludes. It has rejected all his other arguments.

Attorney for Appellant (Williams): Nicholas Dumich

Attorneys for Appellee (State): Rosemary Greene, District Attorney, Stewart Bratcher, Asst. D.A., Mickey Thacker, Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Clint Malcolm, Asst. A.G.

LEWIS, JUDGE V. CHATHAM CO. BOARD OF COMMISSIONERS ET AL. (S15A1741)

A probate court judge who sued the **Chatham County** Board of Commissioners for paying magistrate judges more than he earns, has lost his appeal with a decision by the Georgia Supreme Court.

Under today's unanimous ruling, the Supreme Court has upheld a lower court's ruling denying his request to force the County to pay him the same as magistrate judges.

"Because magistrate judges and probate court judges are not similarly situated classes, we affirm," the lower court's judgment, **Justice Harold Melton** writes for the Court.

According to briefs filed in the case, in 2007, after determining that judges' salaries were inconsistent and "all over the board," the County successfully requested the Georgia General Assembly to pass local legislation that set the salaries for Chatham's magistrates and probate judge at 80 percent of the annual salary paid to Superior Court judges. In addition, they would receive 80 percent of any supplement given to a Superior Court judge.

Before 2013, neither magistrate judges nor probate judges in Chatham County received longevity pay increases. But that year, the Board of Commissioners gave two 5 percent increases

to judges of the Magistrate Court and Recorder's Court based on the number of four-year terms those judges had served, and they were made retroactive to January 2008. However, the County did not give the same raise to Probate Court Judge Harris Lewis.

Lewis sued the County and Commissioners, seeking a declaration from the trial court that the County's failure to give him the same increase in compensation that it gave Magistrate Court and Recorder's Court judges violated the equal protection clause of the Georgia Constitution. He also asked the trial court to grant him a "writ of mandamus" and order the County to pay him the increase and make it retroactive to Jan. 1, 2008. On March 23, 2015, the trial court entered an order denying both his requests. Lewis then appealed to the state Supreme Court.

To prevail in an equal protection challenge, today's opinion says, "the challenger must first show that he or she is similarly situated to members of a class who are treated differently than he or she is treated."

"In this case, then, Lewis must prove that probate judges are similarly situated to magistrate judges for compensation purposes. They are not."

First, the 1983 Georgia Constitution "creates magistrate judges and probate judges as separate classes with separate jurisdictions," today's opinion says. Second, the Georgia Code "sets forth separate provisions for magistrate courts and probate courts regarding jurisdiction, duties, and qualifications, among other things."

"Furthermore, it is undisputed that the cases and daily functions of magistrate judges and probate judges are different and distinct. As a result, Lewis's contention that magistrate and probate judges are similarly situated for purposes of equal protection is simply untenable, and from the outset, it is clear that the trial court properly denied both his request for a declaratory judgment and his petition for mandamus."

"Whether it regards a class of one or a class of thousands, an equal protection challenge without similarly situated classes must fail."

Attorneys for Appellant (Lewis): Owen Murphy, Noble Boykin, Jr.
Attorneys for Appellee (County): R. Jonathan Hart, Jennifer Burns

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

* Sylvester Hendrix (DeKalb Co.)

HENDRIX V. THE STATE (S15A1169)
(While the Court has upheld Hendrix's convictions and life prison sentence, it is sending the case back to the trial court to fix his sentences. Because there was only one victim, he cannot be sentenced for both malice murder and felony murder, and the latter sentence should have been thrown out. Also, because the aggravated assault was based on the same act as the malice murder, it should have been merged into the malice murder for sentencing purposes.)

* Kortez Hurt (Fulton Co.)	**HURT V. THE STATE (S15A1057)** (While the Court has upheld Hurt's convictions and life prison sentence, again another trial court has erred in failing to throw out a second felony murder charge for sentencing purposes. Instead the judge merged it with the first felony murder charge, which was wrong.)
* Kisha Rutledge (Fulton Co.)	**RUTLEDGE V. THE STATE (S15A0739)**
* Jarrett Dixon (Fulton Co.)	**DIXON V. THE STATE (S15A0836)**

While the Court has upheld Dixon's murder conviction and life prison, today it has reversed the murder and other convictions, and sentences, of his co-defendant, Rogelio Higuera-Guiterrez in **HIGUERA-GUITERREZ V. THE STATE (S15A0834)**. The Court has found "there is simply no competent evidence that Guiterrez was present or otherwise involved in the planning or execution of the underlying drug transaction or subsequent shootings," **Justice Harold Melton** writes in today's opinion. "Therefore, the evidence was insufficient to support his convictions."

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IN DISCIPLINARY MATTERS, the Georgia Supreme Court has accepted a petition for **voluntary surrender of license** – tantamount to disbarment – from attorney:

* Michael L. Terrell	**IN THE MATTER OF: MICHAEL L. TERRELL (S16Y0039)**

Last week, on Oct. 29, 2015, the Court ordered the **reinstatement to the practice of law**, effective Nov. 11, 2015, of attorney:

* Kimberly L. Copeland	**IN THE MATTER OF: KIMBERLY L. COPELAND (S15Y1040)**