Supreme Court of Georgia
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SUMMARIES OF OPINIONS

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OLVERA ET AL. V. UNIVERSITY SYSTEM OF GEORGIA'S BOARD OF REGENTS ET AL. (S15G1130)

In a ruling today by the Supreme Court of Georgia, college students who are not U.S. citizens have lost their appeal of a Georgia Court of Appeals decision upholding the dismissal of their lawsuit by a **Fulton County** judge. The students were asking the high court to rule that they are entitled to cheaper in-state tuition at Georgia's colleges and universities.

In today's unanimous opinion, however, **Justice Harold Melton** writes for the court that the Board of Regents, which governs the state's university system, is immune from the students' lawsuit under the doctrine of sovereign immunity, which is the legal doctrine that protects the state government and its agencies from being sued.

"It is settled that the Board is an agency of the State to which sovereign immunity applies," the opinion says.

According to the facts of the case, in 2010, the state Board of Regents amended its policy manual to require that all students who wish to attend any institution in the University System of Georgia be "lawfully present" in the United States. The policy manual also required that for any non-citizen student to receive in-state tuition, the student had to be "legally in this state." On June 15, 2012, the U.S. Department of Homeland Security established the "Deferred Action for Childhood Arrivals" program, which allows certain young people who are in the country illegally to remain here for at least two years without fear of removal.

Miguel Angel Martinez Olvera and other non-citizen college students who are beneficiaries of the federal deferral program, filed a lawsuit against the Board of Regents seeking a "declaratory judgment" from the trial court that they are "lawfully present" in Georgia and are

therefore entitled to in-state tuition. The Board of Regents claimed they were not in "lawful status" in this country. (A "declaratory judgment" is one that declares the legal rights of the parties and asks the court to give its opinion on a question of law, but it does not award damages or order that any action be taken or stopped.)

In response to the lawsuit, the Board of Regents filed a motion to dismiss the case, claiming the students' lawsuit was barred by "sovereign immunity." The trial court granted the motion, the students appealed, but the Court of Appeals upheld the lower court's decision. The students then appealed to the Georgia Supreme Court, which accepted their "petition for certiorari" to determine whether the Court of Appeals erred in ruling that a legal action seeking a declaratory judgment was barred by sovereign immunity.

"The sweep of sovereign immunity under the Georgia Constitution is broad," today's opinion says. "It provides: 'Except as specifically provided in this paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly….'"

In the Supreme Court's 2014 decision in *Georgia Dept. of Natural Resources v. Center for a Sustainable Coast,* "we recently explained the extensive nature of sovereign immunity. 'The plain and unambiguous text of the 1991 constitutional amendment shows that only the General Assembly has the authority to waive the State's sovereign immunity,'" the opinion says. "Therefore, absent some exception, the Board is immune from the declaratory judgment action brought by the students."

In previous cases, the state Supreme Court has avoided answering whether this sort of declaratory judgment action against the State is barred by sovereign immunity. "In this opinion, we squarely address that question and find that declaratory judgment actions of this type are, in fact, barred by the doctrine of sovereign immunity," the opinion says in a footnote.

The high court has also rejected the students' argument that the Board's immunity is waived under the state's Administrative Procedure Act, "and the students have pointed to no other source of law containing an explicit waiver of the Board's sovereign immunity in this matter."

Today's opinion notes, however, that, "Our decision today does not mean that citizens aggrieved by the unlawful conduct of public officers are without recourse. It means only that they must seek relief against such officers in their individual capacities."

"At this point in time, however, the students have not attempted to follow this route."

Attorney for Appellants (Students): Charles Kuck

Attorneys for Appellees (Board of Regents): Samuel Olens, Attorney General, Dennis Dunn, Dep. A.G., Britt Grant, Solicitor General, Russell Willard, Sr. Asst. A.G., Allen Lightcap, Asst. A.G.

<u>THE STATE V. TUNKARA</u> (S15A1715)

A man convicted of murder is entitled to a new trial under a ruling by the Georgia Supreme Court.

Today's unanimous opinion, written by **Justice Harold Melton**, upholds a **Fulton County** judge's ruling that Mahamadou Tunkara deserves a new trial because he lacked a qualified interpreter during his trial.

According to briefs filed in the case, on Oct. 16, 2007, a police officer was dispatched to the Sene Gambian Restaurant off Campbellton Road in Atlanta, where he found Mohamed Turay lying in the parking lot in a pool of blood. Standing nearby was Mahamadou Tunkara, also covered in blood. Tunkara, who grew up speaking Soninke in his native country of Gambia, had emigrated to the United States in 1995. A number of witnesses, who were at the restaurant and also from Gambia, spoke to police. Turay, Tunkara, and some of the others owned businesses located in the same flea market. According to the witnesses, a short time earlier that day Turay and Tunkara had been in an argument, which later culminated in Tunkara stabbing Turay and severing his carotid artery. Turay died a week later from complications at Grady hospital. According to the defense, Turay was a much taller and heavier man than the "skinnier" and weaker Tunkara. In the earlier fight, Turay had slapped Tunkara, who fell to the ground, the defense said. With Turay on top of him, Tunkara bit him before the witnesses broke up the fight and Turay went inside the restaurant. When he came back outside, the defense said Turay again confronted Tunkara and got on top of him, but this time Turay had a knife. During the scuffle, Turay dropped the knife, Tunkara grabbed it and stabbed Turay. Tunkara did not intend to stab Turay, the defense claimed, but Tunkara could not breathe and he had to escape. According to state prosecutors, multiple witnesses told a different story. They said it was true Turay hit Tunkara, who was bleeding from his nose. They helped break up the fight, and took Turay into the restaurant to talk to him. Turay told them Tunkara had bitten him and he felt embarrassed because "if you don't want to fight [Tunkara], there's no way you can escape from him." Two of them told Turay to get into his car and leave, which Turay agreed to do. As Turay walked to his car, with keys in hand, Tunkara ran up behind him and stabbed him in his left ear, witnesses for the State said. One of the witnesses then grabbed Tunkara and held him until police arrived. Tunkara was arrested at the scene.

Tunkara was indicted for murder, aggravated assault and possession of a knife during the commission of a felony. In January 2010, his first trial ended in a mistrial after the jury failed to reach a unanimous verdict. At that trial, Tunkara had a state certified court interpreter who spoke Tunkara's native language. A second trial began in November 2010, and at that trial, Tunkara had a different, non-certified interpreter. While the State said the second interpreter was "capable of understanding and speaking" Soninke, the defense said the interpreter was "not a court certified, authorized, registered, or conditionally approved interpreter in the state of Georgia." One of the disputes at the second trial was who first had the knife, with three witnesses for the State saying Turay did not have a knife when he left the restaurant and was only holding keys. Tunkara, however, testified that Turay came to him with a knife in his left hand, and he grabbed it when Turay dropped it. Toward the end of the trial, Tunkara's attorney moved for a mistrial, arguing that the court appointed interpreter had not been providing Tunkara with adequate translation of the court proceedings and as a result Tunkara was deprived of his constitutional rights to understand the proceedings against him and participate in his defense. As a result of the inadequate interpretation, Tunkara was led to believe that his blood was on the murder weapon, as opposed to Turay's, which is what the evidence supported. The trial judge denied the motion, finding that based on his demeanor at trial, Tunkara seemed to understand the proceedings.

On Nov. 19, 2010, the jury convicted Tunkara on all counts, and he was sentenced to life in prison plus five years for the knife charge. In October 2014, with a new attorney, Tunkara filed a motion requesting a new trial, arguing his due process rights had been violated by the

absence of a qualified interpreter. Following a hearing on his motion for new trial, the same judge who presided over his second trial, granted the motion and ordered a new trial. The judge's order stated: "Based on the testimony of defendant's trial counsel at the hearing and the record, the court finds that there was a complete breakdown of the defendant's understanding of what was transpiring at trial due to the interpreter, and that this prejudiced him at trial….the court, therefore, in the interests and principles of justice and equity, and the sound discretion of the court, hereby grants the defendant's motion for new trial." The trial court's order cited Georgia Code § 5-5-20 and 5-5-21. Georgia Code § 5-5-20 states: "In any case when the verdict of a jury is found contrary to evidence and the principles of justice and equity, the judge presiding may grant a new trial before another jury." Georgia Code § 5-5-21 states: "The presiding judge may exercise a sound discretion in granting or refusing new trials in cases where the verdict may be decidedly and strongly against the weight of the evidence even though there may appear to be some slight evidence in favor of the finding." The State appealed to the Georgia Supreme Court, arguing that the trial court made no finding that the trial verdict went strongly against the weight of the evidence, which supported Tunkara's conviction.

In today's opinion, the high court affirms the trial court's ruling but says it depended on the wrong statute. As opposed to the two statutes cited by the trial court, which apply to considerations about the weight of the evidence, a third statute, Georgia Code § 5-5-25 states: "In all motions for a new trial on other grounds not provided for in this Code, the presiding judge must exercise a sound legal discretion in granting or refusing the same according to the provisions of the common law and practice of the courts."

"The inadequacy of an interpreter is one of the 'other grounds not provided for in this Code,'" the opinion says. "Accordingly, this statutory provision authorized the trial court to grant a new trial on this ground in this matter."

Attorneys for Appellant (State): Paul Howard, Jr., District Attorney, Paige Whitaker, Dep. D.A., Sheila Gallow, Asst. D.A.

Attorney for Appellee (Tunkara): Bruce Harvey

<u>SEABOLT, WARDEN V. NORRIS</u> (S15A1692)

The Supreme Court of Georgia has upheld a lower court's ruling that throws out the malice murder conviction of a woman who was 15 years old when she was charged with murdering her father.

As a result of today's unanimous opinion, written by **Justice Harold Melton**, Melissa Nicole Norris, who has been in prison since 1997 and is now in her mid-30s, is entitled to a new trial.

In this high-profile case, Norris was a ninth-grader at Thomson High School in **McDuffie County** when her father, Charles Barry Norris, was found dead in the family's home on Dec. 20, 1995, from a single gunshot wound to his head. The girl told her older brother and police that after an argument with her father, she took a .38 caliber revolver from her brother's room and shot her father in the back of the head at close range. She told an agent with the Georgia Bureau of Investigation she did not know the gun was loaded and was "playing" with it near her father's head when it went off.

In 1996, Norris was indicted for malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony. At trial, Norris changed her story and

said the account she had told police was false and that she was covering for her brother, who had shot and killed their father. In August 1997, the McDuffie County jury found her guilty of malice murder, aggravated assault, and possession of a firearm during commission of a felony, and she was sentenced to life plus five years in prison. The jury found her not guilty of felony murder and not guilty of voluntary manslaughter and involuntary manslaughter as "lesser included" offenses of felony murder. In 2007, the Georgia Supreme Court upheld her convictions and sentence.

In May 2012, Norris's attorney filed a petition for "habeas corpus," which is a civil proceeding that allows already convicted prisoners to challenge their conviction on constitutional grounds in the county where they're incarcerated. They generally file the action against the prison warden, who in this case was Kathy Seabolt. In her habeas petition, Norris claimed her attorney for her appeal had been ineffective in violation of her constitutional rights for failing to argue a number of things, including that the trial judge had erred by not instructing jurors they could consider the death of Norris's father an accident and by not instructing them that they could consider her guilty of the less serious charge of involuntary manslaughter as a lesser included offense of malice murder. Following a hearing, the habeas court granted relief to Norris, throwing out her convictions on the ground that her appellate counsel had rendered "ineffective assistance of counsel." The warden then appealed to the Georgia Supreme Court.

In today's opinion, the high court has ruled that the habeas court was right about some of its ruling but not all, and it has partially affirmed and partially reversed the habeas court's decision. The effect of today's opinion, however, is that the State would have to retry Norris to get her convictions reinstated.

Specifically, the high court agrees with the habeas court that Norris's appeals attorney was ineffective for failing to argue the trial judge erred by not charging the jury on involuntary manslaughter as a lesser included offense of *malice* murder. The judge refused to make the instruction, instead charging the jury that involuntary manslaughter was only a lesser included offense of *felony* murder.

Under Georgia statutory law, a person "commits the offense of involuntary manslaughter in the commission of an unlawful act when he causes the death of another human being without any intention to do so by the commission of an unlawful act other than a felony." Here, Norris was "not necessarily engaged in the felony of aggravated assault if she was playing with the gun or even pointing it at the back of her father's head, ostensibly without his knowledge," the opinion says. "Indeed, based on Norris's statement to police that she did not even know that the gun was loaded when she pointed it at the back of her father's head, the jury could have reasonably concluded that Norris acted in a manner that amounted to reckless conduct, but did not act with the requisite malice to support a finding of guilt for murder or commit an underlying felony to support a conviction for felony murder, at the time that the fatal shot was fired. The trial court therefore should have given the requested charge on involuntary manslaughter as a lesser included offense of malice murder, and not just as a lesser included offense of felony murder, and erred by failing to do so."

That error was damaging to Norris's case, "as the evidence presented at trial was not overwhelming," the opinion says. "Indeed, while the evidence was undisputed that the victim was shot in the back of the head at point blank range, the conflicting evidence about the manner in which the shooting transpired – including Norris's statement to police that she did not know

that the gun was loaded when she was playing with it and her trial testimony in which she claimed that she had not shot her father at all and was simply trying to cover up her brother's actions – would have allowed a properly instructed jury to consider reasonable alternatives for the shooting that did not involve an outright intent to commit malice murder." The habeas court therefore properly granted Norris relief on this claim, the Supreme Court has ruled.

For the purposes of any retrial, the opinion states that the habeas court also "correctly concluded that the trial court should have given the requested charge on accident."

"It makes no difference that Norris completely changed her story at trial, claiming that the statement that she had given to police was entirely false, and that she had not shot her father at all," the opinion says. "This testimony does nothing to alter the fact that evidence was also presented to the jury in the form of Norris's properly admitted statement to police that the shooting may have occurred by accident. It was for the jury to decide whether it would believe any or all of Norris's statement to police or any of her testimony at trial, and the trial court was required to give the jury a charge on accident in order to allow them to fully consider this issue."

Today's opinion, however, concludes that the habeas court erred in ruling that Norris's appeals attorney was ineffective for failing to argue that the trial judge improperly limited her trial attorney's closing argument to one hour. And the habeas court was wrong to conclude that her appeals attorney would have succeeded on a claim that her trial attorney had been ineffective for failing to object to alleged comments about Norris's right to remain silent.

"Judgment affirmed in part and reversed in part," the opinion says.

Attorneys for Appellant (Warden): Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Crowder, Asst. A.G.

Attorney for Appellee (Norris): Rodney Zell

THE STATE V. LEE

In another case involving a young man who was 15 years old when he was charged with murder, the State Supreme Court has ruled in his favor and against the **Fulton County** District Attorney.

Under today's unanimous opinion, when Ceron Lee goes on trial for his role in the 2006 shooting death of Anthony Price, the statement he made to investigators while in their custody will be suppressed because he did not "knowingly and intelligently" waive his *Miranda* rights before speaking to them.

According to briefs filed in the case, the afternoon of Sept. 23, 2006, Price's body was found on the side of the road. He had died from a single gunshot wound. A witness told police he had observed someone dragging Price's body from a car described as a silver Dodge Magnum, which investigators later tied to Demarcus Stevens. Lee, Price and Stevens were all friends. The following day, which was a Sunday, Lee and several other witnesses appeared at the police station, where they were interviewed, beginning in the early afternoon. As a result of the interviews, Lee was deemed a suspect, and police initiated a second interview at about 11 that night. Lee's mother was with him for that interview, which was videotaped. The video shows Lee and his mother in an interrogation room with two officers. Lee sat hunched over, holding a shirt over his face. When the officer attempted to apprise Lee of his *Miranda* rights (the right to remain silent, etc.), and asked him to read the form aloud, Lee's mother took the form, read it, and said she understood the rights and did not wish her son to speak without a lawyer. When the

investigators told them Lee was implicated in Price's murder, both Lee and his mother began sobbing and wailing uncontrollably. At times, Lee appeared to be hyperventilating and crying for his "Daddy." His mother gathered him in her arms and began hugging and rocking him. Throughout the approximately one-hour recording, Lee is seen crying, at times wailing, and holding his head in his hands. The officers did not attempt again to bring up the subject of his rights or ask whether he wanted to waive them. Rather they persisted in asking questions about the shooting until eventually Lee, prompted by his distraught mother, began to answer them.

In March 2011, Lee and Stevens were indicted for malice murder and felony murder. Shortly after, Lee's attorney filed a motion to suppress his statement to investigators. Following a hearing and a review of the videotaped interview, the trial judge ruled that Lee's constitutionally protected Fifth Amendment right against self-incrimination had been violated and the second interview was inadmissible in its entirety. Based on Lee's emotional state and age, the length of time he had spent that day at police headquarters, and the lack of indication that Lee himself actually understood his rights, the court found that Lee had not made a knowing and intelligent waiver of his rights. The District Attorney's office then appealed, arguing that Lee acquiesced in the waiver of his rights by participating in the interview and that considering the totality of the circumstances, a preponderance of the evidence showed that Lee had made a knowing and voluntary waiver of his rights.

In today's opinion, written by **Justice Carol Hunstein**, the high court disagrees, and it has upheld the lower court's ruling that Lee's second statement must be suppressed.

"The State bears a 'heavy burden' in establishing a juvenile's knowing and intelligent waiver of rights," the opinion says. "The State failed to carry its burden here."

"The video recording reflects clearly that Lee himself never once expressed any affirmative understanding of his rights or desire to waive them. To the contrary, 15-year-old Lee, who by that time had been at the police station for approximately 10 hours, was extremely distraught and appears to have had minimal capacity to understand what little the investigators attempted to communicate regarding his rights. Lee did not sign the waiver form, nor even look at it, and he engaged in no discussion with the officers, or his mother, regarding his rights. While Lee's mother indicated that she understood her son's rights, her understanding is of little consequence given that Lee 'could not rely on his mother to . . . waive his rights.'"

"For these reasons, the trial court properly concluded based on the totality of the circumstances that Lee did not knowingly and intelligently waive his rights before giving his custodial statement. We therefore affirm the trial court's order ruling this statement inadmissible at trial."

Attorneys for Appellant (State): Paul Howard, Jr., District Attorney, Paige Whitaker, Dep. D.A., David Getachew-Smith, Chief Sr. Asst. D.A.
Attorney for Appellee (Lee): Tony Axam

BARROW V. MIKELL, COMMISSIONER ET AL. (S15G1168)

The Georgia Supreme Court has ruled in favor of an asylum seeker from the country of Gambia by reversing a Georgia Court of Appeals decision and a **Fulton County** court decision that prevented him from applying for a new driver's license.

According to briefs filed in the case, Abdou Barrow has been in the United States for 24 years since he arrived from Gambia in 1992 and filed an application for asylum in 1997. In 1999,

his asylum application was denied and he was ordered removed from this country. Although Barrow had been issued a driver's license, in April 2010, the Georgia Department of Driver Services cancelled it, based on federal Immigration and Customs Enforcement (ICE) records that showed Barrow had a "warrant of removal" pending against him and he was not "lawfully present" in the United States. (Robert Mikell is the current Commissioner of the Department of Driver Services.) In June 2010, the Department of Driver Services notified Barrow that it could not reinstate his license because his legal presence in the United States could not be verified. In the same notification, the department instructed Barrow to come into the department with "all your official documents, including all valid immigration documents," by July 13, 2010. Barrow did not do so, nor did he appeal the April 2010 cancellation of his license or the June 2010 denial of his application to have his license reinstated.

Almost three years later, in April 2013, Barrow learned that the Immigration Court in San Antonio, Texas, had re-opened the federal removal proceedings against him and his asylum application had been revived. In November 2013, Barrow again applied at the Snellville, GA office of the Department of Driver Services to have his license reinstated. But on Nov. 25, 2013, the Department of Driver Services sent emails to Barrow's lawyer saying it would not reinstate the license due to his immigration status.

Within 30 days, on Dec. 2, 2013, his lawyer filed an appeal in the Fulton County Superior Court. In response, the State filed a motion to dismiss the appeal, arguing that Barrow had failed to file the appeal within 30 days of an "appealable decision." Georgia Code § 40-5-66 states that an aggrieved person "shall have the right to enter an appeal" of "any decision rendered by the [Department of Driver Services]" and that such an appeal "must be filed within 30 days from the date the department enters its decision or order." According to the Department of Driver Services, Barrow was required to file his petition for judicial review within 30 days of the cancellation of his license in April 2010. The trial court agreed with the State and dismissed Barrow's case. Barrow then appealed to the Georgia Court of Appeals, which upheld the Fulton court's ruling. In his appeal, Barrow argued that the revival of his application for asylum in 2013 constituted a change in his immigration status, which gave him the right both to apply for reinstatement of his license and to appeal the denial of the reinstatement, which he did within 30 days. But the Court of Appeals disagreed. It acknowledged that the language in the statute giving the right to appeal "any decision" of the Department of Driver Services is "very broad." However, the appellate court said that under the state Supreme Court's 1987 decision in *Earp v. Lynch*, "a driver who had failed to request reinstatement until approximately a year after the original revocation had waived his right to an appeal because '§ 40-5-66 requires appeals to be made within 30 days of the revocation decision by the Department.'" "Although we recognize that Barrow did not have any grounds for appealing the initial revocation decision in 2010, we are constrained to affirm the trial court's denial of his 2013 appeal (based on a change to his immigration status) as untimely under the rational of *[Earp]* which binds this court," the Court of Appeals decision said. Barrow then appealed to the state Supreme Court.

In today's unanimous opinion, **Justice Keith Blackwell** writes for the court that the Court of Appeals' reliance on *Earp v. Lynch*, as well as on this court's 1987 decision in *Earp v. Angel*, is "misplaced."

One reason is that in both *Lynch* and *Angel*, the petitioners had their licenses *revoked.* In this case, however, Barrow had his license *canceled,* and Georgia law makes an important

distinction between the two. Unlike revocations, which must be appealed within 30 days of the revocation, under Georgia Code § 40-5-1 (3), a cancellation is "without prejudice, and application for a new license may be made at any time after such cancellation."

"Here, the Department canceled – but did not revoke – the license that it had issued to Barrow," today's opinion says. "Barrow was entitled by the plain terms of the statute to make an application for a new license at any time after the cancellation. He did so, and the Department denied his application. He petitioned for judicial review of that denial, and he filed his petition within 30 days of the denial. His petition was timely, and the trial court and Court of Appeals erred when they concluded otherwise."

Attorneys for Appellant (Barrow): Justin Chaney, S. Anne Thompson
Attorneys for Appellee (Mikell): Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Joseph Drolet, Sr. Asst. A.G., Amy Radley, Asst. A.G.

GEORGIACARRY.ORG, INC., ET AL. V. JAMES (S15A1901)

A Georgia gun rights organization has lost its appeal of a **Richmond County** judge's ruling in its lawsuit against a probate judge who initially refused to issue a man a temporary gun license.

In today's unanimous opinion, **Chief Justice Hugh Thompson** writes for the court that the lawsuit should have been dismissed, and the high court is sending the case back to the trial court to do so.

According to briefs filed in the case, on Jan. 6, 2014, Iziah Smith applied for a five-year renewal of his Georgia "weapons carry license." His current gun license had fewer than 90 days remaining before it expired. Staff for Probate Court Judge Harry B. James, III refused to issue a temporary renewal of Smith's license. According to the brief filed by the attorney for Smith and GeorgiaCarry.Org, Judge James' office had not issued anyone a temporary renewal gun license for more than 10 years. If applicants asked, James' office staff informed them that their office did not issue temporaries, according to Smith's attorney. James claimed he never had a policy of refusing to issue temporary gun licenses; it's just no one had applied for one since 1999 until Smith applied in 2014. According to the briefs, James informed Smith he could not have a temporary license because there were problems with his criminal record. Smith had been charged in another county with sexual battery, but the court's record did not reflect the final disposition.

On Jan. 13, 2014, the attorney for Smith and GeorgiaCarry.Org wrote a letter to Judge James, pointing out that Georgia law required the issuance of temporary licenses unless the applicant was for some reason ineligible. Specifically, Georgia Code § 16-11-129 (i) states that, "Any person who holds a weapons carry license under this Code section may, at the time he or she applies for a renewal of the license, also apply for a temporary renewal license if less than 90 days remain before expiration of the license he or she then holds….Unless the judge of the probate court knows or is made aware of any fact which would make the applicant ineligible for a five-year renewal license, the judge shall at the time of application issue a temporary renewal license to the applicant." The same statute says: "When an eligible applicant fails to receive a license, temporary renewal license, or renewal license within the time period required by this Code section and the application or request has been properly filed, the applicant may bring an action in mandamus or other legal proceeding in order to obtain a license, temporary renewal license, or renewal license….If such applicant is the prevailing party, he or she shall be entitled

to recover his or her costs in such action, including reasonable attorney's fees." ("Mandamus" is a legal remedy that is used to force a public official to perform a required duty.)

On Feb. 18, 2014, Smith and GeorgiaCarry.Org filed a lawsuit against Probate Judge James, seeking a "writ of mandamus," arguing that under Georgia law, Smith was entitled to temporary gun licenses and the judge was wrong to refuse to issue it. Although Smith initially had been refused a temporary renewal license, once the court record reflected that Smith's charges had been reduced to simple battery, the probate court issued him a gun license on Jan. 27, 2014. He therefore received the license prior to the filing of the lawsuit and prior to the expiration of his previously issued license. The case was assigned to Superior Court Judge Carl Brown. On April 24, 2014, Smith and the gun rights organization filed a motion asking Judge Brown to recuse himself on the grounds that a Superior Court judge in Richmond County should not sit in judgment of a Richmond County Probate Court judge. In May 2014, Judge Brown denied their motion for recusal. In November and December, 2014, both sides filed motions seeking "summary judgment," which a judge grants if he/she decides a jury trial is unnecessary because the facts are undisputed and the law falls squarely on one side or the other. In their motion, Smith and the gun rights organization argued they were entitled under the law to have their legal fees covered. In his motion, the probate judge argued the case was moot because by then, Smith already had his license. Following a hearing, in March 2015, Judge Brown ruled in favor of Judge James by granting him summary judgment while denying summary judgment to the others. Smith and GeorgiaCarry.Org then appealed to the state Supreme Court.

In their appeal, their first argument was that the trial judge erred in refusing to recuse himself. But in today's opinion, "We disagree," the high court says.

Smith did not meet the three-pronged test the state Supreme Court established in *Mayor & Aldermen of Savannah v. Batson-Cook Co. (2012)* for determining whether another judge should be assigned to hear a recusal motion. In such cases, a trial court must determine whether the motion was filed within five days of learning there are grounds for disqualification, whether the affidavit was legally sufficient, and whether recusal was warranted based on the facts. Here, Smith and GeorgiaCarry waited two months after filing their complaint before seeking to recuse the trial judge. "Given appellants' failure to file the motion within five days of learning of the alleged grounds for disqualification, it was not error for the trial court to deny the motion to recuse," today's opinion says.

Because James began issuing temporary renewal licenses, Smith and the gun rights organization acknowledged their mandamus action was no longer necessary. But they argued they were still entitled to recover attorney's fees. They pointed out that at the time they filed their lawsuit, the state law in effect said that when an eligible applicant fails to receive a gun permit or renewal license, he not only may bring a mandamus action to obtain it, but if "such applicant is the prevailing party," he is entitled to recover attorney's fees. Smith and GeorgiaCarry claimed they were the prevailing parties because James began issuing the temporary permits in response to their complaint.

However, pertaining to Smith, "this case was moot from the outset," the opinion says. Smith received a new gun license from James within 30 days of filing his application – "well within the time required by law." He also received it before his previous license expired and before filing his lawsuit. As for the gun rights organization, it did not seek a license and did not

file the case as a class action on behalf of someone who had, meaning that the organization lacked standing to seek legal costs.

Because this complaint was moot and GeorgiaCarry lacked standing, it was therefore "incumbent upon the trial court to enter an order dismissing appellants' claims," the opinion says. "Accordingly, we remand this case to the trial court with direction that it vacate the grant of summary judgment to James and enter an order of dismissal."

Attorney for Appellants (Smith): John Monroe
Attorney for Appellee (James): Robert Hunter, III

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

* Stanley Howard (Burke Co.)	**HOWARD V. THE STATE (S15A1584)**
* Joe Lockhart (Fulton Co.)	**LOCKHART V. THE STATE (S15A1461)**
* Kevin Sears (Ware Co.)	**SEARS V. THE STATE (S15A1618)**
* Christopher Anton Smith (Fulton Co.)	**SMITH V. THE STATE (S15A1705)** (The Supreme Court upheld Smith's murder conviction and life prison sentence, but is sending the case back to the trial court to correct a sentencing error. The judge correctly merged the aggravated assault count into Smith's malice murder count for sentencing purposes. However, the judge erred by not sentencing Smith separately for armed robbery and possession of a firearm by a convicted felon, which did not merge into the malice murder conviction. The high court is therefore sending the case back to the trial court to sentence Smith on those two counts.)
* Brandon White (Richmond Co.)	**WHITE V. THE STATE (S15A1826)**

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

* Donald Carlton Gibson	**IN THE MATTER OF: DONALD CARLTON GIBSON (S16Y0547)**
* Tashawna L. Griffith	**IN THE MATTER OF: TASHAWNA L. GRIFFITH (S16Y0439)**
* Jay Harvey Morrey	**IN THE MATTER OF: JAY HARVEY MORREY (S16Y0341)**

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

* Michael Anthony Eddings **IN THE MATTER OF: MICHAEL ANTHONY EDDINGS (S16Y0317)**