



Supreme Court of Georgia

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



CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Monday, July 18, 2016

10:00 A.M. Session

CARMAN V. THE STATE (S16A1002)

In this death penalty case, a man is appealing a ruling by a **Fulton County** judge, arguing that retrying him for murder after the judge declared a mistrial would be double jeopardy.

FACTS: According to State prosecutors, on Aug. 16, 2012, former police officer William Rucker was a patron at O.T.'s Lounge in Atlanta when he witnessed Demario Carman and Otis Ricks charge into the lounge with their guns drawn, and push 53-year-old Vanessa Thrasher to her cash register. Rucker and another witness testified that Thrasher pleaded with the men not to shoot her, repeating to them they could take the money. But Ricks shot Thrasher, who immediately fell to the ground. While Carman and Ricks fumbled with the cash register, Thrasher pulled herself up and fired her weapon, hitting Carman in the arm. Ricks then shot her again. Rucker testified "they stood over and shot her." In all, Thrasher was shot seven times, including twice in the back of her head execution style. The entire incident was recorded on the lounge's surveillance cameras. In November 2012 Carman, Ricks and two others were indicted for malice murder, participation in criminal street gang activity, armed robbery, and weapons charges. In December 2012, the State filed a "Notice of Intent to Seek the Death Penalty Against Demario Carman."

After three weeks of jury selection, Carman's trial began Monday, Nov. 17, 2014. Kimberly Staten-Hayes, who had worked on the case during the two years leading to trial, was due to serve as Carman's lead counsel during the guilt/innocence phase of his trial. Christian Lamar was her co-counsel and due to act as primary counsel for the penalty phase if Carman was convicted. Gabrielle Pittman was appointed two weeks before jury selection primarily to assist in the selection of jurors. The judge had previously announced that she intended to conduct the trial until the end of the day on Monday, Nov. 24, then recess for Thanksgiving until Monday, Dec. 2. On the fourth day of trial, however, after the State had called its ninth witness, Staten-Hayes learned during a recess that her niece had attempted suicide, and the judge observed her crying in the restroom. Before the State concluded its direct examination of its ninth witness, the judge cleared the courtroom and announced that, "Given Ms. Staten-Hayes's circumstances, we absolutely will not be proceeding today. What is going to occur at this point is I will give both sides an opportunity to state their position about whether I should declare a mistrial or whether this trial should be delayed." Lamar told the judge that he had discussed the matter with Carman and he proposed delaying the trial until the Monday after Thanksgiving, Dec. 2, which he said would allow him and Pittman to "come up to speed" in the event Ms. Staten-Hayes was unable to return. State prosecutors agreed with that proposal, as did Carman. But the trial judge expressed concern that if Staten-Hayes dropped out of the case, the issue of Carman's representation would become an issue on appeal, that jurors might become "frustrated," and that it would be "an injustice" to both Carman and the victim's family for the case to proceed. In response, Staten-Hayes spoke in favor of a continuance, saying that what "I was hoping is that if the court would just give me a couple of days" so she could go to Nashville and check on her niece. She explained that her niece was the only child of her sister who had just died, and she was in the hospital at Vanderbilt University after slitting her wrists and taking pills. The judge then said, "I am not going to put [Staten-Hayes] in a position of having to decide between her niece and this trial." Defense attorney Lamar and State prosecutors then each renewed their objections to the judge calling a mistrial. Following a recess, the trial judge reiterated her reasoning in concluding that there was a "manifest necessity" for a mistrial, but she allowed Lamar to expand on his objection. Lamar stated that a mistrial would damage Carman's case because the defense had already "revealed [its] theory in the case." The trial judge agreed that everybody had "revealed their theory of the case," but that "the balance of the equities would make it appropriate to declare a mistrial."

Once the judge declared a mistrial, Carman's attorneys filed a "Plea in Bar," arguing that a re-trial would constitute double jeopardy, and double jeopardy is barred by the U.S. Constitution, which states that no person shall be "subject for the same offense or be twice put in jeopardy of life or limb." The trial judge denied his plea, and Carman now appeals to the state Supreme Court.

ARGUMENTS: Carman's attorneys argue the trial judge erred by denying their plea. By the time a mistrial was called, the jury had been impaneled, the guilt-innocence phase of Carman's trial was substantially concluded, and "the evidence was not as favorable to the State as presented in the opening statement." In its 1998 decision in *Pleas v. State*, the Georgia Supreme Court ruled that, "Once a jury is impaneled and sworn, jeopardy attaches and a defendant is entitled to be acquitted or convicted by that jury." "The trial court erred in denying Mr. Carman's plea in bar of former jeopardy in a capital case after declaring a mistrial [on its

own] over the objection of both the defense and the State without manifest necessity,” his attorneys argue in briefs. The U.S. Supreme Court stated in its 1824 decision in *United States v. Perez*: “We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a **manifest necessity** for the act, or the ends of public justice would otherwise be defeated....To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner.” Here, no “manifest necessity” existed to declare a mistrial. “This case strikes at the heart of both the Fifth Amendment guarantee against double jeopardy and the Sixth Amendment right to counsel,” Carman’s attorneys argue. “Here, the trial court, expressing concern about future appeals and the convenience of the jury, substituted its judgment for that of Mr. Carman and his counsel after co-counsel learned of a family emergency (despite the presence of long-time lead counsel and a second qualified attorney). Despite the fact that reasonable alternatives to a mistrial were evident and presented to the court, rather than exercising the ‘greatest caution, under urgent circumstances and for very plain and obvious causes’ the trial court chose, in this capital case, to declare a mistrial over both Mr. Carman and the State’s objection. The trial court not only denied Mr. Carman the valuable right to be tried by the jury which was impaneled and had heard most of the evidence against him, but also denied his Sixth Amendment right to the guiding hand of counsel. In doing so, the trial court elevated its opinions regarding appropriate trial strategy over the valued right to be tried by a particular jury and the corresponding constitutional guarantee against double jeopardy, and, arguably, based its decision on erroneous interpretation of the Unified Appeal Procedures.” As a result, “any future prosecution of Mr. Carman is barred by the state and federal prohibitions against double jeopardy and cruel and unusual punishment, as well as the right to counsel.” The trial court’s judgment should be reversed, Carman’s attorneys argue.

The State argues the trial court’s declaration of a mistrial over the parties’ objections did not constitute an abuse of discretion as the court properly determined a “manifest necessity” existed in support of a mistrial. “Manifest necessity exists when the accused’s right to have the trial completed by a particular tribunal is subordinate to the public interest in affording the prosecutor one full and fair opportunity to present [his or her] evidence to an impartial jury,” the Fulton County District Attorney’s Office, representing the State, argues in briefs. Here, “it is difficult to imagine how the proceedings in this case would successfully be defended in later appeals where Appellant’s [i.e. Carman’s] lead attorney principally responsible for his life was substituted with new co-counsel, appointed two weeks prior to jury selection, and to assist only in the selection of a jury,” the State argues. In death penalty cases, special measures to ensure reliability are necessary as “the State’s decision to pursue a sentence of death against a defendant generally triggers a heightened standard of care.” The U.S. Supreme Court “has recognized a need for a heightened standard of reliability from the very beginning of a capital case given that the ‘end’ may result in the death of a defendant,” the State argues. “Because the trial court evidently believed the potential risk of error in proceeding with trial insupportable as a matter of law, and principally where Appellant’s rights at stake boiled down to a question of life or death, the mistrial was both appropriate and necessary.” Furthermore, the Georgia Supreme Court “has held that where it is clear from the record that a trial court ‘actually exercised its discretion’ in

deciding to grant a mistrial, the double jeopardy clause will generally not bar a retrial.” After both sides presented arguments for objecting to a mistrial, the judge determined a mistrial was necessary to protect Carman’s right to a fair trial – “in large part where any mistake could result in his death due to possible ineffective assistance at trial.” Also, the trial court did not improperly interpret and apply the Unified Appeal Procedure as a basis for the court’s mistrial, the State contends. Carman’s own brief acknowledges that the trial court “did not explicitly reference the Unified Appeal Procedure,” and the record nowhere suggests that the trial court believed that Pittman was *unqualified* under the Unified Appeal Procedure to serve as co-counsel, but instead shows that she was *unprepared* because she had only recently joined the defense team. And the trial court’s declaration of a mistrial did not violate Carman’s Sixth Amendment right to counsel, the State contends. After making an inquiry into the matter, the trial judge was not *required* to accept the defense attorney’s statement that Lamar and Pittman could adequately defend Carman without Staten-Hayes. Furthermore, the record is devoid of any evidence that Carman *personally* chose to proceed with only Lamar and Pittman as counsel; instead the record only shows that he wanted a continuance. The State is not prevented from further prosecuting Carman “as the proceedings were properly terminated,” the State argues.

Attorneys for Appellant (Carman): Kimberly Staten-Hayes, Christian Lamar, Gabrielle Pittman

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

YUGUEROS ET AL. V. ROBLES ET AL. (S16G0619)

A plastic surgeon who was sued after performing a “tummy tuck” on a woman who died from post-operative complications is appealing a Georgia Court of Appeals decision that reversed a **Fulton County** jury’s verdict in her favor.

FACTS: On June 24, 2009, Dr. Patricia Yugueros performed a liposuction, buttock augmentation, and abdominoplasty surgery (“tummy tuck”) on Iselda Moreno at Northside Hospital in Atlanta. Two days after being discharged from the hospital, Moreno called Yugueros and said she was experiencing pain and not eating well. Believing Moreno was having gastritis caused by her prescribed medications, Yugueros told Moreno to take only Tums and Tylenol instead. A few hours later, Rudy Robles, Moreno’s husband, called the surgeon and said his wife was still in pain and he was taking her to the hospital. Yugueros recommended they go to Northside, where she had privileges, but they went instead to Gwinnett Medical Center’s emergency department, where Moreno arrived complaining of severe abdominal pain, nausea and vomiting. Dr. Michael Violette, an emergency room physician, ordered an abdominal x-ray and concluded it was “unremarkable.” Laboratory tests of Moreno’s blood and urine also revealed nothing unusual. Violette examined her abdomen before diagnosing her with post-operative pain and ordering anti-nausea and pain medication. He released her from the emergency room with instructions to return if her symptoms worsened. Meanwhile, Dr. James York, a radiologist at Gwinnett Medical Center, read the same x-ray that Violette had, and he thought it showed possible “free intraperitoneal air” in her abdomen. “Free air” can be a normal finding in a post-operative patient, but it also can indicate a serious condition, and York recommended a CT scan be ordered. However, by the time York’s report was faxed to the

emergency room, Moreno already had been discharged, and no one contacted Violette, Moreno or Yugueros about York's findings.

About three hours later, Moreno was in extreme pain. Yugueros instructed Moreno to go to Northside, where Yugueros admitted her into the hospital and ordered that she receive a procedure to assist her lungs. The surgeon also prescribed pain medications. She did not order an x-ray, or CT, or get the radiology report from Gwinnett Medical Center. At 5:15 a.m., the nurse called Yugueros and said the medications were not controlling Moreno's pain, and that she had concentrated urine and hypoactive bowel sounds. Yugueros ordered different pain medication, intravenous fluids, and medication to help move Moreno's bowels. Later that afternoon, after Moreno's legs became numb and she had to be carried from the bathroom, Yugueros instructed the nurse to contact the rapid response team, which in concert with Yugueros decided to order an abdominal x-ray, along with other tests. Around 4 p.m. that day, the on-call surgeon was contacted because Moreno's x-ray showed evidence of abdominal free air. After the surgeon tended to another emergency patient, Moreno went into surgery around 7:10 p.m. Once she was opened up, the surgeon discovered that Moreno's stomach had basically torn open and was 95 percent "necrotic" or dead. Moreno died later that night, four days after her surgery.

Robles sued Yugueros and her practice group, Artisan Plastic Surgery, LLC, for medical malpractice, alleging Yugueros was negligent in her post-operative care and treatment of his wife. He did not name the Gwinnett Medical Center or any of its doctors as defendants. But Yugueros and Artisan filed notices designating Gwinnett Medical Center, Dr. Violette and Dr. York as those the jury should require to share in paying damages if it ruled in Robles' favor.

At issue in this case is testimony that was given during deposition – the pre-trial process in which the parties must share sworn testimony, documents and information about their case. After Robles gave Artisan notice of the deposition, Artisan designated Dr. Diane Alexander as its representative to be deposed by Robles' attorneys. Alexander is Artisan's founder, co-owner, and a board certified plastic surgeon. At the deposition, Alexander was asked what she had been told about Yugueros' care of Moreno and she related the events as she understood them. Alexander stated that at some point she believed Yugueros had ordered a CT scan. But that was incorrect. The questioner then asked Alexander, "Do you know who ordered a CT scan?" And she replied, "I suspect Dr. Yugueros ordered it." She was then asked whether ordering a CT scan would have been the appropriate medical standard of care. Yugueros said yes. "If you don't understand why the patient – why they're having pain, it would be standard of care to – if you don't know what's going on, that would be a – yes. The answer is, yes, a CT scan would be – it would provide more information."

At a pre-trial hearing, Yugueros and Artisan's attorneys argued in favor of a motion to exclude Alexander's testimony about the appropriate standard of care, saying she did not have sufficient facts and was relying on hearsay. The trial court granted Artisan's motion, excluding Alexander's testimony because it was hearsay, she did not have all the data necessary to form an opinion, and Robles did not ask if Alexander could say to a degree of medical certainty that Yugueros had violated the standard of care by not ordering a CT. The case went to trial without the testimony about the standard of care, and the jury ruled in favor of Yugueros and Artisan.

Robles appealed, and the Court of Appeals, in a 5-to-2 decision, reversed the trial court's decision. The majority found that the trial court erred in excluding Alexander's testimony because it had not been offered as an expert opinion, which is governed by Georgia Code § 24-7-

702 (b), but rather it was offered under the statute that governs depositions, Georgia Code § 9-11-32 (a) (2), and it states that the deposition of a party designated to testify on behalf of a “public or private corporation, a partnership or association...which is a party may be used by an adverse party for any purpose.” Yugueros now appeals to the state Supreme Court, which has agreed to review the case to determine whether the Court of Appeals erred in ruling that the deposition testimony may be admitted at trial under the statute governing depositions without regard to the strict rules of evidence governing the admissibility of expert testimony under § 24-7-702.

ARGUMENTS: Yes, the Court of Appeals erred, Yugueros’ attorneys argue. The plain language of the state’s Civil Practice Act states that at trial, any part of a deposition may be used against any party **“so far as admissible under the rules of evidence applied as though the witness were then present and testifying,”** they argue in briefs. “Because the admission of deposition testimony is always subject to the rules of evidence...the Court of Appeals erred by holding that an otherwise inadmissible opinion can come into evidence as an admission of a party opponent.” The trial judge correctly concluded that Alexander’s “opinion” was not based upon sufficient facts or data. He found she was not privy to all the facts and circumstances, and was really just passing on hearsay. The judge went on to state that “this is not an admission against interest because they are not saying that Dr. Yugueros violated the standard of care, all she’s saying is the CT scan is part of what might be considered as part of the standard of care.” The testimony was ruled out only after a “thorough analysis” by the judge and the Court of Appeals was wrong to reverse his ruling. Therefore, the state Supreme Court should reverse the Court of Appeals, Yugueros’ attorneys argue.

“The Court of Appeals did not err in holding that Artisan’s corporate deposition testimony should have been admitted as an admission of a party opponent, nor did it reach this conclusion without regard to the rules of evidence, either in regard to the admissibility of ‘expert’ testimony under § 24-7-702, or under other applicable rules of evidence or procedure,” Robles’ attorneys argue in briefs. “Dr. Alexander is a board certified plastic surgeon who had sufficient information and is qualified to admit that the standard of care required a CT.” She had unfettered access to Moreno’s medical records and advance notice of the topics to be discussed at deposition. While she may have failed to prepare, she implicitly qualified as an expert witness under § 24-7-702. “Any failure of preparation by the witness is squarely laid at Artisan’s feet,” the attorneys argue. Alexander never mentioned the possibility that she lacked sufficient facts or data. Indeed she even brought Moreno’s medical records to the deposition. “Instead, petitioners seek to conflate the fact that Dr. Alexander misperceived whether a CT was actually ordered with an absence of facts or data,” the attorneys argue. “Whether a CT had been performed (or not) is wholly irrelevant to whether the standard of care required that one be performed.” Under the law on depositions, § 9-11-32, “the corporate designee is not simply testifying based on her own personal knowledge, but is ‘speaking for the corporation’ about matters to which the corporation has reasonable access,” the attorneys contend. “The corporation has a duty to prepare the corporate designee for testimony.” Finally, “Georgia has embraced the concept that relevant evidence should be admitted at trial unless there is a reason to exclude it.” In this case, perhaps “the most critical issue in the underlying trial was whether the standard of care required Dr. Yugueros to order a CT,” the attorneys argue. “Dr. Alexander, Artisan’s founding member, testified that the standard of care required that a CT scan be ordered. The Court of Appeals

considered the arguments of the petitioners, and of the dissent, and properly concluded that the trial court erred in excluding this admission of a party opponent,” Robles’ attorneys argue. The Supreme Court should uphold its decision.

Attorneys for Appellants (Yugueros): Thomas Carlock, Wayne McGrew, III, John Rers, M. Scott Bailey, Erica Jansen

Attorneys for Appellee (Robles): Brent Kaplan, Hilary Hunter

THE CITY OF ATLANTA V. ATLANTA INDEPENDENT SCHOOL SYSTEM ET AL.
(S16A1103)

ATLANTA INDEPENDENT SCHOOL SYSTEM V. CITY OF ATLANTA ET AL.
(S16X1105)

In these related appeals, which involve the annexation of **Fulton County** property into the City of Atlanta, the City is appealing a Fulton County court ruling that dismissed its petition to declare a 1986 statute unconstitutional. The statute expands the jurisdiction of the Atlanta Public Schools. At issue in this case is property taxes and where children will go to school.

FACTS: In 1950, the Georgia General Assembly passed a local constitutional amendment to the Georgia Constitution governing education-related aspects of annexation by Atlanta within Fulton County. The local amendment said: (1) that “when the corporate limits of the City of Atlanta are extended into Fulton County, the territory embraced therein shall become a part of the independent school system of the City of Atlanta and shall cease to be a part of the school system of the county,”; and (2) any “school property” within this annexed territory “shall become the property of the City of Atlanta.” In 1950, Atlanta’s municipal government owned and operated the Atlanta public schools. That changed in 1973, when the General Assembly separated APS from Atlanta’s municipal government by enacting separate charters for the two entities and removing essentially all educational responsibilities from the municipal government.

Ten years later, the 1983 Constitution specifically forbade any further local amendments. Those pre-dating the 1983 Constitution, however, could be continued by the General Assembly through local legislation. Any that were not continued by local legislation prior to July 1, 1987, however, would be automatically “repealed and . . . deleted” as per the Georgia Constitution. In 1986, the General Assembly passed House Bill 1620, which is the crux of this case. The legislation stated that the 1950 local constitutional amendment “shall not be repealed or deleted on July 1, 1987, as part of the Constitution of the State of Georgia but is specifically continued in force and effect on and after that date as part of the Constitution of the State of Georgia.” House Bill 1620 described the 1950 schools amendment as a “constitutional amendment providing that, upon the extension of the corporate limits of the City of Atlanta into Fulton County, the additional territory and school property located in annexed area become[s] a part of the City of Atlanta independent school system.”

Since that time, Atlanta has acquired a piece of property located within unincorporated South Fulton and wants to annex it. In addition, residents of several communities in unincorporated Fulton County have approached City officials requesting possible annexation into Atlanta. In March 2015, the City filed a lawsuit in Fulton County Superior Court to determine whether the Atlanta public schools’ boundaries would automatically expand upon annexation, i.e. to determine whether the local constitutional amendment is still valid. The City named the Atlanta Public Schools as the respondent and sought a declaration by the court that House Bill

1620 was unconstitutional because it violated the requirement that any local constitutional amendment be continued “without amendment.” The City argued that while the 1950 amendment stated that the “school property within the area embraced in the [annexation] shall become the property of the City of Atlanta,” the 1986 statute changed the wording and stated that “school property located in the annexed area becomes a part of the City of Atlanta independent school system.” In May 2015, the Fulton County School District filed a motion to intervene as a party on the side of the Atlanta public schools. In October 2015, the trial court ruled in favor of the school system and dismissed the City’s petition. The trial court concluded that the 1950 local constitutional amendment had been properly continued by House Bill 1620. The City of Atlanta now appeals to the Georgia Supreme Court.

ARGUMENTS (S16A1103): Attorneys for the City of Atlanta argue the trial court erred by ruling that House Bill 1620 properly continued the 1950 local constitutional amendment. House Bill 1620 either (1) tried to illegally amend the local constitutional amendment, or (2) its text, title, and public notice were unconstitutionally misleading. “The local constitutional amendment expressly directed that any ‘school property’ in territory annexed by Atlanta within Fulton County ‘shall become the property of **the City of Atlanta**,’ the City’s attorneys argue in briefs. “In contrast, the title, text, and public notice of House Bill 1620 incorrectly represented that any annexed ‘school property’ would ‘become **a part of the City of Atlanta Independent School System**.’” It is not clear from the record whether the General Assembly was deliberately attempting to change the 1950 amendment by redirecting annexed school property from the City to the public school system. If the 1986 General Assembly did intend to change the recipient of annexed school property, House Bill 1620 violated the Georgia Constitution’s requirement that any local constitutional amendment be continued “without amendment,” the attorneys argue. Even if House Bill 1620 was not an attempt to amend the 1950 local constitutional amendment, it is *still* invalid because its text, title, and public notice failed to accurately portray its effect. Georgia’s Constitution requires that legislation such as House Bill 1620 “distinctly describe” the affected law and its alteration. The Constitution requires that at a minimum, the title and text of the bill must be accurate and not misleading. The Georgia Supreme Court has repeatedly invalidated legislation with misleading titles. House Bill 1620’s title specifically said the local constitutional amendment transferred annexed school property to the Atlanta public schools, but the 1950 amendment in fact transferred it to the City. The trial court erred in treating Atlanta and the Atlanta public schools as legally interchangeable, and in essence concluding that it was harmless error for House Bill 1620 to refer to the Atlanta public schools when it should have said Atlanta, the City’s attorneys argue. In addition, as a local act, House Bill 1620 was subject to a constitutional public notice requirement. Under the Constitution, local acts’ public notices must accurately describe the legislation, which this one did not.

Attorneys for the Atlanta and Fulton County school systems suggest in briefs that the City filed this lawsuit because it is “[a]pparently concerned that the 1950 schools local constitutional amendment could be an impediment to future annexations in Fulton County.” Therefore it is seeking to invalidate House Bill 1620 and thereby repeal the 1950 amendment. In its petition, it alleges that House Bill 1620 is unconstitutional because it purportedly amends or mischaracterizes the 1950 amendment, in violation of the Georgia Constitution’s “Notice and Distinct Description Clauses, which stated that all local constitutional amendments were repealed on July 1, 1987 unless they were continued “without amendment.” “The City, however, is

wrong,” the attorneys argue. “Its challenge to House Bill 1620 is based entirely on an improper, hyper-technical interpretation of that statute which ignores the relevant historical and statutory context – two factors this [Georgia Supreme] Court has repeatedly held are critical to determining the meaning of a statute.” As the City itself explains, the 1950 amendment’s treatment of school property is explained by the governance of schools at the time it was enacted. The 1950 amendment provided that annexed school property became the property of the City of Atlanta because at the time, it was the entity responsible for Atlanta’s public schools. “By 1986, however, when the General Assembly enacted House Bill 1620, the Atlanta Independent School System [i.e. Atlanta public schools], rather than Atlanta’s municipal government, was responsible for the City’s public schools. Thus, far from amending or mischaracterizing the 1950 schools local constitutional amendment, House Bill 1620’s description of the 1950 [amendment] continued its nature and effect: school property in Fulton County that is annexed by the City becomes a part of the entity responsible for Atlanta’s public schools,” the attorneys argue. As a result, House Bill 1620 satisfies the Distinct Description Clause and the Notice Clause of the Georgia Constitution “as its public notice and text plainly put a person of ordinary intelligence on notice of its and the 1950 schools local constitutional amendment’s subject matter,” the school systems’ attorneys argue. Therefore, this Court should uphold “the Superior Court’s well-reasoned decision dismissing the petition and upholding House Bill 1620.”

ARGUMENTS (S16X1105): In a cross-appeal, the school systems argue that even though the trial court correctly ruled that House Bill 1620 did not violate the Georgia Constitution, the court made two erroneous legal rulings and it should have dismissed the City’s petition without reaching the merits of the City’s improper challenge to House Bill 1620. First, the Atlanta Independent School System is a political subdivision of the State. “As a result, suits against the Atlanta Public Schools are barred by the constitutional privilege of sovereign immunity, unless that immunity has been waived by the Constitution or an act of the General Assembly,” the school systems’ attorneys argue. (The doctrine of sovereign immunity protects state government and its agencies from lawsuits.) “Here, the Superior Court incorrectly held that the judicial review clause of the Georgia Constitution waives sovereign immunity for declaratory judgment actions challenging the constitutionality of a statute, such as the City’s challenge to House Bill 1620.” The court’s second error was its ruling that the City’s petition presented a controversy that was “ripe” for the court to decide under the state’s Declaratory Judgment Act. However, it is not clear whether the City has the legal authority to complete any of the three proposed annexations of territory in unincorporated Fulton County by the City. As a result, the petition “presents only a question of academic interest,” and “the entry of declaratory judgment is not appropriate because a court has no province to determine whether or not a statute, in the abstract, is valid, or to give advisory opinions” on such matters, the school systems argue.

Atlanta argues that the City’s claims for declaratory relief – asking the court to declare that House Bill 1620 is unconstitutional and the 1950 amendment is therefore invalid – is both “ripe” and a controversy the court should decide. “The trial court correctly reached the merits on the underlying constitutional claim, describing it as ‘quite obvious that where children will go to school and the tax ramifications upon the consummation of the proposed annexations at issue here are of paramount concern and importance to the City and the impacted school systems as well as to the affected students, families, and their communities,’” the City’s attorneys argue. “Judicial review of the local constitutional amendment’s constitutional validity – declaring the

General Assembly’s act in violation of the constitution void... – is necessary to answer those important and time-sensitive questions.” In arguing that the trial court erred in reaching the substance of this constitutional challenge, the schools systems seek “a shield of sovereign immunity that would functionally immunize certain constitutional violations and severely erode the judiciary’s essential role in Georgia’s constitutional system.” As to the school systems’ contention that Atlanta cannot seek declaratory judgment for pending annexation petitions, the school systems ignore “Atlanta’s need for relief and the importance of this issue for South Fulton families and property owners,” the City argues. Atlanta needs to be able to tell Fulton residents interested in potential annexation where their children would go to school and what their property taxes would be.

Attorneys for Appellant (City): Emmet Bondurant, David Brackett, Robert Ashe III, Robert Highsmith, Jr., Joseph Young

Attorneys for Appellee (Schools): Richard Sinkfield, Phillip McKinney, Timothy Fitzmaurice

BURNEY v. STATE (S16A1042)

In this **Fulton County** case, Octavious Burney is appealing his murder conviction for shooting a man and injuring another as a result of an argument.

FACTS: On May 11, 2009, Leonard Young walked to a bus stop with his girlfriend, Shaniqua Arrington, and her friend, Jasmine Junior, who needed to catch the bus to attend her college classes. While the three waited for the bus, they were approached from a gas station across the street by Steven Stillwell, a.k.a. “Little Steve”, and Burney, a.k.a. “Tay-Tay.” Stillwell called out to Young that he had heard Young was looking for him. Young responded to Stillwell that if he wanted to find him, he knew where his mother and grandmother stayed. After the exchange, the group began arguing loudly, and Young left the girls to walk closer to Stillwell. Burney punched at Young, who ducked and, in turn, punched Burney in the mouth. Stillwell then retrieved a gun from their car that was parked at the gas station. Shaniqua yelled in warning that Stillwell had a gun and Young began to run toward the gas station. According to the State, Stillwell handed the gun to Burney, who opened fire on Young, striking him once in the back. The fatal bullet perforated his right lung and a large blood vessel connected to his heart, causing massive internal bleeding. According to witnesses, Burney said during the shooting, “He’s about to die.” Young, after being shot, fell into Shaniqua’s arms and began seizing, while Jasmine flagged down a nearby ambulance. Burney and Stillwater both fled from the scene. Atlanta Police Department Officer Bryan Ricker, upon arrival at the scene, discovered a second victim, Julius Ruffin, who also had been shot. Ruffin, who was injured by stray gunfire, gave a statement at Grady Hospital to a Detective from the Atlanta Police Department saying that he had been watching a fight at the gas station, heard gunfire, and was then shot. Shaniqua later positively identified Burney and Stillwater in a police lineup.

Burney was tried in Fulton County in March of 2013, and received a life sentence for malice murder and five consecutive years for firearm possession. His motion for new trial was denied by the trial court on June 10, 2015, and he now appeals his convictions to the State Supreme Court.

ARGUMENTS: Burney’s attorney raises five issues on appeal, asking this court to reverse his conviction. He claims, among other things, that the trial court used the incorrect legal standard in denying his motion for a new trial. He also claims that the trial court violated former

Georgia Code section 17-8-57, which was applicable at the time of the trial. The code section provided that it was error for a judge in any criminal case to express his opinion about the guilt of the accused. In response to Burney's location at the time of the crime, the judge stated that, "I think this is also becoming repetitive. I think we've heard from the witnesses, the eyewitnesses themselves where people were. I haven't heard any conflicting testimony about that, so I'm going to sustain the objection..." The defense's main argument at trial was that Burney was not at the location when the crime occurred. Therefore, the judge's assertion that the eyewitnesses had established where people were located without contradiction undermined the defense. Burney's attorney for his appeal also argues that Burney's attorney at his trial was ineffective, as evidenced by his failure to object to a prior statement by Shaniqua which was impermissibly introduced. This statement, which identified Burney as the shooter, improperly bolstered her testimony to the jury. For these reasons, as well as additional arguments outlined in his brief, Burney is asking this Court to find that the trial court erred and to reverse his convictions.

The State argues, however, that the trial court applied the correct legal standard when it ruled on his motion requesting new trial. The District Attorney and Attorney General, representing the state, explain in their brief that, "Nothing in the court's order suggests that the court did not apply the correct standard," and they reference a Georgia Supreme Court case from 2015, *Allen v. State*. They also argue that the trial court did not incorrectly comment on the evidence in violation of former Georgia Code section 17-8-57, as Burney contends. Under the Georgia Supreme Court's 2003 decision in *Parker v. State*, that statute was only violated if the trial court's instruction to jurors "assumes certain things as facts and intimates to the jury what the judge believes that evidence to be." No such violation occurred here, the State contends. Finally, the State asserts that Burney's claim that his trial counsel was ineffective lacks merit, and that he failed to show that prejudice occurred as a result of the lack of objection. The attorneys argue that the statement at issue was properly admitted as a prior inconsistent statement. For these reasons, among others, the State argues that no error occurred at trial which requires a reversal in this case. The State is therefore asking this Court to affirm Burney's convictions and sentences.

Attorney for Appellant (Burney): Brian Steel of the Steel Law Firm, P.C.

Attorneys for Appellees (State): Paul Howard, District Attorney, Paige Whitaker, Dep. D.A., and Michael Snow, Asst. D.A. of the Fulton County District Attorney's Office. Samuel Olens Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G. and Scott Teague, Asst. A.G. of the Georgia Department of Law.

2:00 P.M. Session

JOHNSON V. THE STATE (S16A1347)

A man charged with murder is challenging a **Gwinnett County** Superior Court's ruling for failing to acquit him and grant his demand for a speedy trial.

FACTS: Around 11 p.m. on April 13, 2014, a gunfight broke out at the Bradford Gwinnett Townhomes in Norcross. Law enforcement responded to the scene, where Kevin Pierre was found dead on the ground from a gunshot wound. Witnesses alleged that the shots had been fired from a large truck driven by Quinton Hall. Sherwin Johnson was allegedly in the

passenger's seat of the truck at the time of the shooting. The truck was traced back to a man who said he had lent it to Johnson earlier that day. A few days later, Johnson was arrested for felony murder and aggravated assault, and he allegedly had small amounts of marijuana and cocaine on his person. Johnson was appointed Scott Drake as an attorney to represent him in the court proceedings and Drake filed a motion for bond, which was later withdrawn in June. By August, Johnson filed, among other things, a handwritten demand for a speedy trial and a request for an appointment of new counsel, stating the Drake was ineffective in his representation. Two days later, Drake filed a motion to terminate his representation of Johnson. In September, the trial court filed an order dismissing Johnson's August 26th filings on the ground that he was represented by counsel at the time of their filing. On Oct. 22, the trial court ruled that Johnson could proceed with the case representing himself, and appointed standby counsel (an attorney who can assist a pro se litigant in legal matters when needed). During the next several months, Johnson filed various demands for a speedy trial. The trial court later held a hearing in May, at which Johnson also filed a motion for acquittal in open court, which the trial court denied that same day. The trial court did issue an order, however, directing the State to comply with outstanding discovery requests and setting the trial for June. In response, the State provided Johnson's standby counsel with several CDs and DVDs. The trial court then postponed the trial until August. According to the State, Johnson has also asked for delays in the trial to challenge the sufficiency of the indictment under which he is being held and to seek testing of evidence. He then filed a notice of appeal to the Court of Appeals, seeking review of the order denying his motion for acquittal and claiming that his right to a speedy trial had been violated. In February of this year, the Court of Appeals transferred the case to the Georgia Supreme Court, which is the matter now before the court on Oral Arguments.

Johnson, currently incarcerated at Gwinnett County Detention Center, will be appearing before the State Supreme Court to argue on his own behalf.

ARGUMENTS: Johnson argues, among other things, that the arrest warrant under which he was originally held was improper. He claims it contained false information and had a blatant disregard for the truth. He also says that it contained no substantial evidence, was without probable cause - violating the 4th Amendment - and was based on second hand "hearsay" information. He also claims he was denied his 5th and 6th Amendments right to due process and confrontation of his accusers. Johnson reasserts that Drake served as ineffective assistance of counsel to him when he failed to assert his demand for a speedy trial, a desire Johnson says he conveyed to him. He argues that the trial court has violated Georgia Code 15-6-21 (b), which states "[i]n all counties with more than 100,000 inhabitants, it shall be the duty of the judge of the superior, state, or city court, unless providentially hindered or unless counsel for the plaintiff and the defendant agree in writing to extend the time, to decide promptly, within 90 days after the same have been argued before him or submitted to him without argument, all motions for new trials, injunctions, demurrers, and all other motions of any nature." Johnson believes he has been treated unfairly by the county detention center, explaining that he "was stripped of all clothing and given a green 'turtle suit' as if [he] was crazy, mentally insane, or wanted to hurt himself... [he] has no mental history which would somehow justify this humiliating treatment... The months [that he] was on this [suicide watch] status caused unbelievable stress, anxiety, suspicion and often hostility." (Capitalization removed from quote).

Representing the State, the District Attorney's office argues that Johnson's appeal should be dismissed, as there is no written order which he is directly appealing. The State cites U.S. Supreme Court cases *Baker v. Wingo* and *Doggett v. United States* as precedent for speedy trial violations, a standard which they claim is not met here in Johnson's case. Also, his first demand for a speedy trial was invalid, as he was represented by counsel at the time and it was filed outside the time limit. Additionally, he failed to properly serve the DA's office a copy of the demand, the State argues. Contrary to Johnson's allegations, no harm has been inflicted by the trial court and "[t]here is no evidence of oppressive pre-trial incarceration; in fact, the trial court ordered additional law library time for [Johnson]." "In this case there is photographic evidence of the commission of the crimes and phone records related to the time and place of the crimes. No photos have been lost. No photos have been destroyed. All of the evidence is available for Appellant to test." The State is asking the Georgia Supreme Court to affirm the trial court's holdings here on appeal.

Attorney for Appellant (Johnson): Sherwin Johnson, Pro Se

Attorneys for Appellees (State): Patricia Burton, Paula Smith, and Samuel Olens from the Georgia Department of Law, and Daniel Porter, Christopher Quinn, and Charissa Henrich from the Gwinnett County District Attorney's Office