



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Monday, October 3, 2016

10:00 A.M. Session

ROBERSON V. THE STATE (S16G0931)

At issue in this case is whether a woman has the right to appeal a **Richmond County** judge's refusal to require the County to give her a free copy of her trial transcript based on her public defender's determination that she was indigent.

FACTS: In March 2014, Necole "Nick" Roberson and her son got into an altercation and she threw boiling water on him. Following a jury trial, Roberson was convicted of misdemeanor Simple Battery Family Violence and sentenced to 12 months, with 30 days of confinement – suspended upon proof of a psychiatric evaluation – and the remainder on probation.

In April 2014, Roberson filed a notice stating she planned to appeal to the Georgia Court of Appeals. She also filed an "affidavit of poverty," and in September 2014, Roberson filed a motion to obtain a transcript of her trial free of charge on the ground that she was indigent. In response, the trial judge expressed concern, noting that "during the trial Ms. Roberson testified that she had recently moved into a nice house." The judge asked for evidence of Roberson's indigence. Following a hearing, the judge denied the motion, finding the defense "failed to provide any such evidence either at the hearing or thereafter, despite specific requests by the Court and very specific direction as to what evidence might suffice."

In her appeal, Roberson argued the trial court erred by denying her motion for a free transcript, by excluding evidence of prior difficulties between Roberson and her son, and by excluding prior acts of violence by her son against another person. In February 2016, the Court of Appeals upheld the trial court's ruling regarding Roberson's ability to pay for a trial transcript, stating that "that decision is not subject to review and is therefore affirmed." The Court of Appeals held that under Georgia Code § 9-15-2, the trial court's determination about Roberson's indigence was final and therefore not subject to appeal. The statute says: "The judgment of the court on all issues of fact concerning the ability of a party to pay costs or give bond shall be final." Also, the Court of Appeals cited the Georgia Supreme Court's 1987 decision in *Penland v. State*, in which the high court upheld the constitutionality of the statute regarding the finality on questions of indigence in a criminal case, including for the purpose of obtaining a copy of a trial transcript at government expense. The high court ruled that because neither the U.S. nor Georgia constitutions confers a per se right of appeal, the man appealing in *Penland* suffered no denial of his right to due process by the final ruling of the trial court denying him a free transcript. The Court of Appeals also rejected Roberson's argument that another statute, Georgia Code § 17-12-24, which is part of the Georgia Indigent Defense Act, required a different result. That statute says that, "The circuit public defender... shall determine if a person... charged in any manner is an indigent person entitled to representation under this chapter." But the appellate court ruled that "nothing in the Indigent Defense Act provides that the public defender office's determination regarding a defendant's status as indigent for the purpose of representation automatically applies to a determination of indigence for the purpose of requiring the county to provide an appellate transcript free of charge to an indigent defendant." Because Roberson's other arguments depended on information in the transcript, which Roberson failed to provide, the appellate court ruled she could not show any error on those claims either. Roberson now appeals to the state Supreme Court, which agreed to review the case to see if the Court of Appeals erred in determining that a convicted defendant deemed indigent by a judicial circuit's public defender can be deemed not indigent for the purpose of obtaining a free transcript for her appeal.

ARGUMENTS: Roberson's public defender argues the Court of Appeals erred in ruling that the procedure used by a trial court when making a determination about a person's indigence for the purpose of obtaining a free transcript is not subject to appellate review. Even if it were not, "the procedure used by the trial court, when making such a determination, is subject to review," Roberson's attorney argues in briefs. In this case, the trial court failed to supplement the record with evidence rebutting Roberson's affidavit of poverty. "Specifically, the trial court presented no evidence with respect to Appellant's [i.e. Roberson's] current earning or other resources." She, on the other hand, presented at the hearing a variety of evidence proving her indigence, including information from the Georgia Department of Labor showing she earned zero income from the third quarter of 2013 through the second quarter of 2014. Therefore, the trial court "failed to employ the proper procedure when determining whether Appellant was indigent for purposes of obtaining a free transcript for direct appeal." "Allowing the trial court to enjoy such unfettered discretion creates disparate treatment of indigent defendants and erodes the fundamental guarantee of equal protection of the laws, essentially by depriving indigent defendants of a right to appeal" the attorney argues. *Penland v. State* was decided prior to the passage of the Indigent Defense Act at a time "when trial courts made only one determination of indigence, which applied to the issue of appointed counsel as well as to the issue of payment of

costs for a copy of a transcript for appeal,” the attorney argues. “By requiring only one determination of indigence, the trial courts acknowledged that a defendant who is too impoverished to hire an attorney on appeal is also too impoverished to pay for a copy of a trial transcript.” But with passage of the Act, the responsibility of making determinations of indigence for purposes of legal representation was shifted from the trial court to the judicial circuit’s public defender. As a result of the Court of Appeals ruling in Roberson’s case, two groups of indigent defendants have been created: (1) indigent defendants who are too impoverished to hire an attorney for their appeal, and too impoverished to pay for a transcript; and (2) indigent defendants who are too impoverished to hire an attorney for their appeal, but not too impoverished to pay for a transcript. The Court of Appeals decision marks a new change in the law that runs counter to the Georgia Supreme Court’s 2006 ruling in *Mitchell v. State*, in which the high court ruled that, “An indigent, on appeal is entitled as a matter of right to a free copy of the transcript of trial proceedings....” The Court of Appeals ruling should be reversed.

The Assistant Solicitor General, representing the State, argues the Court of Appeals made the correct determination in upholding the trial court’s denial of Roberson’s motion. “In doing so, the Court of Appeals properly followed a long line of case law beginning with this Court’s decision in *Penland v. State*,” the State’s attorney argues in briefs. “The trial court had the authority to make a determination of Appellant’s indigent status and this was not subject to review.” As the Court of Appeals ruled, “although the Indigent Defense Act provides that the public defender offices established by the Act are required to determine whether a defendant is indigent for the purpose of providing a defense, that determination does not control a county’s obligation to provide an appellate transcript...And because the Act does not pertain to a determination of indigence for the purpose of providing a transcript free of charge to indigent defendants, it follows that the trial court retains discretion...to determine whether a defendant is indigent for the purpose of holding a county responsible for the cost of a transcript.” The trial court must be able to retain the authority to question and determine indigence, the State contends. “This authority goes to the trial court’s inherent and enumerated authority to ensure the trial court is not forced to become an unwilling or unwitting participant in fraudulent behavior,” the attorney argues. “The procedure used by the trial court to rule on appellant’s motion was proper and should not be disturbed.”

Attorney for Appellant (Roberson): Brooke Ray

Attorney for Appellee (State): Matthew Andrews, Asst. Solicitor General

SOUTHERN STATES-BARTOW COUNTY, INC. ET AL. V. BARTOW COUNTY ET AL. (S16A1716)

A company is appealing a **Bartow County** court ruling that it no longer has the right to construct a landfill on property it owns. The company argues that the County’s 1993 zoning ordinance eliminating its right is unconstitutional.

FACTS: Southern States owns a tract of property near the intersection of Euharlee Road and Hodges Mine Road in unincorporated Bartow County. In 1989, it applied to the Georgia Environmental Protection Division for a permit to operate a sanitary waste landfill. Less than a year later, Southern States requested that Bartow County issue a certificate of land use approval, which the State required before issuing a permit. The County denied the request, stating that the zoning ordinance then in effect did not allow a landfill on the site. Southern States sued the

County but before that case was resolved, the Georgia Supreme Court ruled in another Bartow County case that the zoning ordinance in effect had to be thrown out because it failed to follow minimum procedures set out in Georgia's Zoning Procedures Act. In 1993, the County adopted a new zoning ordinance following the Supreme Court's ruling. In section 6.1.4, the ordinance states: "Any intended non-conforming use for which a vested right was acquired prior to the adoption of this ordinance...shall be prohibited unless such is actually commenced within one year of the adoption of this ordinance...." In 1994, the Bartow Superior Court ruled in Southern States' favor, finding that, "Plaintiffs have a vested right to obtain a certificate of the right to use their real property without county land use restrictions...." Two months later, Southern States requested and obtained a zoning certification letter from the County's zoning administrator to give to the Environmental Protection Division as part of its landfill permit application. However, according to the County and nearby property owners, it was another eight years before Southern States in 2002 gave the "go-ahead...to proceed with a full hydrogeological site assessment, wetland evaluations, and other work necessary to move the pending solid waste application forward through the Environmental Protection Division landfill permitting process."

In May 2013, property owners near the proposed landfill site sued Southern States, asking the court to order the company not to go forward with the landfill until they could get a hearing on whether the site was "suitable for a landfill and would cause irreparable harm should such permit be granted." They argued that under section 6.1.4 of the zoning ordinance, Southern States' vested right as recognized by the court in its 1994 order expired as a result of the company's failure to start using the property as a landfill within one year of the adoption of the ordinance. In response, Southern States filed a motion arguing that section 6.1.4 of the 1993 ordinance is unconstitutional. In December 2013, the Bartow Superior Court ruled that Southern States' vested right to operate a landfill on the property had lapsed under section 6.1.4 of the ordinance as a result of the failure to begin using the property as a landfill. On appeal, the Georgia Court of Appeals upheld the ruling, but it remanded the case to the trial court to consider Southern States' constitutional challenge to the ordinance. On remand, Southern States argued section 6.1.4 is unconstitutional because it violates the constitutional prohibition against the enactment of retroactive laws and it eliminates a vested right by legislative fiat even when the holder of that right does not consent. In February 2016, the trial court ruled that the 1993 ordinance is constitutional. Southern States now appeals to the Georgia Supreme Court, arguing the ordinance is unconstitutional as applied to them.

ARGUMENTS: Attorneys for Southern States argue the trial court erred by applying the 1993 ordinance, thereby eliminating their vested right to develop a landfill on their property. "Under Georgia law, a landowner acquires a vested right to use its property notwithstanding a change in the zoning ordinance if it has made a substantial change of position in relation to the land, made substantial expenditures, or has incurred substantial obligations," they argue in briefs. In 1994, the trial court found that Southern States had "spent substantial sums of money" in its effort to get a landfill permit and that it had "acted in reliance upon assurances from the Bartow County zoning administrator that the landfill was permitted." "The question of whether Southern States has a vested right to use its property for a landfill was resolved in favor of Southern States by the 1994 order, which Bartow County did not appeal," the company's attorneys argue. "Thus, the only question presented here is whether the county, by ordinance, may eliminate this vested right (without the payment of any compensation) based on one year of nonuse, even though the

property owner has expressed its intent to develop its property consistent with its vested rights.” The ordinance “divested Southern States of its vested rights without its consent” and that is in violation of the Georgia Constitution. “The trial court erred because the Appellants’ [i.e. Southern States’] vested right was divested by legislative fiat solely as a result of the passage of one year, even though the evidence shows that the Appellants were taking action to use their property for a landfill and never abandoned these efforts. Proof that the Appellants did not abandon their effort to operate a landfill on the Southern States’ property is underscored by the fact that EPD issued a solid waste handling permit in 2013 during the pendency of this action.” The lengthy regulatory process through which any applicant for a landfill permit must go through makes it “impossible for a property owner to obtain all governmental approvals – especially where the approvals are appealed by neighboring property owners – and commence use of a tract for a landfill within one year.”

Attorneys for the County and property owners argue the trial court properly ruled that section 6.1.4 of the 1993 zoning ordinance is constitutional as applied to Southern States,. The power to regulate land use is granted by the Georgia Constitution directly to counties. “There is no question that under Georgia law, a ‘governing authority can require a nonconforming use to be terminated in a reasonable time,’” the attorneys argue in briefs. Under the rule Southern States wants the Supreme Court to adopt, “the holder of a vested right could sit on that right forever, until eventually, even decades later, the holder of the right decided to use its land without any regard to how the landscape, surrounding community, regulatory environment, and scientific knowledge had developed and changed in the meantime. Such a rule would be inconsistent with the well-established principle that local governments have the power to regulate land use.” The ordinance did not divest Southern States of a vested right without its consent “because Southern States consented to the loss of those rights through its conduct,” the County’s attorneys argue. “Southern States has failed to ever commence using its property as a landfill for more than two decades.” In its 1983 decision in *Hayes v. Howell*, the Georgia Supreme Court ruled that the holder of a vested right could lose that right by failing to meet reasonable conditions and obligations imposed by the government. In *Hayes*, retention of the rights was conditioned on using them or paying taxes on them within a specified period of time. Under the reasoning set forth in *Hayes*, section 6.1.4 of the ordinance “is not an unconstitutional retroactive law as applied to Southern States,” the attorneys argue. Other jurisdictions, such as California, have ruled that “a vested right to build or develop can lapse or expire based upon failure to proceed,” the County and property owners argue. “Section 6.1.4 itself did not divest Southern States of its vested right; it conditioned the retention of those rights on Southern States using them, which Southern States failed to do for years.”

Attorneys for Appellants (Southern): David Flint, Mark Forsling

Attorneys for Appellees (County): Brandon Bowen, Sarah Martin

MOSBY V. THE STATE (S16A1580)

A woman convicted of murdering a man who shot her four times is appealing a **Fulton County** judge’s refusal to grant her a new trial, arguing the State failed to disprove she was acting in self-defense.

FACTS: Leslie Mosby and her former girlfriend, Patricia Burns, had been lovers for more than a year. But by November 2012, Burns had moved out of the Travel Lodge where they

had been living and was staying with a man named Theisen Wynn at the Extended Stay Suites on Frederick Drive in unincorporated Fulton County. The parties dispute the facts of what happened on Nov. 13, 2012. Here is Mosby's account: Mosby received a call from Burns who indicated she was in trouble and needed her to pick her up at the Skyway Motel on Fulton Industrial Blvd. When Mosby arrived, Burns was sitting in a car with a man. The three got out of their cars, and an argument ensued between Mosby and Burns. Mosby later testified she saw Wynn "fumbling" with something and believed she saw him put a gun into a cloth bag or his coat. She then began to back up, believing she had been "set up" by Burns' call. As she attempted to return to her car, Wynn advanced on her, and Mosby fired a warning shot. She then heard, but did not see, a muzzled shot from Wynn, and later argued he accidentally shot himself at close range. Mosby then fired a shot at Wynn to repel him, inflicting a non-fatal wound to his left leg. Wynn continued to move toward her and began firing at her. She got into her car and attempted to shield herself behind her car door while returning fire. During the encounter, Mosby was shot four times – in her chest, arm, abdomen and leg. Wynn was shot twice in his right arm, once in his upper left thigh, and he was fatally wounded by a bullet that struck his upper right leg and penetrated the femoral artery. Wynn later died during surgery at Grady hospital. While Wynn had fired all 15 of his bullets, Mosby fired a total of four shots. Mosby was later arrested at Grady hospital while she was recovering from surgery. Her statement to the arresting officer, asking why she was being arrested when she was the one who had been accosted, was later played to the jury. Mosby testified in her defense that the number of bullets fired, the damage to her car, and her multiple injuries supported her claim that she shot Wynn in self-defense.

Here is the State's account of what happened on Nov. 13, 2012, although briefs filed by both the District Attorney's office and the Attorney General's office differ from one another in some of the details. Burns met Mosby when she first came to Atlanta and lived at the Extended Stay Lodge, but when they began having difficulties in early 2012, Burns left. On Nov. 13, she went to a nearby Travel Lodge to retrieve a cell phone from an acquaintance. At around 5 a.m., she got a ride back to the Extended Stay Lodge with her friend, Wynn. When they pulled into the parking lot, Mosby drove up and blocked Wynn's car, angrily confronting Burns of being in a relationship with Wynn. According to the State, Mosby shoved Burns, then pulled out a gun and threatened to shoot Burns every time she saw her. Mosby then approached Wynn who had gotten out of the car, asking him if he and Burns were together. When he responded, "It is what it is," she fired at Burns. Burns turned and ran toward the hotel entrance, hearing more gunshots as she ran away. When Wynn stumbled into the hotel, bleeding badly, Burns called 911. At that point, she saw a gun in Wynn's hand but later said Mosby had had been the first to shoot. The State says that when Mosby was later arrested at Grady hospital, she asked the officer why she was being arrested when "they" were the ones who had shot her and she did not even have a gun.

In March 2013, the jury found Mosby guilty of all the charges with which she had been charged, including the murder of Wynn, the aggravated assault of Burns, and Possession of a Firearm by a Convicted Felon. She was sentenced to life plus 25 years in prison. Mosby filed a motion for new trial, but following a hearing, the trial court denied it. Mosby now appeals to the state Supreme Court.

ARGUMENTS: The Public Defender representing Mosby argues the evidence was insufficient to prove that Mosby did not act in self-defense. Georgia Code § 16-3-21 (a) states: "A person is justified in threatening or using force against another when and to the extent that he

or she reasonably believes that such threat or force is necessary to defend himself or herself or a third person against such other's imminent use of unlawful force." "Thus, the mere threat of force is all that is required when one reasonably believes that she must defend herself against another's imminent use of unlawful force," Mosby's attorney argues in briefs. "When a defendant produces evidence that she was justified in using deadly force, the State bears the burden of disproving that affirmative defense beyond a reasonable doubt." Mosby argues that the physical evidence and the surveillance video from the hotel support her claim that she was justified in using force against Wynn and Burns because she believed such force was necessary to defend herself against their imminent use of illegal force. Specifically, she points to her testimony of Wynn "fumbling" with a gun in his pocket, the number of wounds she suffered, the extensive damage to her car, and the medical examiner's determination that Wynn suffered a contact wound in his groin area while the surveillance video of the incident shows her gun never made contact with Wynn. She also points out that her initial statement to police when she was arrested in the hospital was consistent with her testimony at trial that Wynn was shooting at her. Her testimony that she fired a warning shot, then attempted to return to her car while Wynn shot at her, is consistent with the surveillance video of the event and with the defense's theory that Mosby acted in self-defense. Mosby's attorney also argues that her constitutional right to effective assistance of legal assistance was violated by her trial attorney's failure to bring in an expert witness. Effective legal assistance involves adequately researching the law and presenting the case in a competent manner. In this case, "trial counsel's failure to hire an expert cannot be characterized as strategic or a choice, as trial counsel testified that it simply did not occur to him to do so, nor was any decision made pursuant to thorough investigation," Mosby's attorney argues. "Trial counsel's presentation of Appellant's [i.e. Mosby's] justification defense without expert testimony explaining what happened on the grainy video that lacked audio was not objectively reasonable under the circumstances." Furthermore, an expert witness could have supported Mosby's contention that Wynn shot himself accidentally, causing a direct muzzle imprint on his own skin. With expert testimony, "the defense would have been able to lend credibility to Appellant's testimony that she heard Mr. Wynn fire a shot and needed to fire back because she was in reasonable fear for her life." Because the video lacked audio, the jury watching it did not hear that shot and only saw Mosby shooting as if the aggressor. "Had an expert testified for the defense, there is a reasonable probability Appellant's story of the events in question would have been deemed credible by the jury," the attorney argues. Mosby is entitled to a new trial.

The State argues the evidence was sufficient to find Mosby guilty beyond a reasonable doubt of all the crimes with which she was charged. In denying her motion for new trial, the trial judge further found that questions of witnesses' credibility, conflicts in the evidence, and whether the circumstances of the confrontation were sufficient to cause a reasonable person to justify the use of deadly force were all questions for the jury to decide. The trial judge correctly found that the jury was free to accept or reject Mosby's account of what happened and her claim that she acted in self-defense. Clearly the jury did not accept her account. "Mosby is a felon who lied to the police," the District Attorney argues in briefs. Her statement at the hospital that she did not even own a gun "was demonstrably false, as seen in the security video." Furthermore, "a witness may be impeached by proof of a prior felony conviction." According to Mosby's attorney, she has prior felony charges for marijuana possession. Also, contrary to Mosby's

contentions, the physical evidence does not support any claim of justification. “The fact that there could be muzzle imprint from a self-inflicted wound to Wynn’s *left* thigh changes nothing, since the cause of death was the shot to the *right* thigh, striking the femoral artery.” And whether the number of shots fired by Mosby (five compared to Wynn’s 15) “showed restraint or calculation was an inference for the jury to draw.” Likewise, the “security video of the parking lot is scarcely of cinematic quality and the weight to be given that evidence also was a jury question,” the State argues. But it does appear that Mosby pushed her former lover before the shooting began. “As the aggressor, Ms. Mosby was not entitled to a finding of justification,” the State argues. Finally, “the trial court’s ultimate conclusion that Ms. Mosby failed to overcome the strong presumption of effective assistance is not clearly erroneous and should be affirmed.”

Attorney for Appellant (Mosby): Jessica Seares

Attorneys for Appellee (State): Paul Howard, Jr., District Attorney, Paige Whitaker, Dep. D.A., Marc Mallon, Sr. Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Jason Rea, Asst. A.G.

2:00 P.M. Session

JONES V. THE STATE (S16A1742)

In this **Glynn County** child murder case, a man is appealing his conviction for killing his girlfriend’s 17-month-old daughter by repeatedly slamming her head against the floor.

FACTS: In October 2008, Kimberly Hester and her baby girl, 17-month-old Brianna Hester, moved into the apartment of Kimberly’s boyfriend, Daryl Keon Jones, in Brunswick, GA. Also living there were Jones’ three children from a previous relationship, including his son, 8-year-old Alijha. On April 30, 2009, Kim’s father, Glenn Hester, went to Jones’ apartment to visit his granddaughter and stayed about three hours. He later testified Brianna seemed fine, although he did notice bruising above the baby’s right eyebrow and on the top of her head. He had been concerned for a while about the bruises, and even had sent an email to his daughter and Jones the week before. Before Hester left that afternoon, Jones’ older children arrived home from school. Sometime after Hester left, Kim Hester left to attend an evening class at a school in Jacksonville, FL, leaving Jones alone in the apartment with Brianna and his three children. The older children were playing outdoors. Jones’ son, Alijha, later testified that when he came back inside, he saw his father hit Brianna’s head on the ground in the living room five or six times. He testified that he had seen his father choke the baby and hit her head on the floor before, but he had not told anyone because he was scared. Alijha said he went to his room but came back when he heard a “big boom.” He saw that Brianna had fallen down in the living room, at which point he said he (or his father) called 911.

Brianna was transported by ambulance from the hospital in Brunswick to Memorial Hospital in Savannah where she was admitted by a pediatric intensivist, Dr. Mary Carol Lytle. When Brianna arrived at the hospital, she was still breathing but was “nearly brain dead,” according to Dr. Lytle. The physician later testified that a CT scan of the baby’s head showed massive cerebral swelling and bleeding and that the baby “would have had to take multiple, repetitive beatings to the head” to cause the injuries she observed in her brain. She said the bleeding was the type she had seen in cases involving abuse or “very, very high speed car

accidents where a child has been ejected and rolled.” Dr. Lytle also observed bruises around Brianna’s ears, face, and scalp, as well as retinal bleeding, usually caused by repetitive back-and-forth force. While Jones said Brianna had accidentally fallen and been injured, and Kimberly Hester said the baby had a history of falling, Dr. Lytle testified that Brianna’s injuries were not consistent with those sustained in a normal fall or household accident. Rather, she testified they were consistent with her head being slammed repeatedly into a flat surface. After life-saving measures were discontinued with the mother’s agreement, within a few moments, Brianna died. The Georgia Bureau of Investigation forensic pathologist who performed the autopsy testified he found 58 external injuries, primarily bruises – 36 of which were on the child’s face and head. Most were recent but some were in the stage of healing. An internal examination revealed that the right side of the baby’s brain was flattened, and the corpus callosum, which connects the two hemispheres of the brain, was completely severed. There was also hemorrhaging along the baby’s optic nerves and retina. He too concluded that Brianna’s collective injuries were caused by trauma and could not have been caused by an underlying medical condition. He listed the cause of death as multiple blunt force injuries.

Jones testified at trial and denied killing Brianna, claiming that he would have been physically unable to hurt her because he was weak from having had dialysis that morning. He also suggested that his wife from whom he was getting a divorce had told Alijha to say that Jones killed Brianna, and he implied that Alijha was responsible for the baby’s death. His attorney hired a medical expert who reviewed the results of Brianna’s autopsy and testified her injuries were caused by cerebral venous sinus thrombosis (CVST), a rare medical condition that affects six in 1 million children a year.

Jones was indicted by a grand jury for three felonies: malice murder, felony murder while committing cruelty to children, and cruelty to children. Each charge in the indictment stated Jones committed it “by inflicting multiple blunt force injuries to her head and face.” At a December 2010 trial, the jury acquitted Jones of malice murder but could not reach a verdict on the other two charges, and the judge declared a mistrial. In February 2012, Jones filed a “plea in bar” to prevent the State from retrying him on the felony murder and child cruelty counts, arguing that would constitute double jeopardy. The judge denied his plea. In August 2012, Jones was retried by another jury and found guilty of felony murder and cruelty to children. He was sentenced to life in prison. Jones then filed a motion requesting a new trial, which the judge denied, and Jones now appeals to the Georgia Supreme Court.

ARGUMENTS: Jones’ attorney argues the trial judge erred by denying Jones’ plea in bar and his motion for new trial. “Double jeopardy and due process under the U.S. and Georgia constitutions prevent the retrial of this case,” the attorney argued in the motion. Under the doctrine of “collateral estoppel,” “when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit,” the attorney argues in briefs. Jones argues that the jury’s acquittal of the malice murder count in his first trial bars his retrial on the remaining two counts of the indictment because the jury decided the ultimate issue in his favor, i.e. he did not cause the injuries that led to Brianna’s death. “The trial court officially received the verdict of not guilty of ‘inflicting multiple blunt force injuries to the head and face of Brianna Hester,’ making the verdict valid and final,” Jones’ attorney argues. “The ultimate issue was determined on Dec. 16, 2010 and cannot be constitutionally re-litigated.”

The District Attorney and Attorney General's office, representing the State, argue the trial court properly denied Jones' plea in bar and his motion for new trial. Malice murder requires an express or implied intent to kill. Felony murder requires only that a defendant, while in the commission of a felony, caused the death of another human being "irrespective of malice." They are two different crimes. "A defendant need not act with an intent to kill at the time that he or she took the actions that led to the victim's death," the State argues. "The defendant need only commit the underlying felony, here cruelty to children, that is integral to, and leads to, the victim's death." A jury is "clearly authorized to find a defendant guilty of felony murder even where it finds that a defendant did not possess the requisite malice to sustain a malice murder conviction," the State argues. Double jeopardy does not prohibit a prosecution for felony murder where a jury has acquitted a defendant for the malice murder of the same victim. In this case, there was "sufficient evidence to support Jones' conviction for both felony murder and child cruelty," the State contends, urging the Supreme Court to affirm the lower court's ruling.

Attorney for Appellant (Jones): James Yancey, Jr.

Attorneys for Appellee (State): Jackie Johnson, District Attorney, Andrew Ekonomou, Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Aimee Sobhani, Asst. A.G.

JOHNSON V. THE STATE (S16A1649)

A man convicted in **Mitchell County** of murdering his friend while both were drunk is appealing his conviction and life prison sentence.

FACTS: On June 22, 2013, Gregory Johnson and Hugh Ethridge spent the day drinking in Johnson's trailer in Baconton, GA. According to Johnson's wife, from whom Johnson was separated, the two men had been friends for 15 years, often drank together, and frequently fought when they did. Around 5:30 p.m., Johnson's brother-in-law, Kenneth Walls, who lived with Johnson, came home from work and found Johnson sitting on the recliner "squalling like a baby" and "babbling." Sitting on the loveseat with his arm on the armrest and his ankles crossed was Ethridge. He was dead. Johnson told Walls he had shot Ethridge in a struggle. On the floor between the two men were a single shot .410 shotgun and an empty bottle of liquor. Walls called 911, and Mitchell County Sheriff's Deputy Jeff Coalson arrived first on the scene. Coalson noticed Johnson's speech was badly slurred and he kept saying the gun was not his and he was sorry. Johnson told Coalson he had shot the victim and he also told Special Agent Michael Walsingham of the Georgia Bureau of Investigation that "he was crying because he had just shot his friend." But a short while later, Johnson, who was still visibly intoxicated, told Investigator Kevin Sellers that he did not shoot Ethridge. "He said that Hugh Ethridge went to his house, got his gun, came back, loaded it, and threatened to kill him," Sellers testified. "He said that Hugh shot himself and after he shot himself, Greg was supposed to shoot himself." Sellers testified that he moved the shotgun and the liquor bottle, although he said he took pictures of them before moving them. Under cross examination, Sellers testified that he had not worn gloves when he moved the shotgun or when he removed the shell from the shotgun. When Sellers went to the home of Ethridge's mother to make the official death notification, Sellers said Ethridge's mother discovered that her shotgun was missing and that the bullet box had been opened. Sellers testified that the victim's mother was never shown the shotgun found at Johnson's trailer to see if it was her gun, and that they were not sure who owned the gun, according to briefs filed by the

District Attorney. Sellers concluded that two shots had been fired – one into Ethridge’s neck and another that made a hole above the window behind the victim. Both shells recovered from the scene appeared to have been fired from a single shot .410 shotgun. The next day, when Sellers and Walsingham interviewed Johnson after he had sobered up some, Johnson said he and Ethridge had been drinking at his home, that Ethridge had left and returned with a gun, put a shell in the gun and said he was going to kill Johnson, after which they tussled over the gun. While Sellers believed the hole over the window was from a gunshot, Johnson told him he thought the hole in the window was from Ethridge throwing something through it. Johnson did not remember if Ethridge pulled the trigger or if he had accidentally pulled it. The medical examiner concluded that the cause of death was a contact shotgun wound which entered the front base of the victim’s neck. At the time of death, Ethridge had a blood alcohol level of .259 – more than three times over the legal limit.

In January 2014, a jury found Johnson guilty of felony murder and aggravated assault and he was sentenced to life in prison. Johnson now appeals to the state Supreme Court.

ARGUMENTS: Johnson’s attorney argues the trial court erred by denying their motion asking the judge to grant a directed verdict of acquittal because the evidence did not authorize a finding beyond a reasonable doubt that Johnson killed Ethridge. The prosecutor began his opening statement by telling the jury: “But what actually happened that day, I don’t know that we’ll ever know exactly what it is...And what you’ll see is the Defendant’s statement doesn’t match up with the physical evidence.” “The State therefore began this case by admitting that it could not prove Johnson’s guilt,” the attorney argues in briefs. “It thereby imposed upon Johnson the burden of proving his innocence.” But it is the burden of the State to prove guilty beyond a reasonable doubt. “If the prosecutor does not know enough to say that the defendant is guilty, can a jury legally find beyond a reasonable doubt that the defendant is guilty?” The trial court also erred in not declaring a mistrial when the prosecutor told the jury in his opening statement to compare the physical evidence with the defendant’s “testimony.” “The defendant did not testify,” as was his constitutional right. Similarly, it was error not to declare a mistrial when Special Agent Walsingham admitted on the stand that after the investigation he did not know what happened, but added, “Mr. Johnson knows.” By saying this, “Walsingham stripped Johnson of his right to remain silent and imposed upon Johnson the obligation to testify, in violation of the Fifth and Fourteenth Amendments of the United Constitution,” and of the Georgia Constitution, Johnson’s attorney argues. “It shifted the burden of proof from the State to the defendant.” Also, Johnson had “ineffective assistance of counsel,” in violation of his constitutional right, because his trial attorney failed to make a motion for mistrial “in response to the burden shifting statements of the district attorney and to the improper burden shifting remarks of Walsingham,” the attorney contends. “The conviction should be vacated and the defendant released, or, in the alternative, a new trial granted.”

The District Attorney and Attorney General, representing the State, argue the evidence authorized the jury to find Johnson guilty beyond a reasonable doubt. Johnson confessed to his brother-in-law, Walls, crying and saying he had shot Ethridge in a struggle. He told Deputy Coalson he was sorry and that he had shot the victim. Then he told Investigator Sellers that the victim had gotten the gun and shot himself. But the next day, he told Walsingham that when Ethridge had loaded the gun, Johnson had tried to wrestle the gun away, but the gun had fired and Ethridge “fell into a seated position on the loveseat where he was found.” Yet he said he was

crying because “he had just shot his friend.” He kept changing his story, and “forensic evidence clearly negated Appellant’s [i.e. Johnson’s] theories of self-defense, accident or suicide because Sellers testified” and showed a photo of Johnson sitting on the loveseat with his arm on the armrest and his feet crossed. “Based on different accounts of events rendered by Appellant as to the cause of the victim’s death, and forensic evidence which negated Appellant’s accounts of event, it is clear that there was conflict in evidence, and the trial court was authorized to so conclude, and therefore, properly denied appellant’s motion for directed verdict,” the State contends. Furthermore, neither the prosecutor’s opening statement nor Walsingham’s statement warranted a mistrial. “The State contends that prosecution counsel’s statement neither impugned Appellant’s right to presumption of innocence nor shifted the burden of proof to Appellant. Once again, Appellant attempts to slice and dice the State’s opening statement without giving due regard to the context in which it was made.” As to Walsingham’s statement, the “rule of law that prevent comments being made about Appellant’s decision not to testify applies to comments made by prosecutors, not witnesses,” the State argues. Finally, Johnson’s trial attorney rendered effective assistance and “the trial court did not abuse its discretion in denying Appellant’s motion for new trial,” the State contends.

Attorney for Appellant (Johnson): J. Converse Bright

Attorneys for Appellee (State): Joseph Mulholland, District Attorney, Moruf Oseni, Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Vanessa Meyerhoefer, Asst. A.G.

KILGORE V. THE STATE (S16A1430)

A man convicted a second time of murder is appealing a **Fulton County** judge’s refusal to grant him a third trial. This is the second time he has appealed to the Georgia Supreme Court.

FACTS: In May 2006, Jonathan Kilgore and James Ward were convicted by a jury of murder, burglary and aggravated assault for the 2003 shooting death of John Reid and the assault of Jarvis Winder during a drug robbery shootout. A third co-indictee, Devoka Finch – Kilgore’s older brother –pleaded guilty to a less serious charge in exchange for his testimony against Kilgore and Ward. According to the evidence at trial, Reid was killed as a result of a botched armed robbery at his home. The plan to rob Reid was concocted by Finch, who owed more than \$1,000 in traffic fines. Finch asked his younger brother, 16-year-old Kilgore, if he knew where he could get some drugs, and Kilgore told him about Reid, a known drug dealer. Finch then called Ward and told him that he “had a lick” – street lingo for a robbery target. Ward met the brothers at their mother’s apartment, and the three went to Reid’s home on Graymont Drive in southwest Atlanta where Reid and his friend, Winder, were playing video games. Finch wore a bullet proof vest and brought handcuffs, gloves and a mask. Kilgore knocked on the back door and Reid let him in, while Ward and Finch concealed themselves outside. After Kilgore went inside, Reid walked to a back bedroom while Kilgore waited in the kitchen. When Reid came back to the kitchen, gunfire erupted. Winder and Reid ran to the back room where Reid collapsed and died from a gunshot wound to the back. Winder grabbed a shotgun, peered around the corner and saw Kilgore and Ward. Kilgore spotted him and shot at Winder, who returned fire, apparently wounding Ward. Winder then escaped from the house and ran to a neighbor’s, and police were called. Ward and Kilgore fled by car, but Finch remained in the area and was arrested near the crime scene by law enforcement officers who responded to the 911 call.

In March 2004, Finch, Kilgore and Ward were jointly indicted for malice murder, aggravated assault, and other crimes. In a plea bargain, Finch pleaded guilty to the reduced charge of voluntary manslaughter and was sentenced to 20 years in prison. In exchange, he testified against his younger brother and Ward, stating that the three had driven to Reid's house intending to rob Reid of money and drugs. He said Ward and Kilgore were both armed with handguns, and Ward fired the first shot. At a joint jury trial, Ward and Kilgore were convicted and Kilgore was sentenced to life in prison, with Ward getting life plus 25 years.

On appeal, while the Georgia Supreme Court found that the evidence was sufficient to convict Kilgore and Ward beyond a reasonable doubt, the trial judge erred by unilaterally excusing a juror during the lunch break without Kilgore and his attorneys present. Because Kilgore and Ward were denied their constitutional right to be present at all critical stages of their trial, the Supreme Court reversed their convictions and ordered a new trial. The State retried the case, and Kilgore was again convicted by a jury and sentenced to life plus 30 years in prison; Ward was acquitted of all charges. The trial court denied Kilgore's motion for a new trial, and he again appeals to the state Supreme Court.

ARGUMENTS: Kilgore's attorney argues Kilgore is entitled to a new trial because during closing arguments, the State prosecutor made an improper comment on Kilgore's right to remain silent. "The State is not permitted to ask the jury to draw an inference from a defendant's failure to say something," the attorney argues in briefs. Specifically, the prosecutor said the defendants wanted jurors to believe they didn't know a robbery was planned, that they were "just there, we didn't know what was going on." Then the prosecutor said, "Because see, otherwise, they would be able to say something else. But you know they're there." In stating this, "the prosecutor's manifest intention was to argue that Kilgore's silence is proof of his guilt," the attorney argues. "The prosecutor's improper comment was prejudicial because the evidence was not overwhelming and the witnesses' credibility was very much at issue, thus the improper comment was enough to affect the outcome of the trial." As a result of this comment, the State improperly shifted the burden of proof from the State to Kilgore, and the trial judge failed to correct the error, the attorney contends. "By arguing that Kilgore would have been able to 'say something else,' the State is putting the burden on the defense to prove an alternative explanation for Kilgore's presence at the robbery – but it is the State's burden to disprove all alternative explanations and to prove each element of the offenses charged," Kilgore's attorney argues. "The trial court has a responsibility to correct an error like this, but here the court did not." Finally, Kilgore's trial attorney rendered "ineffective assistance of counsel" for failing to object to the prosecutor's comment, in violation of Kilgore's constitutional rights.

The State, represented by the District Attorney's office and the Attorney General's office, argues that the prosecutor did not comment on Kilgore's choice to not testify and that Kilgore has taken the comment out of context. The prosecutor's statement "demonstrates clearly that the prosecution was referring not to Appellant's [i.e. Kilgore's] choice to not testify, but to the defense counsel and their argument against the State's case." The prosecutor was responding to the defense attorneys' attempt in their closing arguments to impugn the credibility of co-indictees Finch and Winder, and the prosecutor was criticizing Kilgore's attorneys' assertion that Kilgore had been unaware of the plot to rob Reid, and had only gone to Reid's home to buy marijuana. Because the prosecutor did not improperly comment on Kilgore's right to remain silent but was simply responding to arguments both defense attorneys made in their closing, the

State did not improperly shift the burden of proof to Kilgore, and there was no need for the judge to intervene. Finally, Kilgore has failed to show that his trial attorney's performance was deficient and has further failed to show that he was prejudiced by any alleged deficiency, the State contends.

Attorney for Appellant (Kilgore): Ryan Locke

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