



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**

Please note: *These summaries are prepared by the Office of Public Information to help news reporters determine if they want to cover the arguments and to inform the public of upcoming cases. The summaries are not part of the case record and are not considered by the Court at any point during its deliberations. For additional information, we encourage you to review the case file available in the Supreme Court Clerk's Office (404-656-3470), or to contact the attorneys involved in the case. Most cases are decided within six months of oral argument.*

Monday, December 5, 2016

10:00 A.M. Session

GOLDSTEIN, GARBER & SALAMA, LLC V. J.B. (S16G0744)

An Atlanta-area dental practice is appealing a \$3.7 million verdict against it in a lawsuit brought by a young woman in **Fulton County** after she was sexually assaulted by a male nurse anesthetist while she was sedated.

FACTS: On Sept. 16, 2009, 18-year-old J.B. underwent a dental procedure at the offices of Goldstein, Garber & Salama, a dental clinic. In one phase of the procedure, Dr. Maurice Salama surgically installed a post for a tooth implant. Paul Serdula, a Certified Registered Nurse Anesthetist, administered anesthesia to J.B. In a subsequent phase, Dr. David Garber placed a temporary dental prosthetic device in place of the future implant. Between the conclusion of Salama's surgical procedure and the beginning of Garber's cosmetic procedure, J.B. remained in a heavily sedated state for about two hours. At some point, she was left alone with Serdula, who made three brief video recordings of her with his cell phone: one in which he looked down her shirt at her breasts, another in which he moved her underwear to reveal her vagina, and a third in which he placed his penis between her lips. The videos of J.B. were later discovered when Serdula's cell phone was found hidden under a bathroom sink where it had been recording employees using the restroom. Examination of the phone also revealed videotapes of Serdula sexually molesting other anesthetized female patients, including a 15-year-old girl. Serdula

eventually pleaded guilty to numerous charges, including aggravated sodomy and aggravated child molestation, and he was sentenced to life in prison.

J. B. sued the dental clinic, claiming among other things that Goldstein, Garber & Salama was liable for negligence and the infliction of emotional distress. The case proceeded to trial, where the plaintiff's expert witnesses presented evidence that the dental practice had violated statutory requirements for dentists supervising certified registered nurse anesthetists and had violated standards of care for monitoring patients under anesthesia. The trial court denied the dental clinic's motion asking the judge to direct a verdict in its favor on J.B.'s claims of medical malpractice and negligence, and the jury awarded \$3.7 million to J.B. The jury apportioned 100 percent of the liability to the dental clinic and none to Serdula. (While J. B. had initially sued Serdula, she dismissed him from the suit after he pleaded guilty and was sentenced to prison.) The dental clinic appealed, but in a split 4-to-3 vote, the Georgia Court of Appeals upheld the trial court's ruling. The clinic now appeals to the Georgia Supreme Court.

ARGUMENTS: Attorneys for Goldstein, Garber & Salama argue the state Supreme Court should reverse the lower courts' judgments and rule in favor of the dental clinic, or order a new trial on liability and damages. There is no dispute that J.B. is a blameless victim who was sexually assaulted by Serdula while under anesthesia. "But Serdula is in prison, serving a life sentence for his crimes against Plaintiff [i.e. J.B.] and other women whom he assaulted under similar circumstances in other medical facilities," the attorneys argue in briefs. "Faced with a judgment-proof defendant, Plaintiff's counsel sought to assign blame elsewhere and filed suit against Goldstein, Garber & Salama." But the ruling upheld by the Court of Appeals is "some decidedly bad law." "Though it was undisputed at trial that [the dental clinic] had no reason to suspect that Serdula posed a threat to patients, a bare majority of the Court of Appeals nevertheless affirmed the jury's verdict finding [the clinic] at fault for Plaintiff's injuries, effectively imposing strict liability on it for the unforeseeable criminal conduct of a third party," the clinic's attorneys argue. "What's more, it affirmed the jury's appointment of *zero percent* fault to Serdula for the harm he directly and intentionally caused..." If this decision is allowed to stand, it would make Georgia "an extreme outlier" among other states considering similar issues. The attorneys say they are "unaware of any other decision permitting medical practitioners to be held strictly liable for the unforeseeable criminal conduct of a third party." "And no other state that permits apportionment of fault between negligent and intentional tortfeasors [i.e. wrongdoers] has sanctioned a verdict apportioning *no fault* to an undisputed intentional tortfeasor," who in this case would be Serdula. "First, a defendant cannot be liable for injuries caused by a third party's criminal conduct unless the third party's action were reasonably foreseeable," the attorneys argue. In Georgia, it is "black-letter law" that negligence is not actionable unless it is the "proximate cause" of the plaintiff's injury. "Proximate cause" is a cause that directly produces an event and without which the event would not have occurred. In other cases like this, involving injuries caused by the intervening criminal conduct of a supervised employee, the Georgia Supreme Court has ruled that an employer may only be held liable where "it is reasonably foreseeable from the employee's 'tendencies' or propensities that the employee could cause the type of harm sustained by the plaintiff." "Here there is literally *no* evidence that Goldstein, Garber & Salama should have known that Serdula had any propensity to harm its patients." He came with excellent references from other healthcare providers, had no criminal history, and had no record of complaints from prior jobs. Even J.B.'s experts agreed that

“Serdula had not done anything prior to being discovered that would have put anybody on notice that he might sexually molest a patient,” the attorneys argue, quoting one of the experts. As one of the appellate court’s dissenters observed, the evidence the majority of that court relied on was “founded upon a vague and generalized concept of violence that only suggests the mere *possibility* of improper conduct if a patient is left alone while under anesthesia, not the *probability* of improper conduct” that is required. The Court of Appeals also erred in holding the dental clinic liable for negligence because the state’s statute that regulates the administration of anesthesia was not intended to guard against sexual assault. The statute allows a dental clinic to use a certified registered nurse anesthetist such as Serdula, “provided that such sedation is administered under the direction and responsibility of a dentist duly permitted under this Code section...” While the dental clinic did not have the requisite permit to use a nurse anesthetist, that “technical breach” cannot support negligence because this particular statute was intended to protect patients from the medical risks of anesthesia, not from sexual assaults. Finally, the Court of Appeals erred by affirming a verdict that apportioned zero percent fault to Serdula, the intentional wrongdoer, the clinic’s attorneys argue. “Georgia’s apportionment statute requires the jury to consider the fault of *all* persons who contribute to a plaintiff’s injury or damages, including nonparty criminal actors.” The Court of Appeals incorrectly concluded that Goldstein, Garber & Salama had waived its right to challenge the jury’s apportionment of fault on appeal. “This was error,” the attorneys argue. The appellate court was wrong to characterize the clinic’s challenge as a challenge to the verdict’s form and not to its substance. “The problem is not with the form of the verdict, or the judge’s instructions, but with the verdict itself – namely that there was no evidence to support it,” the clinic’s attorneys contend.

J.B.’s attorneys argue that the analysis by the clinic’s attorneys “ignores many of the key facts heard by the jury” and “conveniently fails to acknowledge that this is a medical malpractice case,” J.B.’s attorneys argue in briefs. “The jury heard evidence that Goldstein, Garber & Salama violated the Georgia Dental Practice Act, breached the applicable medical standard of care, and contravened its own policies by (1) having a certified registered nurse anesthetist administer anesthesia to its patients when in fact [the clinic’s] dentists themselves could not lawfully administer or supervise the administration of anesthesia; (2) permitting J.B. to remain under anesthesia for two hours after the surgical portion of her procedure concluded; and (3) leaving her unsupervised in the surgical room during this two-hour period while improperly anesthetized.” “Indeed, the evidence at trial showed that it was [the clinic’s] multiple acts of medical negligence that created the very opportunity for J.B.’s sexual assault. Had the clinic adhered to Georgia law, the standard of care, and its own policies, none of this would have happened.” While the clinic refused to accept any responsibility for J.B.’s injuries, the jury recognized its culpability and apportioned 100 percent of the fault to it. The jury’s verdict is fully consistent with the evidence and easily satisfies the “any evidence” standard of review, which states that “if there is any evidence to support the jury’s verdict and the court’s judgment, the judgment will not be disturbed on appeal.” Under the Georgia Dental Practice Act, a nurse anesthetist may not administer anesthesia unless the supervising dentist has a proper permit. According to the testimony of experts, the clinic breached the standard of care by allowing Serdula to administer anesthesia to J.B. in the absence of a supervising dentist who had proper permitting or sufficient training, by allowing J.B. to continue to be sedated after the surgical portion of her procedure ended, and by allowing J.B. to be left alone with Serdula. One expert

also testified the clinic violated the standard of care by not having at least two people present with J.B. at all times. Evidence showed that a reasonable jury could find that Serdula's sexual assault of J.B. was an act that was foreseeable by the clinic. "In the medical malpractice context, it is not required that a patient prove that a *particular* harm is foreseeable and probable," the attorneys argue. "Instead, it is enough to show that a doctor had a reasonable apprehension that *some* harm could occur." The statute that regulates the administration of anesthesia "serves to protect anesthetized patients from unreasonable risks, including sexual assault," J.B.'s lawyers argue. Finally, the Court of Appeals correctly affirmed the jury's apportionment of 100 percent fault to Goldstein, Garber & Salama. First, the dental clinic waived its right to having a review of the allocation of fault by the appellate court for failing to file a motion for new trial while the case was still in the trial court. The practical effect of the jury's allocation of 100 percent fault to the clinic "is to make J.B. whole and to incentivize Goldstein, Garber & Salama to take proper measures to prevent such harm in the future," J.B.'s attorneys argue. "The jury knew Serdula was incarcerated and penniless, knew he had been held criminally responsible for his actions, and knew that 'it was not in their power to add to his punishment.'"

Attorneys for Appellant (Goldstein, Garber & Salama): H. Lane Young, Matthew Barr, Jonathan Freiman, Tadhg Dooley

Attorneys for Appellee (J.B.): William Bird, Paul Hotchkiss, Michael Regas, II, Jenifer Jordan

SEXUAL OFFENDER REGISTRATION REVIEW BOARD V. BERZETT (S17A0082)

The state Attorney General's office is appealing a **Fulton County** judge's ruling that the statute requiring "sexually dangerous predators" to wear electronic ankle monitors is unconstitutional.

FACTS: Kenneth Berzett is a convicted child molester. Under Georgia Code § 42-1-14, the state's Sexual Offender Registration Review Board determines how likely it is that a sexual offender will engage in another sexual crime against a minor, then assigns to the offender the classification of Level I risk, Level II risk or "sexually dangerous predator." The Board determined Berzett was at high risk of committing another sexual offense against a minor and classified him as a sexually dangerous predator. Under subsection (e) of the statute, "Any sexually dangerous predator shall be required to wear an electronic monitoring system" that has the capacity to locate the predator and record his location through a link to a global positioning satellite system, record the predator's presence near a crime scene or prohibited area, and set off an automatic alarm if the system is removed or tampered with. Berzett today is director of Mighty Man Ministries, a job his lawyers say requires him to travel around the state and to South Carolina helping farmers. His sex offender obligations, including his monitoring, are handled by the Washington County Sheriff's Department. Berzett sued the Sexual Offender Registration Review Board in two separate actions. First, he filed a petition for judicial review of his classification as a sexually dangerous predator, and in the second, he filed a petition for "declaratory relief," seeking an order from the court declaring that § 42-1-14 – and in particular its ankle monitor provisions – is unconstitutional. The Board filed a motion asking the court to dismiss Berzett's petition for a declaration about the statute's constitutionality. In April 2015, following a hearing, the trial court upheld the Board's classification as a sexually dangerous predator. Berzett did not appeal that ruling. But the trial court denied the State's motion to dismiss his petition for declaratory relief, allowing the case to go forward. The court ruled that

the lawsuit was not barred by sovereign immunity, which protects state agencies from being sued, and was not moot as a result of the upholding of Berzett's classification. Ultimately the trial court ruled that § 42-1-14 violates the double jeopardy clauses of the U.S. and Georgia constitutions because it is "punitive;" violates Berzett's constitutional right to due process because it lacks a provision for continuing review; violates his protection from an "unconstitutional taking" of property by requiring Berzett to pay for his ankle monitor; and violates his Fourth Amendment rights by presenting an unreasonable search. The trial court then issued a "writ of prohibition" against the Sexual Offender Registration Review Board, prohibiting it from requiring Berzett to wear and pay for the tracking device, and from otherwise enforcing any provisions of § 42-1-14 (e) against Berzett. The Board now appeals to the Georgia Supreme Court.

ARGUMENTS: Representing the state's Sexual Offender Registration Review Board, the Attorney General's Office first argues that the trial court lacked the authority to rule on Berzett's petition for declaratory relief because no actual controversy existed between the Board and Berzett. "When the trial court upheld Berzett's risk classification as a Sexually Dangerous Predator..., the only aspect of § 42-1-14 that the Board has authority over, there ceased to be any actual live controversy between the Board and Berzett for which declaratory relief could be provided," the State's lawyers argue in briefs. The electronic monitoring of Berzett does not involve the Board, but rather is done by the Washington County Sheriff's Office. The Board "cannot control whether or not the monitor is on Berzett's ankle or whether or how he is monitored," the State argues. "At this point, the trial court lost jurisdiction to hear the matter." The trial court's order is invalid because it used an improper vehicle – a writ of prohibition – to order the Board to do things over which it has no authority. "The only thing that the Board has authority over is the determination of one's risk level and rendering a classification level; the monitoring is left to other state and county agencies." Furthermore, sovereign immunity bars Berzett's lawsuit because the Georgia Constitution provides that "the State of Georgia and its agencies are immune from suit except as specifically waived by the Constitution or by an act of the General Assembly providing that sovereign immunity has been waived." Here there has been neither. Finally, the trial court erred in finding that § 42-1-14 is unconstitutional, the State contends. The electronic monitoring of certain high risk sex offenders is a *civil* as opposed to *criminal* mechanism and therefore does not violate the double jeopardy clause of the federal and state constitutions which only concerns criminal rights and punishments. "When legislative intent is clearly expressed, the only way to override this intent is to show by the clearest of proof that the statute is so punitive in effect that it negates the state's intention to deem it civil," the State argues. A number of courts around the country have found that lifetime electronic monitoring statutes like Georgia's are not punitive. "These are minor inconveniences, many similar to those faced by all cell phone owners, but hardly akin to probation," the State contends. Also, the electronic monitoring scheme of § 42-1-14 is a reasonable search and therefore does not violate the Fourth Amendment "in light of the limited nature of the intrusion and the State's interests in preventing recidivism of sex offenders." Requiring Berzett, "a sex offender classified as having the highest risk to reoffend, to wear an electronic monitoring device is reasonable," the State argues. Finally, the statute does not amount to an unconstitutional taking for requiring the offender to pay for the device, and it does not violate due process. The trial court erred in ruling that the statute does not provide for continuing review. Sexually dangerous predators are

permitted to request another reevaluation of their classification after 10 years from their previous classification.

Bertzett's petition was not moot and sovereign immunity does not bar his lawsuit, his attorneys argue. Therefore, the trial court was correct to deny the State's motion to dismiss his lawsuit. The trial court also correctly ruled that 42-1-14 is unconstitutional. First it is a punitive statute that was applied retroactively to him in violation of the "ex post facto" provisions of the federal and state constitutions. Contrary to the Board's claim that the statute does not impose *any* restraints on offenders, the Georgia Supreme Court disagreed in its March 2016 ruling in *Gregory v. Sexual Offender Registration Review Board*. In *Gregory*, this Court ruled that the electronic tracking requirement is "quite clearly, we think, a serious restraint on his liberty." The Board "cannot credibly argue that Bertzett does not have 'numerous restrictions on what he can and cannot do' as a predator, nor can it claim that his obligations are not at least as onerous as those placed on a probationer," Bertzett's attorneys argue in briefs. Bertzett "is monitored and controlled in virtually the same fashion as if he were on probation or parole." Also, the Board has "failed to establish *any* connection between monitoring/increased reporting and a decline in crimes by recidivist sex offenders," Bertzett's attorneys argue. Because the requirements of § 42-1-14 constitute punishment as a result of Bertzett's prior conviction, the statute also violates his constitutional right against double jeopardy. And it violates his right to due process because it fails to provide continuing review. It is also an unconstitutional taking of his property by requiring him to pay for the monitoring out of his own pocket. Finally, the statute authorizes an unreasonable search in violation of his Fourth Amendment protections. "Even assuming there were a 'special need' for the State to track Bertzett's every movement, a warrant would still be required," Bertzett's attorneys contend. Finally, the Georgia Supreme Court should uphold the trial court's ruling that the statute violates Bertzett's right to privacy.

Attorneys for Appellant (State): Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Joseph Drolet, Sr. Asst. A.G., Rebecca Dobras, Asst. A.G.

Attorneys for Appellee (Bertzett): Mark Yurachek, Thomas Rawlings

ABRAMYAN ET AL. V. STATE OF GEORGIA ET AL. (S17A0004)

Atlanta taxicab drivers are appealing a **Fulton County** court's dismissal of their lawsuit against the State government in which they claim that their rights to operate vehicles for hire in the City of Atlanta are exclusive and do not include ride-share companies such as Uber and Lyft.

FACTS: The case stems from House Bill 225, which the Georgia Legislature passed in 2015, stating that the purpose was "to provide uniform administration and parity among ride-share network services, transportation referral services, and transportation referral service providers, including taxi services that operate in this state for the safety and protection of the public." The new legislation provided for the regulation of all transportation for hire and included the regulation of cabs and ride-share networks, such as Uber and Lyft. At issue in this case are the medallions Atlanta taxicab drivers must purchase from the City of Atlanta to operate "vehicles for hire" within the city limits. Under local ordinances, the City has capped the number of medallions at 1,600 and cab drivers must spend as much as \$6,000 to purchase one. Under another state law (Georgia Code § 36-60-25), owners of the medallions – known as Certificates

of Public Necessity and Convenience –may sell them, give them as gifts, or use them to acquire stock or even as collateral to secure a loan. The medallions allow the City to control the number of cabs in operation. But with House Bill 225, the cab drivers claimed that ride-share companies such as Uber and Lyft could operate as many vehicles as they wish. They argued the medallions gave them the exclusive right to operate “vehicles for hire” and that the new state law dilutes the value of their medallions. On July 1, 2015, Dmitriy Abramyan and four other cab drivers sued the State and the Georgia Department of Public Safety, claiming that the taxi medallions are a “protected property interest” and that the enactment of House Bill 225 constituted an unconstitutional “taking” of their property, requiring that the State compensate them for their loss. The State argued that the medallions are not property protected by the Georgia Constitution. The trial court ruled in the State’s favor and dismissed the drivers’ lawsuit, finding that no constitutional claim existed. The drivers now appeal to the Georgia Supreme Court.

FACTS: Attorneys for the taxi drivers argue that prior to the passage of House Bill 225, the City of Atlanta provided taxicabs with medallions the exclusive right to provide rides originating in the city limits. The statute “constitutes a taking of constitutionally protected property rights,” the attorneys argue, and results in damage to the value of the medallions. “The State of Georgia specially authorized municipalities or counties to issue Certificates of Public Necessity and Convenience for the operation of taxicabs or vehicles for hire with the enactment of Code of Georgia § 36-60-25,” the attorneys argue in briefs. “This law unequivocally established protected property rights for owners of [the medallions/certificates] including the right to transfer by purchase, gift, bequest, or acquisition of the stock or assets of a corporation.” The trial court therefore erred in ruling that House Bill 225, which damaged the value of the taxicab drivers’ property, did not constitute an “unconstitutional taking” of their property. “The Superior Court’s decision was influenced by out-of-state decisions which essentially found under different laws and facts that taxi medallion owners should not have trusted their own governments and should absorb any monetary loss caused by allowing new vehicles for hire such as Uber or Lyft to operate and literally make billions,” the attorneys argue. “Here, the State by statute, and the City by ordinance, created [medallions] with all property rights and for decades induced [taxi drivers] to invest tens of thousands of dollars in [the medallions] to exclusively operate vehicles for hire in Atlanta for the public good. The State should not be allowed to destroy their values without compensation.” The drivers’ “right to adequate compensation is protected by the Constitution of the State of Georgia,” the drivers’ attorneys argue. In its 1966 decision in *Bowers v. Fulton County*, the Georgia Supreme Court ruled that adequate compensation for taking property includes compensation for damage and expenses caused by the taking. “Plaintiffs’ exclusive right to operate ‘vehicles for hire’ within the City of Atlanta created value. Because House Bill 225 extinguished that exclusive right, Plaintiffs have been financially damaged.” Atlanta’s ordinances limit the maximum number of taxicabs to 1,600, which is based on the relationship between the number of taxicabs operating within a geographic area and the quality of services they provide. An excessive number of cabs results in a reduced level of service and more passenger complaints, the ordinances say. Atlanta’s medallion owners “had the exclusive constitutional property right to operate vehicles for hire (except for state licensed limousines and horse carriages) in the City of Atlanta and at the Atlanta Airport prior to July 1, 2015,” the drivers’ attorneys argue. “The new laws damaged that property right.” The State granted the City of Atlanta the power to enact ordinances related to the issuance of the

medallions, and the State knew that the ordinances granted the medallion owners “the exclusive right to originate fares within the corporate limits of the City of Atlanta.” Before House Bill 225 was passed, “taxicab medallion owners did, in fact, have an unalterable monopoly in the City of Atlanta ride share market. To allow the State of Georgia to damage the investment backed expectations of the medallion owners without compensation would be treating their personal property like a firearms, fishing or hunting license.” The court’s order is based on the unsupported assumption that the number of medallions issued by the City could be increased without negatively affecting their value. “There is no justifiable reason to require the [medallion/certificate] owners to shoulder the financial costs of allowing an unlimited number of ride shares like Uber or Lyft in the City of Atlanta,” the drivers’ attorneys contend.

The Attorney General’s Office argues on behalf of the State that the General Assembly has an interest in regulating businesses as an exercise of its police powers. “The regulation of ride-share networks may have had an indirect effect on [taxicab drivers], but the taxi industry is a highly regulated industry and [taxicab drivers] could not have had any reasonable expectation that regulatory changes affecting their business would not take place,” the State’s attorneys argue in briefs. “Many jurisdictions throughout the country have addressed the arguments that [taxicab drivers] have raised and without exception have found that taxi medallions are not a protected property interest; thus, the regulation of ride share networks cannot cause any ‘taking.’” The taxi drivers have provided no facts to support their contention that tax medallions are a protected property interest and that the enactment of House Bill 225 resulted in an unconstitutional “taking” of their property. Taxi drivers must still have a medallion to operate a taxi in the City of Atlanta “so the ownership of a taxi medallion still has value,” the State argues. “Further, the purpose of House Bill 225 was to regulate ride-share networks. Any effect on the value of taxi medallions is incidental to the new regulations and not the purpose of the regulations.” The drivers’ case “presents nothing more than a claim for alleged diminution in value related to a changing regulatory scheme,” the State argues. “The State is not the ‘insurer against all shrinkage of values that might result from the passage of laws intended for the public good’ and is not responsible for any diminution in value allegedly suffered by [the taxi drivers],” the State’s attorneys argue. Here, the drivers “have a license, not a protected property interest.” “Ride share networks are a recent phenomenon and are a consequence of advancing technology,” the State argues. In case after case, “other jurisdictions have rejected ‘takings’ claims like those raised here.” “Although House Bill 225 may have the effect of diminishing the value of medallions, there is simply no guarantee of a minimum value of medallions.” Finally, the trial court did not rely upon the unsupported assumption that the number of medallions could be increased without decreasing their value, the State contends.

Attorneys for Appellants (Abramyan): William Pannell, Keith Fryer

Attorneys for Appellees (State): Samuel Olens, Attorney General, W. Wright Banks, Jr., Dep. A.G., Robin Leigh, Sr. Asst. A.G., Brooke Heinz, Asst. A.G.

2:00 P.M. Session

THE STATE V. HARRIS (S17A0117)

The **Fulton County** District Attorney is appealing a court decision granting a new trial to a young man sentenced to life in prison for his role in the murder of a taxi driver when he was 17 years old. The trial court ruled that the young man's trial lawyer had been ineffective, in violation of his constitutional rights, for failing to try to get the teen's text messages suppressed as evidence because they were improperly obtained by a court order rather than by a search warrant.

FACTS: On April 22, 2009, Atlanta Police discovered the body of Stephen Anim, 57, slumped over in the driver's seat of his cab. He had been shot to death. The vehicle had apparently crashed into the gate of the Big Bethel Village retirement facility on Richard Allen Blvd. in Atlanta. The investigation led officers to Quantavious Harris, 17, and Samuel Ellis, 16. According to state prosecutors, Harris and Ellis got into Anim's cab at the Hamilton E. Holmes Marta Station and directed him to a secluded dead end street behind a closed hospital. There they demanded Anim's property, then shot him in the back of the head. Anim died holding \$17 in cash. Investigators later discovered that \$700 and a GPS system were missing from the vehicle. The suspects fled the scene but surveillance video showing them entering the cab led to their arrests after it was aired on television. Both were indicted for malice murder, felony murder based on aggravated assault with a deadly weapon, aggravated assault, attempted armed robbery and possession of a firearm during the commission of a felony. Harris was tried first and convicted in September 2011 of all but malice murder. He was sentenced to life plus five years in prison, according to the brief filed by the District Attorney. (Ellis was later convicted and sentenced to life plus five years' probation.) Harris then filed a motion requesting a new trial.

At issue in Harris's case is a series of text messages that were on his phone. As part of his defense, Harris acknowledged being in the cab with Ellis at the time of the killing but denied being involved in the shooting and said he had already left the cab when he heard the gunshot. No gun was recovered from the scene, and according to his attorney for his appeal, the only evidence disputing Harris's defense of merely being present, were the text messages he had sent earlier in the day to his girlfriend, stating he would have to rob someone and may have to shoot him.

Investigators recovered the messages not from Harris's phone but from his cellular service provider. However, in doing so, they obtained them with only a court order as opposed to a search warrant. State and federal law require a warrant for records less than 180 days old. But Harris's trial attorney failed to make a motion asking the court to exclude the records as a result of being obtained without a proper warrant. Following Harris's hearing on his motion for new trial, the trial court ruled that Harris's trial attorney had provided "ineffective assistance of counsel," in violation of his constitutional rights. Under the U.S. Supreme Court's 1984 decision in *Strickland v. Washington*, to prove "ineffective assistance of counsel," a defendant must show not only that his trial attorney provided deficient performance, but also that except for that unprofessional performance, there is a reasonable probability the outcome of the proceeding would have been different. Here, the trial judge ruled that the attorney's failure to move to suppress the text messages was professionally unreasonable, and that had the text messages been excluded as evidence, the outcome of his trial likely would have been different. State prosecutors

immediately obtained a warrant for the text messages and attached it to a motion asking the judge to reconsider the ruling granting Harris a new trial. The court denied the motion, and the State now appeals to the state Supreme Court.

ARGUMENTS: The State argues the trial court erred in granting Harris a new trial. “The State does not contest that a search warrant, and not merely a court order, is required under federal law for law enforcement to obtain the contents of cell phone text messages,” the District Attorney’s office, representing the State, argues in briefs. “Nor does the State strongly dispute that trial counsel’s ignorance of that requirement would support a finding of attorney deficiency.” But Harris failed to prove the second prong under *Strickland*, requiring that Harris show “prejudice,” or the strong likelihood that his trial would have come out differently had his attorney tried and succeeded in keeping out the text messages. And that is because the cell phone text messages would have been admissible under the “inevitable discovery” rule, the State contends, which allows in evidence obtained by illegal means if the prosecution can show it eventually would have been obtained legally. Here, had the trial attorney made a timely motion before trial to suppress the text messages, “the State would have sought and obtained a search warrant for the very same records,” the State argues. And it would have done so “well before trial.” The fact that a search warrant was eventually issued refutes any claim under *Strickland* of prejudice. “Where as here, trial counsel’s failure to file a motion to suppress is the basis for a claim for ineffective assistance, the burden is on the appellant [i.e.Harris] to make a strong showing that the damaging evidence would have been suppressed had counsel made the motion,” the State argues. “Harris failed to meet this burden, and the trial court erred in granting a new trial on ineffective assistance grounds, because ‘inevitable discovery’ makes the text messages admissible.” Furthermore, while the use of an incorrect judicial order is admittedly an error “in substance it amounts to only an administrative error, which does not justify suppressing the texts or granting a new trial in this case.” Finally, “Suppression is not a statutory remedy under federal law for the erroneous use of a court order rather than a search warrant to obtain the contents of stored electronic communications such as text messages.”

Harris’s attorney argues the trial court’s grant of his motion for new trial should be upheld. The State has failed to present a reason why the grant of his motion based on ineffective assistance should be reversed. “The trial court correctly held that trial counsel’s failure to file a motion to suppress was professionally unreasonable, and that it was harmful due to a strong showing that, had a motion been made, these text messages would have been suppressed,” the attorney argues in briefs. The State even conceded that absent these messages, the remaining evidence against Harris “was not overwhelming.” “Trial counsel failed to challenge this violation and there was a reasonable probability that, but for this failure, the outcome of his trial would have been different.” It was not until the trial court granted Harris’s motion for new trial that the State improperly tried to introduce the new evidence of a warrant it had just obtained. “Both state law and the [federal] Stored Communications Act are very clear; a warrant is necessary to obtain the contents of electronically stored written communications fewer than 180 days old,” Harris’s attorney argues. The State’s argument based on “inevitable discovery” fails because “there is no evidence the police were pursuing lawful means to uncover the text messages when the violation occurred. The record shows that the police obtained a number of other search warrants in this case but made no attempt to comply with the warrant requirement when obtaining Mr. Harris’s text messages. There was no substantial compliance, nor was this a mere administrative error,

but was instead a flagrant violation of Mr. Harris’s rights against unlawful search and seizure that went unchallenged due to trial counsel’s ineffective assistance.”

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

Attorney for Appellee (Harris): Kevin Anderson

MAJOR V. THE STATE (S17A0086)

In this **Hall County** case, a high school student is appealing terroristic threat charges against him that stemmed from something he posted on Facebook.

FACTS: In September 2014, Devon Major, a student at Lanier Career Academy, a charter high school, posted a Facebook message saying his school, “LCA,” “ain a school stop coming here all yall ain gonna graduate early why cuz there to many yall f---ers to even get on a computer I swear and there so much drama here now Lord, please save me before o get the chopper out and make Columbine look childish.” A school resource officer saw the post and informed the principal and law enforcement. When officers contacted Major, he admitted posting the statement. He was arrested and charged with two counts of making terroristic threats. Through his attorney, Major filed a motion challenging his indictment, arguing that the statute under which he was charged is unconstitutional because it is vague and overbroad in violation of his First Amendment right to free speech and Fifth Amendment right to due process. The trial court denied his motion, and he asked to appeal to the Georgia Supreme Court. The high court granted his request to appeal while his case was still pending in the trial court, and specifically asked the parties to address the question of whether the statute under which he was being charged, Georgia Code § 16-11-37 (a), was unconstitutionally void because of its vagueness. The parties are now arguing that question here on appeal while Major still awaits trial.

ARGUMENTS: Major argues that the trial court erred when it denied his motion challenging Georgia Code section 16-11-37 (a) as unconstitutional. Major cites a 1942 U.S. Supreme Court case, *Chaplinsky v. New Hampshire*, in asserting that the First Amendment permits the regulation of certain areas of speech only as long as the regulations are “well-defined” and “narrowly limited.” As outlined in *United States v. Alvarez*, a U.S. Supreme Court case from 2012, First Amendment challenges of speech-restricting statutes involve a three-step inquiry: 1) whether the statute at issue restricts speech based on content; 2) whether the restricted speech falls entirely into the category of unprotected speech; and 3) whether the statute satisfies strict scrutiny. Major argues Code section 16-11-37 criminalizes communication without having to show the speaker’s intent to communicate a threat, allowing for the prosecution of protected speech. Some forms of speech are unprotected, such as “true threats.” In its 2003 decision in *Virginia v. Black*, the U.S. Supreme Court defined a “true threat” as “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence.” In other words, the State must demonstrate that the speaker possessed the specific intent to communicate a threat. Code section 16-11-37, however, criminalizes speech beyond that of a “true threat,” Major’s attorney argues, by “criminalizing speech made ‘in reckless disregard of causing such terror.’” The State may only regulate speech with “narrow specificity,” which is not accomplished here. Finally, Major argues that his statement was never meant to communicate a specific crime, but was rather a therapeutic, cathartic expression. “Notably, the statement was not reported by any of [Major’s] friends or fellow students, but rather discovered

by a school resource officer.” Here, Major “has not communicated any threat to commit a crime of violence, and thus may not be prosecuted under section 16-11-37,” his attorney argues. Major is now asking the Georgia Supreme Court to reverse the trial court’s order and to declare that the statute under which he is being charged is unconstitutional.

Represented by the District Attorney, the State argues that Georgia Code section 16-11-37 is not unconstitutionally vague or overbroad. “A law is unconstitutionally vague and violates due process if a reasonable person can’t tell what speech is or is not permitted by the statute,” the State argues in briefs. “Vague laws are susceptible to arbitrary and discriminatory enforcement.” A law is unconstitutionally overbroad if it “regulates substantially more speech than is necessary to accomplish a legitimate purpose advanced by the State, in this case public safety.” The language in Code section 16-11-37 “that permits the State to obtain a conviction when a threat is made in reckless disregard of its potential for inciting terror does not render the statute unconstitutionally void for vagueness or overbreadth,” the State argues. “Those who are subject to punishment under the statute know by its wording that they can be convicted for making threats with reckless disregard for whether they might terrorize others. It is sufficiently clear from the language of the statute that they may be convicted for intentional threats and that they may not be convicted for negligently issued threats.” The State argues that there is “no evidence that this law, by proscribing the reckless publication of statements that are likely to cause terror, evacuation, or inconvenience, would regulate substantially more speech than necessary to preserve the safety and order of the public.” While Major “contends that threats made for cathartic or therapeutic purposes should be protected,” such an argument “overlooks the fact that threats that are intended for the speaker’s cathartic benefit impose the same amount of damage on those who would be terrorized by receiving the threat.” The State argues that the question of whether or not Major acted with intent when posting this statement is a question that should be left for a jury to decide. Additionally, communication is sufficient to constitute a threat if a reasonable person would conclude that it was a threat. Here, both a school resource officer and the principal arrived at that conclusion. Therefore, the State is asking this Court to affirm the lower Court’s pre-trial ruling that Major’s charge under Georgia Code Section 16-11-37 is valid.

Attorney for Appellant (Major): John Rick of the Hall County Public Defender’s Office
Attorneys for Appellees (State): Lee Darragh, District Attorney of the Northeastern Circuit, Alicia Taylor, Asst. D.A., Christopher Carr, Attorney General, Patricia Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G.