Supreme Court of Georgia
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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Tuesday, May 7, 2019

10:00 A.M. Session

DUKE V. THE STATE (S19M0969)

The man accused of the 2005 murder of Tara Faye Grinstead is appealing to the Supreme Court of Georgia, arguing that the high court has the authority to review his appeal of an **Irwin County** court ruling. Prior to his trial, **Ryan Alexander Duke** is seeking to appeal the lower court's denial of his request for state funds for expert witnesses and an investigator.

FACTS: Tara Grinstead was a high school teacher and beauty queen who disappeared from her home in Ocilla, GA on Oct. 24, 2005. The investigation into her disappearance spanned more than 11 years before the arrest in February 2017 of Ryan Alexander Duke. According to State prosecutors, on Feb. 21, 2017, Bo *Dukes*, a friend and former roommate of Ryan *Duke*, met with a GBI agent and confessed that he had helped Duke burn Grinstead's body after Duke took him to the area and showed him the naked body. Dukes told authorities that Duke confessed to him he had broken into Grinstead's home using a credit card, jumped on her while she lay in bed, and strangled her. He then transferred the body to a large pecan orchard in Ben Hill County before he asked Dukes to help him move the body to an adjacent pine grove where they burned it for two days using pecan wood. On Feb. 22, 2017, Duke also gave a statement to two GBI agents in which he confessed to being responsible for Grinstead's murder, according to briefs filed by the District Attorney of the Tifton Judicial Circuit. Duke said he did not recall strangling her and

did not believe her body was nude when he took it to the pecan orchard. Following his arrest, Duke agreed to accompany the agents to the area where he and Dukes had burned the body. Several days later, agents recovered in the area numerous bone fragments. According to the State, Duke's DNA obtained from buccal swabs was a match for the DNA recovered in 2005 from a latex glove found outside Grinstead's home.

Duke was indicted April 12, 2017 and charged with malice murder, felony murder, aggravated assault, burglary, and concealing a death in connection with the death of Tara Faye Grinstead. Initially Duke was represented by the Tifton Judicial Circuit Public Defender. On Aug. 29, 2018, private attorneys Ashleigh Merchant and John Merchant took over his defense pro bono. They filed a motion for state funding to pay for an investigator and defense experts. The trial court denied the motion, ruling that while Duke "has a constitutional right to be represented by private, pro bono counsel if he so chooses, he is not simultaneously constitutionally entitled to experts and investigators funded by the State."

Duke's attorneys then attempted to appeal this order to the Georgia Supreme Court under the procedures mandated by Georgia statutory law for an "interlocutory" – or pre-trial – appeal. But the trial court did not rule on their request for a "certificate of immediate review," which they generally must have to appeal to this Court, within the 10-day period set by Georgia Code § 5-6-34 (b). Duke's attorneys then applied to the Supreme Court for an interlocutory appeal without the trial court's certificate of immediate review. It asked the high court to exercise its discretion under its 2000 decision in *Waldrip v. Head* to "bypass the statutory requirements for interlocutory review and address the substantive issues on appeal," which the Court has done in "exceptional cases that involve an issue of great concern, gravity, and importance to the public and no timely opportunity for appellate review."

On March 28, 2019, in response to an emergency motion filed by Duke's attorneys, the Georgia Supreme Court granted a delay in Duke's trial, which was due to begin April 1. The high court granted the delay to consider whether it has jurisdiction to review the substantive appeal being requested. At issue in that appeal is whether an indigent defendant in a criminal case represented by private counsel on a pro bono basis, as opposed to by a public defender, has a constitutional right to government-funded experts and investigators. The parties now present arguments on whether the Supreme Court has the authority – or jurisdiction – to consider the substantive appeal.

ARGUMENTS: Duke's attorneys argue that the *Waldrip* decision is valid law and that under it, this Court "is empowered under its inherent authority and Georgia's Constitution and Code to grant applications for interlocutory appeal outside of Georgia's statutory process 'in those exceptional cases that involve an issue of great concern, gravity, and importance to the public and no timely opportunity for appellate review.'" The Court has held that its authority to circumvent the statutory interlocutory appeal process comes from Georgia's Constitution and Code. "Armed with this authority, this Court chose to synthesize its earlier decisions and fashion a more comprehensive common law rule allowing it to consider appeals of interlocutory orders in situations where this Court disagrees with the trial court's assessment of the need for immediate appellate review of an interlocutory order," Duke's attorneys argue in briefs. The *Waldrip* decision was a 4-to-3 decision, and the dissenting opinion argued that Georgia's General Assembly is the body which "determines the manner in which an order entered in a Georgia trial court is appealable," and that the Supreme Court should not exercise its inherent powers to create

an exception to the "established method" created by the legislature. But the dissenters were wrong, Duke's attorneys argue. In this case, Duke contends that the trial court's denial of his requests for state funding for the resources he needs to present his defense violates his rights under the Georgia and U.S. constitutions. He carefully followed the process set down in Georgia Code § 5-6-34 (b) to seek an interlocutory appeal before the Supreme Court, but the trial court did not certify his request. "By not granting Mr. Duke's request for certification on the important constitutional issues he raise below…, the trial court – not this Court – determined this Court's ability to exercise jurisdiction over constitutional matters exclusively reserved to this Court's appellate jurisdiction under the Georgia Constitution," the attorneys argue. "This amounts to a legislative usurpation of this Court's constitutional jurisdiction…." This Court's inherent authority supports *Waldrip*, which must be upheld as applied to the facts of this case. "If this Court does not substantively address the issues raised here, Mr. Duke will be forced to go to trial without the resources necessary to adequately defend himself against the State's charges."

The State, represented by the District Attorney's office, recommends this Court overrule *Waldrip v. Head.* Duke's attorneys contend that contrary to statutory jurisdictional requirements, his case does not require the trial court to issue a certificate of immediate review for this Court to review the trial court's denial of his motion. "It is a well-settled principle that the right to appeal is not constitutional, but instead depends on statutory authority," the State argues, citing a number of Georgia Supreme Court decisions, including its 2017 decision in *Jones v. Peach Trader Inc.* In a 2012 decision in *American Gen. Financial Svcs. V. Jape,* Justice David Nahmias wrote in a special concurrence that the statutory authority set forth in Georgia Code § 5-6-34 (b) "is a jurisdictional law by which the General Assembly has limited the authority of Georgia's appellate courts to hear certain cases." This Court is without jurisdiction if the procedures are not followed, the State argues. Only when those procedures have been followed at the trial court level may the Supreme Court or Court of Appeals "permit an appeal to be taken." This Court "has repeatedly held that trial courts possess the 'carte blanche authority' pursuant to § 5-6-34 (b) to certify an order for immediate review; and without such, the order is *not* appealable," the State contends. "Obtaining a certificate of immediate review from the trial court is an 'essential component' of a trial court's power to control litigation." The *Waldrip* Court determined there was a "defect" in the statutory appellate review process that required them to assume jurisdiction absent a direct appeal or a certificate of immediate review. "We have chosen to bypass the statutory requirements for interlocutory review and address the substantive issues raised on appeal when the case presented an important issue of first impression….," the majority wrote. Although Duke's attorneys argue that the legislature has impeded upon the authority of the judiciary by mandating a statutory procedure for interlocutory appeal, the Georgia Constitution states that, "The General Assembly shall have the power to make all laws," the State argues. "The role and powers of this Court are to apply the interlocutory appeal statute enacted by the legislature by its terms, whether they agree or disagree with the trial court's determination regarding a certificate of immediate review." "The *Waldrip* Court departed from this principle and established its own statutory amendment because of its 'defect' that it 'felt unfair;' however, the judiciary is not constitutionally entitled to establish the laws of Georgia." "*Waldrip's* reasoning is unsound and contrary to the Georgia Constitution separation of powers, § 5-6-34 (b) statutory authority, and well-established case law that the right to appeal is statutory," the State contends. A decision upholding *Waldrip* in this case "will draw heavy reliance from criminal

defendants, each desiring to usurp the trial court's authority to control the case by requesting an emergency appeal when the trial court refuses to grant a certificate of immediate review." Attorneys for Appellant (Duke): Ashleigh Merchant, John Merchant, John Gibbs, III Attorneys for Appellee (State): C. Paul Bowden, District Attorney, Bradford Rigby, Special Asst. D.A., Jennifer Hart, Chief Asst. D.A.

COALITION FOR GOOD GOVERNANCE ET AL. V. RAFFENSPERGER, SECRETARY OF STATE, ET AL. (S19A0769)

A group of citizens is appealing a **Fulton County** court's dismissal of their lawsuit that challenged the 2018 election for Georgia's Lieutenant Governor. They claim that the electronic voting machines used were so defective that the results were invalid and a new election using paper ballots should be held.

FACTS: On Nov. 23, 2018, the **Coalition for Good Governance**, Rhonda J. Martin, Smythe DuVal, and Jeanne Dufort filed a petition in Fulton County Superior Court contesting the 2018 election between Geoff Duncan and Sarah Riggs-Amico. The complaint names **Secretary of State Brad Raffensperger** and the election superintendents from Fulton, Gwinnett, and DeKalb counties as defendants. (The plaintiffs later voluntarily dismissed the DeKalb County Board of Elections and Registration from the complaint with the court's permission.) According to the certified results, Duncan received 1,951,738 votes and Riggs-Amico received 1,828,566 votes for a margin of 123,172. The plaintiffs' attorney alleges that "the extreme disparity in the reported voting pattern between votes cast on electronic voting machines and votes cast on paper ballots, the proven vulnerability of the electronic voting machines, and the numerous instances of voting system malfunction combined to render the election 'so defective' 'as to place in doubt the result,' requiring a new election under Georgia Code § 21-2-527 (d)." On Nov. 29, 2018, the plaintiffs filed an "Emergency Motion for Inspection of Electronic Equipment and Production of Documents."

Following a hearing on pre-trial motions on Jan. 9, 2019, the trial court dismissed the Secretary of State as a defendant because he is not an election superintendent and therefore not a proper party to an election contest. The trial court also denied the motion by Fulton and Gwinnett asking that the other 157 county election superintendents be named as parties. The judge also considered the plaintiffs' motion in which they sought discovery from the memory of the electronic voting machines (called "direct-recording electronic" voting machines or DRE's) and the complete "GEMS" (Global Election Management System) server database. At the hearing, a representative of the Secretary of State expressed concerns about the security of both systems. Following the hearing, the trial court ruled that the plaintiffs could have some access to information from the voting machines and the GEMS database, but only in a carefully controlled manner. The trial court did not allow the plaintiffs to receive the entire GEMS database structure, given the Secretary of State's concerns that unfettered access to it would have compromised the system's security. The trial judge also advised the parties at the hearing that there would be no continuances from the Jan. 17 trial date.

Despite the plaintiffs' demand for a jury trial, the case proceeded to a bench trial – before a judge with no jury – on Jan. 17. Following trial, the judge found that the plaintiffs "did present evidence that the DRE system of voting used in Georgia has many problems and irregularities and is regarded as an outdated and inaccurate system of conducting a vote." In the race for

Lieutenant Governor specifically, the trial court found that there were five instances of problems with voting at two precincts and that there were 4.5 percent fewer votes in the Lieutenant Governor's race than in the Governor's race. However, "the most votes that the plaintiff has shown could be in any way arguably considered irregular or illegal is approximately 32,000 votes," the trial court found. Even assuming all those votes went to Riggs-Amico, the margin between winner and loser was more than 123,000 votes. The trial court dismissed the plaintiffs' petition.

ARGUMENTS: The plaintiffs' attorney argues that because the race for Lieutenant Governor appears on the ballot just below the race for Governor, during the last four election cycles, the race for Lieutenant Governor has received an average of 99.2 percent of the number of votes cast for Governor; the race for Secretary of State has received 98.6 percent; and the other down ballot statewide races have averaged 98 percent. "In this election, however, the Lieutenant Governor's race received far fewer votes than all other statewide races, including much less prominent races such as Commissioner of Agriculture and School Superintendent, and in many precincts, fewer votes than far less prominent regional races," the plaintiffs' attorney argues in briefs. "Even more alarming, this unprecedented pattern appears only in the result of votes cast on the direct-recording electronic ("DRE") voting machines…." The attorney argues that "if the historical average percentage of voters (99.2 percent) actually voted in the Lieutenant Governor's race in 2018, then over 127,000 votes for Lieutenant Governor were not counted. Such a massive number of lost votes is itself sufficient to cast doubt on the election…." The attorney argues the trial court made seven errors. Among them, the trial court erred by not giving the plaintiffs reasonable time for discovery – the pre-trial phase in a lawsuit when both parties may obtain information from each other to prepare their case. The trial court also erred in denying the plaintiffs' motion for a continuance, by not permitting the plaintiffs to examine the internal memory of the electronic voting machines, and by finding that the most votes that could be considered irregular was 32,000, which is "clearly erroneous," the plaintiffs argue.

Attorneys for Duncan and the boards of elections argue that although it is correct that fewer votes were cast in the Lieutenant Governor's race than in other races, Duncan was elected Lieutenant Governor "by an overwhelming margin." "Plaintiffs' appeal is an intricately spun web of speculation and innuendo," the attorneys argue. At trial, the plaintiffs presented only "general evidence of possible vulnerabilities" in electronic voting machines in *other states*. "They utterly failed to carry their burden, as they presented no evidence that a vulnerability in any Georgia electronic voting machine led to the undervote in the Lieutenant Governor's race. The evidence at trial conclusively demonstrated that the voting machines worked properly in the 2018 election." Given the margin of more than 123,000 votes, the trial court properly dismissed the plaintiffs' case. "As the trial court ultimately found in dismissing plaintiffs' petition, plaintiffs could not cross the causal bridge from possible vulnerability to actual compromise of the 2018 election in Georgia," the attorneys argue. "To the contrary, the evidence before the trial court disproved plaintiffs' case. It showed that no hacking or compromise of Georgia's electronic voting system had taken place." The trial court properly dismissed the plaintiffs' claims because there was no evidence of irregularities. The trial court also properly limited the scope of discovery, as "there are legitimate state interests in avoiding the disclosure of security information regarding the state's voting systems." The attorneys for Duncan and the election boards contend that facing the looming deadline of trial, the plaintiffs attempted to delay the trial

several times, starting with a motion for continuance. The trial court properly denied their "delaying tactics." Finally, the trial court was well within its discretion to deny a jury trial, "given the overwhelming evidence that the DREs were not hacked in the 2018 general election," attorneys for the election boards argue.

Attorney for Appellants (Coalition et al.): Bruce Brown

Attorneys for Appellees (Duncan et al.): Edward Lindsey, Jr., Bryan Tyson, Frank Strickland, Bryan Jacoutot, Richard Carothers, Brian Dempsey, Patrise Perkins-Hooker, Kaye Burwell, Cheryl Ringer, David Lowman

DEKALB COUNTY SCHOOL DISTRICT ET AL. V. GOLD ET AL. (S18G1419)

The **DeKalb County School District** and the DeKalb County Board of Education are appealing a Georgia Court of Appeals decision that finds they breached an agreement to provide two years' advance notice to teachers and school employees prior to suspending contributions to their Georgia Tax Shelter Annuity Plan.

FACTS: Until 1979, the DeKalb County School District participated in the Social Security System based on a "§ 418 agreement" with the federal government. That agreement provided Social Security retirement benefits to school district employees. In 1977, the DeKalb County Board of Education notified employees that it was considering withdrawing from the Social Security System in favor of an alternative plan. In May 1979, the Board passed a resolution reaffirming its intent to withdraw from Social Security and establish an alternative plan for its employees. In the resolution, the Board stated it would give a two-year notice to employees before reducing or terminating funding for any alternative plan. Subsequently, the Board pursued an alternative employee benefits plan with a private insurance company. In June 1982, the Board amended its policies to outline certain improvements, again including "a two-year notice to employees before reducing the funding provisions of the Alternative Plan to Social Security." In July 1983, the Board voted to establish its own Tax Sheltered Annuity plan (TSA) in place of the alternative plan. The purpose of the TSA plan was to provide a "written standard procedure under which retirement benefits to serve in lieu of Social Security are provided and administered on behalf of Eligible Employees." The TSA plan stated that, "This Plan may be amended or terminated by the Employer at any time. No amendment or termination of the Plan shall reduce or impair the rights of any Participant or Beneficiary that have already accrued." In 2003, the Board passed a resolution that "amended and restated" the 1983 TSA plan.

In July 2009, during the "Great Recession," Georgia's governor announced a 3 percent reduction in state funding for all Georgia school systems. To try to manage the anticipated loss of $20 million in state funding, the Board voted to suspend contributions to the TSA plan. Although the Board notified employees that funding of the TSA plan would be suspended, it did not give them two years' notice prior to suspending funding. In June 2010, the Board amended its by-laws and policies to remove the two-year notice.

In March 2011, **Elaine Ann Gold** and three other current or former employees of DeKalb County schools sued the school district and board for breaching the agreement to provide two years' advance notice prior to suspending contributions to their Tax Shelter Annuity (TSA) plan accounts. Following a hearing, the DeKalb County Superior Court ruled in favor of the district and board, finding that the employees had "failed to establish the existence of an enforceable, valid contract that was breached by the School District when it suspended certain contributions

to" the TSA plan. The employees appealed to the Court of Appeals, Georgia's intermediate appellate court. They argued the trial court erred because the evidence showed the existence of an enforceable "governmental promise" that required two years' notice before reducing or suspending funding of the TSA plan. Specifically, they argued that because the promise to provide two years' notice "was adopted as Board Policy, it became part of the employees' employment contracts, protected by Georgia's prohibition on retroactive laws and impairment of contracts." They argued that because the notice provision has the force of statutory law, it cannot be amended by the TSA plan documents, which are "subordinate" to it. The Court of Appeals agreed and reversed the trial court's ruling. It found that because the notice policy was legislatively enacted, it became a substantive part of the employees' contracts of employment, and the district's admitted breach of that policy and its attempt to repeal it retroactively violated the Impairment Clause (also called the Contract Clause) of the Georgia Constitution. The school district and school board now appeal to the Georgia Supreme Court, which has agreed to review the case to answer two questions: 1) What is the proper test for determining whether a statute or ordinance establishing a retirement plan becomes a part of a government employee's contract of employment such that later changes may violate the Impairment Clause of the Georgia Constitution? And 2) Did the Court of Appeals apply that test?

ARGUMENTS: The high court's questions recognize that the main issue in this case is "whether a policy of a public employer – here, a school board – is a statute that creates a vested contract right for public employees," attorneys for the district and board argue in briefs. "The answer is 'no.' To hold otherwise would subject government entities, like the local school district here, to almost endless liability, create incredible uncertainty over statutorily protected rights, and saddle taxpayers with hundreds of millions of dollars in potential damages." The first question is answered by a line of this Court's consistent precedent-setting decisions dating back to 1936. As stated in 2014 in *Ayers v. Public School Employees Retirement System of Georgia*, "It is well settled under Georgia law that a statute or ordinance establishing a retirement plan for a government employee becomes a part of her contract of employment as soon as: 1) she performs services while the statute or ordinance is in effect; and 2) she contributes at any time any amount toward the benefits she is to receive." Even if a contract is created by ordinance or statute, the government may modify the retirement plan if a "provision for subsequent amendment was part of the contract when [the pensioner] entered into it," the attorneys argue, quoting a 2015 decision. "This modification language precludes a participant from acquiring 'a vested, contractual right in an unchanged plan and the plan may be amended without breaching employment contracts or violating the Impairment Clause.'" Therefore, answering the Court's first question requires determining 1) whether a statute or ordinance establishing a pension plan becomes part of the employee's contract of employment, and 2) whether the contract is subject to change. The Court of Appeals failed to apply this "Statutory Plan Test," the district's attorneys argue, and discounted the controlling plan document "that unambiguously provided the plan could be amended or terminated at any time." For one thing, none of the plaintiffs or other employees under the TSA plan made contributions to it. "But under this Court's Statutory Plan test, employee contributions are a bedrock element." Even if the 1982 policy did somehow establish a retirement plan and contributions were unnecessary, the employees' contracts reserved the board's right to change its policies and procedures. "Under this Court's precedent, because the contract terms contemplated future changes, plaintiffs did not acquire a vested right

to any future notice or future employer contributions," the district and board argue. "The Court of Appeals' failure to apply these elements of this Court's precedent is in error, has confused the Statutory Plan Test, and will spawn equally confusing case law." The Supreme Court should reverse the Court of Appeals decision and reinstate the superior court's judgment.

"Long-standing precedents hold that when a government creates by law a contractual obligation to employees to provide certain benefits, it must keep that promise just like anyone else," attorneys for Gold and the employees argue. "In deciding such cases, courts have focused always on the language of the legislative act to determine whether it makes a binding promise to its employees or not." This rule gives a government options: One, it can pass a law or ordinance promising certain benefits but reserving the right to terminate the benefits. Two, the ordinance can promise certain benefits and say nothing else, in which case the statutory promise is enforceable and the benefits may not be reduced. Or three, as in this case, the government can pass a law that specifically promises it will not terminate or reduce the benefits except under certain conditions. "This case falls in this third category and the promise must be enforced," the employees' attorneys argue. "The DeKalb County School District and School Board ***chose*** to make a promise to employees that it would not reduce certain benefits without providing a 'two-year notice.' They ***chose*** to legislate that promise into their Board Policies, the exclusive way in which school boards create law governing their district. They ***chose*** not to repeal this policy and admitted that the policy 'remained in effect' until long after its breach. And they ***chose*** to breach the promise." It is undisputed that there was no change to the notice requirement before it was breached. "'The existence of a law which promises benefits…constitutes an inducement to accept the position,'" the attorneys argue, "and once employees provide consideration by working while that law is effective, it becomes a binding contract." There is "no basis for holding that a government may make a statutory promise in return for employment, and then fail to abide by it."

Attorneys for Appellants (District): Allegra Lawrence, Leslie Bryan, Lisa Haldar, Thomas Bundy, III, Josh Belinfante

Attorneys for Appellees (Gold): Michael Terry, Jason Carter, Naveen Ramachandrappa, Roy Barnes, John Salter

2:00 P.M. Session

POLO GOLF AND COUNTRY CLUB HOMEOWNERS ASSOCIATION, INC. V. CUNARD ET AL. (S19A0655)

A homeowners association that sued two **Forsyth County** officials to prevent them from enforcing a local ordinance the association deemed unconstitutional, is appealing a court ruling that barred its lawsuit based on sovereign immunity – the legal doctrine that protects the government and its employees from being sued. This is the second time the parties have been before the Supreme Court involving disputes over who is responsible for paying for the repair of stormwater pipes.

FACTS: As the current case stems from the prior case, here is the background on both: Polo Golf and Country Club Homeowners Association is a homeowners association at the Polo Fields subdivision, which was built in the 1980s and consists of about 1,000 lots. Many of the lots contain stormwater facilities, which include drainage easements and drainage pipes. Under

the association's Declaration of Covenants recorded in the Forsyth County land records in 1987, each homeowner is required to maintain and repair his own property, including any stormwater facilities located on his property. In 1996, Forsyth County passed a stormwater management ordinance, setting up standards and guidelines for stormwater management. In 2004, the county revised the ordinance to update the Georgia stormwater management design manual by adding a section specifically related to Forsyth County's stormwater management systems.

At issue in the first case was Section 4.2.2 of the 2004 Forsyth County Addendum to the Georgia Stormwater Management Manual, which provided a general rule that the owner would be responsible for stormwater management on his/her property. However, the rule included an exception, which stated: "When a subdivision…has a legally created property or homeowners association, the association will be responsible for maintenance of all drainage easements and all stormwater facilities within the entire development." In 2006, the Polo homeowners association commissioned a study of the stormwater facilities and learned that much of the system was failing because the corrugated metal pipes had exceeded their 25-year life span.

John and Diane Rymer, who owned a home at Polo Fields, claimed that the drainage pipes on their property did not properly carry water away from their lot during heavy rains, and as a result, their basement flooded. They sent a demand to the homeowners association that it fix the stormwater system. In response, the association notified the county that "neither the individual homeowner nor [the association] should be held responsible for the maintenance, repairs and continued upkeep of these easements." In February 2010, the Rymers sued the homeowners association and the county. The association counter-sued the Rymers, and also sued the county, asserting the county could not require it to maintain the stormwater facilities because the addendum "applies to new and redevelopments and…cannot be applied to [Polo]."

Eventually, pipes around the Rymers' property failed completely, causing sinkholes on a number of lots and additional flooding on the Rymers' property. In response to the pipe collapse, the county issued a Notice to Comply and Warning Notice to the homeowners association under section 4.2.2 of the addendum. At that point, the Polo homeowners association filed a separate action against the county, arguing a number of things, including that the addendum violated the contract clause of the Georgia Constitution. The parties filed motions asking the court to grant them summary judgment – which a judge grants after determining a jury trial is unnecessary because the facts are undisputed and the law falls squarely on the side of one of the parties. The trial court denied the Polo association's summary judgment motion, but granted the county's. The Polo homeowners association then appealed to the state Supreme Court.

In 2014, shortly before the Supreme Court ruled, the Board of Commissioners revised Section 4.2.2 to state: "When any subdivision or industrial/commercial park, *whether new or existing*, has a legally created property or homeowners association, the association will be responsible for maintenance of all drainage easements and all stormwater facilities with the entire development."

Days later, the Supreme Court ruled that the case should be decided by a jury. But it agreed with the Polo homeowners' association that the 2004 addendum did not apply to pre-existing subdivisions. "Polo was developed nearly twenty years before the addendum was adopted," the opinion said. "It is not a 'new development' or 'redevelopment.' Accordingly, it is not subject to section 4.2.2. of the addendum."

At issue in the current appeal is the 2014 version of Section 4.2.2., which keeps the stormwater maintenance obligation on the association as opposed to on the individual owners. Meanwhile, in addition to the stormwater facilities on the lots showing their age and failing, there is also a failing earthen dam in the subdivision known as Wellington Dam, which also is in need of costly repair.

On Jan. 22, 2018, the Polo Homeowners Association again sued, challenging the constitutionality of Section 4.2.2 as applied to the association. This time, the association sued **John Cunard**, Director of the Forsyth County Department of Engineering, and Benny Stephen Dempsey, Stormwater Division Manager, in their individual capacities. On Oct. 17, 2018, the trial court ruled that the county law was constitutional and that Cunard and Dempsey are protected by sovereign immunity and therefore the suit was barred. The Polo Golf and Country Club Homeowners Association now again appeals to the Georgia Supreme Court.

ARGUMENTS: The association's attorney argues the trial court made seven errors, including that the trial court erred in protecting Cunard and Dempsey with sovereign immunity, which is in conflict with the Georgia Supreme Court's 2017 ruling in *Lathrop v. Deal.* The trial court also erred by not finding the 2014 version of Section 4.2.2 unconstitutional because it: violates the contract clause of both the Georgia and U.S. constitutions; has a retrospective application; and creates an involuntary servitude. The trial court also erred by not finding that the Section is invalid because it requires homeowners associations, including this one, to trespass and because it exceeds the authority of its enabling ordinance. "The association remains in a state of uncertainty as to whether it has no obligation to perform stormwater maintenance on owners' lots (as provided for in the Declaration of Covenants for 32 years), or whether it has that obligation under the 2014 version of Section 4.2.2," the association's attorney argues in briefs. "The associations seek clarity from this Court."

The trial court appropriately determined that sovereign immunity barred the association's claims for relief, the county officials' attorney argues. The trial court also did not err in holding that the 2014 version of Section 4.2.2 is constitutional as it does not violate the contract clause of the U.S. or Georgia constitutions; it does not have a retrospective application; and it does not create an involuntary servitude. Finally, the trial court did not err by failing to rule that the Section is invalid because it requires the association to trespass and is beyond the authority of it enabling ordinance.

Attorney for Appellant (Association): John Lueder
Attorney for Appellees (Cunard): Ken Jarrard

THE STATE V. HAMILTON (S19A0722)

The State is appealing a **Barrow County** judge's grant of a new trial to a man convicted of murdering the nephew he had raised as a boy.

FACTS: Paul Lamar Hamilton, a law school graduate, is a former Magistrate Court Judge in Barrow County. He owns two properties in the county, including a mobile home at 1302 Charlie Hall Road. Brandon Lay, Hamilton's nephew, grew up with Hamilton in the mobile home on Charlie Hall Road. Hamilton had guardianship over Lay because Lay's mother could not raise him. At some point, when Lay was a teenager, Hamilton kicked him out of the mobile home and the two did not remain in touch. In 2015, Lay, by then 34 years old, was living in Statham, GA with his girlfriend, Teddi Taylor. Lay was indigent and did odd jobs to earn

income. According to Hamilton, Lay had prior convictions for theft-related offenses and had spent the previous 10 years in and out of prison. Hamilton still owned the mobile home on Charlie Hall Road but had not lived there for at least three years. The mobile home was abandoned and in disarray. According to state prosecutors, on Oct. 16, 2015, Lay told his girlfriend that he had called his "sister," Hamilton's natural daughter, and told her he would be returning to the residence at Charlie Hall Road to gather some of his belongings, including a photo of himself still hanging on the trailer wall. Although Hamilton's account differs, Lay and Taylor drove a U-Haul to the trailer and took household items, including blankets, towels, and a dresser. According to Hamilton, the items were stolen and included silverware and drug paraphernalia.

Early the morning of October 16, three hunters arrived at Hamilton's property to hunt deer, which Hamilton had given them permission to do. When they arrived, they found a U-Haul truck in the wooded driveway and attempted to box it in. Accounts differ, but two of the hunters started shooting at the U-Haul as it fled, slamming into the front of the hunters' truck. Hamilton was not there, but he later came to the property and met with law enforcement officers after the hunters called 911. According to the State, Hamilton told a deputy from the Barrow County Sheriff's Office that, "If I catch someone else on my property, you'll need to call the coroner." Hamilton also said that after learning about the burglary of his property, he began to drive around looking for the U-Haul. Later that day, a friend drove Lay and Taylor in her Ford Ranger to the intersection of Charlie Hall Road and Old Hog Mountain Road to retrieve some things that had fallen out of the U-Haul, including Taylor's phone. Two women who saw them picking up items on the side of the road saw Hamilton in his vehicle and stopped to tell him some people were picking up items that had fallen out of the U-Haul. Hamilton drove his Lexus to the location of the Ford Ranger and parked it directly in front of the Ranger so the occupants could not drive forward. He then got out of his vehicle and brandished a firearm. None of the occupants of the Ford Ranger had a firearm or weapon. Hamilton approached the car and within 30 seconds, shot Brandon Lay from a distance of no more than five feet, killing him almost instantly. When a sheriff's deputy arrived at the scene, Hamilton told him that he "hated that it happened but they should have stayed out of my trailer down there." He claimed he did not realize he had shot his nephew.

A Barrow County Grand Jury indicted Hamilton in November 2015, charging him with malice murder, felony murder, and aggravated assault. Following an October 2018 trial, Hamilton was convicted of felony murder and aggravated assault and sentenced to life in prison. He was acquitted of malice murder. Immediately following the filing of the sentence, the trial judge, on his own, suddenly granted a new trial, ruling he had erred in instructing the jury on self-defense and intent, and that "the verdict of the jury was contrary to the evidence and principles of justice and equity, and that the evidence adduced at trial was decidedly and strongly against the weight of the evidence to support conviction." The State now appeals to the Georgia Supreme Court.

ARGUMENTS: The State, represented by the District Attorney's office, argues the trial court erred in granting a new trial because the error in charging the jury on self-defense and intent actually helped the defendant, and the error in the malice murder charge was completely irrelevant to the felony murder conviction. The trial court also erred in granting the new trial because "the evidence showed undisputedly that the defendant was guilty of felony murder

where he killed Brandon Lay while he was committing an aggravated assault against Brandon and two other individuals." Trial judges have been afforded the discretion to grant a new trial by sitting as a "thirteenth juror." However, while this is a broad discretion, "it is not an unfettered discretion," the State argues. Under the Georgia Supreme Court's 2011 decision in *Alvelo v. State,* the granting of a new trial "should be exercised with caution and invoked only in exceptional cases in which the evidence preponderates heavily against the verdict." In this case, the trial court "abused its discretion and acted arbitrarily and capriciously in granting the new trial," the State argues. Here, "the weight of the evidence clearly showed that the defendant committed the offenses for which he was convicted." "To overturn a verdict based on such overwhelming evidence is to substitute the judge's judgment for the jury for no discernible legal or factual reason," the State argues. "The trial court provided no explanation for why the evidence supported its decision." Finally, the trial court used an improper legal standard in granting a new trial. The trial court's granting of a new trial should be reversed and the case should be remanded for consideration under the proper standard, the State argues.

Hamilton's attorney argues the State "induced the grant of a new trial on jury instruction grounds" by "strenuously" objecting to the omitted instructions and twice moving for a mistrial. Also, the trial court correctly granted a new trial on grounds that the evidence "weighed strongly against both the verdict and was contrary to principles of justice and equity," the attorney argues in briefs. "Once a trial court exercises its discretion as the 'thirteenth juror,' that decision is entitled to 'substantial' deference and will only be overturned if the evidence demanded the verdict," the attorney argues. "In Hamilton's case, it did not." The evidence before the jury did not demand the guilty verdicts. Finally, the trial court's written order used the correct legal standard and remand is not appropriate, Hamilton's attorney contends.

Attorneys for Appellant (State): J. Bradley Smith, District Attorney, Patricia Brooks, Asst. D.A.

Attorney for Appellee (Hamilton): Matthew Winchester

<u>HOWARD V. THE STATE</u> (S19A0785)

A young man is appealing the murder conviction and prison sentence he received in **Spalding County** for shooting and killing a man.

FACTS: According to State prosecutors, on the afternoon of May 15, 2010, Jerode Martez Paige and his associates were filming a rap video in different locations around Griffin, GA. Although Paige was from the west side of town, the group eventually wound up at the intersection of 4th Street and East Tinsley Street on the east side of town. While they were filming, Paige's producer noticed a man later identified as **Bahir Ramiz Howard** and at least two others suddenly approaching. Howard and the others were wearing blue bandanas. Paige, who was wearing red, told the concerned producer that everything "was cool," as he had made prior arrangements to film at that location. According to the State, there were gang tensions in Griffin between the Bloods on the west side of town and the Crips on the east side. The jury would later hear from a Griffin police investigator who was considered an expert in gang activity that the Bloods associated with the color red while the Crips associated with blue. At one point, Paige saw a truck across the street that he wanted to incorporate into the video, so he crossed the street to speak to the truck's owner. On his way back, according to witnesses, Howard went up to Paige and said, "Get out from over there." Paige told Howard that he knew he was in Howard's

part of town, but asked, "What you want to do?" According to four witnesses, Howard then pulled out a gun and started shooting. Paige, who was unarmed, fell to the ground. The witnesses said Howard then stood over Paige and shot him in the head, killing him. Others began shooting, but later at trial, nobody other than Howard was identified as the shooter of Paige.

Following the shooting, Howard, who was shot in the leg, called 911 and went to the hospital. The bullet later retrieved from Paige's head was a .40 caliber metal jacket consistent with having been fired from a Smith & Wesson .40 caliber pistol. After giving Howard his *Miranda* rights, law enforcement officers at the hospital questioned Howard, who said he had seen three males with red "flags," or bandanas, shooting. Howard said that he had shot his gun, a .40 caliber Smith & Wesson, only after he was shot and that he had not aimed at any one person nor seen the person who had shot him. He said the only ones shooting other than himself were people with "red flags." When law enforcement officers searched Howard's residence, they found a Smith & Wesson box behind a TV that indicated it was for a .40 caliber firearm. Prior to trial, the trial court learned the box was missing from evidence.

Howard was indicted in August 2011 for malice murder, aggravated assault, criminal gang activity and several other crimes. Following a July 2012 jury trial, he was found guilty on all counts except criminal gang activity, of which he was acquitted. Howard was sentenced to life plus five years in prison and now appeals to the state Supreme Court.

ARGUMENTS: Howard's attorney argues the trial court made a number of errors, and Howard should be granted a new trial. Among the errors, Howard's constitutional rights were violated when the trial judge failed to instruct the already deliberating jury that it must begin its deliberations anew after a juror was removed and replaced with an alternate juror. This error deprived Howard of his constitutional right to be tried by 12 jurors in group deliberations. "An alternate juror who joins the jury's deliberations after the deliberations have begun will be at a disadvantage in holding his or her own with the other jurors, and as a result, the criminally accused may not truly obtain a jury of 12, to which he or she is constitutionally entitled," the attorney argues in briefs. The trial judge also erred in instructing the jury about the law of "spoliation" – or the intentional destruction, alteration, or concealment of evidence. The trial court's jury charge "unlawfully released the prosecution from proving guilt beyond a reasonable doubt by creating an inference of guilt if Appellant [i.e. Howard] failed to produce evidence based upon bad faith," Howard's attorney argues. Here, the erroneous instruction "logically and directly targets the firearm that Appellant admitted shooting on the date at issue, but that Appellant had either 'lost' or 'destroyed' by the time of trial." Howard's constitutional right to be present during a critical stage of his trial also was violated when the trial judge met with the juror, who was ultimately replaced, in the judge's chambers. Howard was neither present for, nor aware of, this meeting. Finally, Howard received "ineffective assistance of counsel" because his trial attorney failed to request a jury instruction on the principle of "transferred justification." Under this principle, the accused may not be found guilty if he was justified in shooting to repel an assault, but missed his intended target and killed an innocent bystander. One of Howard's defenses was that he was present at the shootout, shots were fired, and in defense of himself, he returned gunfire. "Nowhere in the trial court's jury instruction does it mandate that Appellant must be found not guilty if he was justified in shooting his weapon, missed his intended target and killed the deceased," Howard's attorney argues.

The State, represented by the District Attorney's and Attorney General's offices, argues that Howard's constitutional rights were not violated because the trial judge did in fact instruct the jury that when one of the jurors was replaced with an alternate, the jury would have to start over with its deliberations. Specifically, after announcing the alternate juror would be replacing one of the jurors, the judge said, "You all will need to kind of start fresh with your deliberations with Mr. Fears and get him caught up to speed." The State contends the judge's jury charge on "spoliation" was harmless in the context of the entire charge. Howard contends that the trial court erred by giving the charge because it shifted the burden of proof to Howard and undermined his presumption of innocence. "In fact, the likely conclusion drawn by the jury would be that the State lost the gun box and the shell casings, and if the jury found that was done in bad faith, it actually increased the State's burden rather than shift the burden to Appellant," the State argues. The only mention of the lost gun by the State was done during closing arguments, and the jurors were instructed not to view closing arguments as evidence." Howard's constitutional right to be present during a critical stage of his trial also was not violated. Here, Howard knew of the discussion in the judge's chambers regarding the potential excusal of the juror because the judge essentially recapped the discussion on the record in open court with Howard present. His trial attorney, who was present for the discussion, explained what had occurred in chambers, and Howard could have objected to not being present, but he did not. Finally, Howard's trial counsel was effective, the State contends. "Here, trial counsel chose not to request a charge on 'transferred justification' because that particular charge did not fit with his theory of the case," the State argues.

Attorney for Appellant (Howard): Brian Steel

Attorneys for Appellee (State): Benjamin Coker, District Attorney, E. Morgan Kendrick, Asst. D.A., Christopher Carr, Attorney General Christopher Carr, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Elizabeth Brock, Asst. A.G.