Supreme Court of Georgia
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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Tuesday, January 22, 2019

10:00 A.M. Session

MERCER UNIVERSITY V. STOFER ET AL. (S18G1022)

Mercer University is appealing a decision by the Georgia Court of Appeals allowing a wrongful death lawsuit against the university to go forward in **Bibb County** State Court.

FACTS: In July 2014, Sally Stofer, a widowed grandmother, attended a free concert with her sister, Carol Denton, at Washington Park in Macon. The concert was part of Mercer's "Second Sunday" concert series, which was planned, promoted, and hosted by Mercer's College Hill Alliance, a division of Mercer. Washington Park is owned by Macon-Bibb County, which granted Mercer a permit to use the park. Mercer paid no rent, although it did pay for security and liability insurance to cover the concert. When Stofer and Denton arrived, they parked at street level above Washington Park and descended a concrete stairway to gain entrance to the concert. Denton later stated they had chosen the particular stairway because it had a handrail at the top where they began their descent. After progressing part way down the steps, they left the stairs and found a place to sit on the grassy hill. Although there were vendors at the park selling food and drink, Stofer did not purchase anything.

When the women later left the concert, they took the same stairs to go back up, but they began their ascent below the halfway point where they had left the steps when they first arrived. They had not been on this lower part of the stairway, and Denton testified it lacked a handrail.

The women had no other way to get to their car because the grassy hill was too slippery and none of the other stairways had handrails at the lower level. Denton ascended the stairs ahead of Stofer, and when she turned to check on her sister, she saw Stofer lose her balance, fall backward and hit her head on the concrete stairs, causing her head to bleed profusely. Stofer fell into a coma, never regained full consciousness, and eventually was removed from life support. She died on Aug. 28, 2014.

Stofer's children, **John Stofer**, who was the executor of his mother's estate, and **Susan Stofer** Chandler, filed a wrongful death lawsuit against Mercer University in Bibb County State Court, claiming negligence and premises liability. In response, Mercer filed a motion asking the trial court to grant "summary judgment" in its favor. A court grants summary judgment when it determines there is no need for a jury trial because the facts are undisputed and the law falls squarely on the side of one of the parties. Mercer argued that it was immune from liability under the state's Recreational Property Act (Georgia Code Section 51-3-20 and succeeding sections), and that Stofer cannot show that the university had knowledge of the hazard.

The Recreational Property Act's self-stated purpose "is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting the owners' liability toward persons entering thereon for recreational purposes." Section 51-3-22 states that "an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity on the premises to persons entering for recreational purposes." Section 51-3-23 of the Act states that any owner of land who invites or permits without charge any person to use the land "for recreational purposes" does not: 1) "Extend any assurance that the premises are safe…; 2) Confer upon such person the legal status of one "to whom a duty of care is owed;" or 3) "Assume responsibility for or incur liability for any injury to person or property caused by an act of omission of such persons."

Key to the dispute in this case is whether Mercer invited the public to use the property "for recreational purposes."

The trial court denied Mercer's motion for summary judgment regarding its claim that it was immune from liability under the Recreational Property Act. Mercer filed an "interlocutory" or pretrial, appeal, but the Court of Appeals upheld the trial court's decision. Mercer now appeals to the state Supreme Court, which has agreed to review the case to determine 1) What is the correct test under the Act to determine whether a property owner who permits the use of the property by others for "recreational purposes" is entitled to immunity? And 2) Is the test for determining the issue of immunity under the Act a question of law for the trial judge to decide, or a question of fact that a jury should decide?

ARGUMENTS: Mercer's attorneys argue the Court of Appeals erred in deciding that questions of fact remain regarding Mercer's purpose in inviting the public to the park under the Act, and that therefore the question of Mercer's immunity could only be resolved by jury trial. "Whether an owner is entitled to immunity under the Recreational Property Act is indisputably a question of law for the trial court," the attorneys argue in briefs. "When the analytical framework is correctly applied to the facts of this case, Mercer is entitled to immunity under the Act because the record is devoid of any relevant and admissible evidence demonstrating that Mercer's purpose in inviting the public to the concert was to knowingly obtain, directly or indirectly, a financial pecuniary gain. In other words, a fact question does not exist in this case which would

require resolution by a jury." The attorneys contend that the Court of Appeals "fundamentally misapplied" the Georgia Supreme Court's analytical framework for determining a property owner's purpose under the Act as laid out in two of the high court's opinions in 2000 and 2004.

Attorneys for Stofer's children argue that not one but two courts have correctly concluded that a question of fact exists for a jury to determine the true nature of Mercer's purpose in hosting the concert where Sally Stofer lost her life. Any concert organizer "who invites the public into a crowded event, with dangerous stone stairways, must answer for negligently doing so," the attorneys argue in briefs. Only in limited circumstances has the Legislature granted immunity from liability. "Absolute immunity from even potential liability, no matter how grievous one's negligence, is not something to be granted lightly. Accordingly, the Legislature limited this immunity to cases where a defendant's reasons for allowing public access are non-commercial: for a 'recreational purpose.'" But here, "the contradictory mix of evidence showing that Mercer had both commercial and recreational purposes in hosting the concert precluded a judge ruling on Mercer's purpose as a matter of law." "Not only did Mercer intend for its College Hill Alliance to increase the university's revenue and drive economic development, Mercer also admitted that the concert series improved the community surrounding Mercer's campus, which benefitted Mercer in attracting students and faculty," Stofer's attorneys argue. Rather than "overturn long-established precedent, when the language of the statute has not changed," the Supreme Court should maintain its previously adopted balancing test when "as here, the use of the property involves a mix of commercial and recreational aspects." The high court should affirm the Court of Appeals application of that balancing test to the facts of this case so that Stofer's children "may have a trial for their mother's needless death," the attorneys argue.

Attorneys for Appellant (Mercer): Brian Trulock, Alan Payne
Attorneys for Appellee (Stofer): Ranse Partin, Davis Popper

CITY OF GUYTON ET AL. V. BARROW (S18G0944)
DUNN ET AL. V. BARROW (S18G0945)

The **City of Guyton** and Director of the state's Environmental Protection Division are appealing a Georgia Court of Appeals decision in favor of a man who challenged the state's issuance of a permit for a waste treatment facility near his land.

FACTS: In October 2013, **Richard E. Dunn**, then Director of the Environmental Protection Division (EPD) of the Georgia Department of Natural Resources, issued a permit to the City of Guyton, authorizing it to build a "land application system" facility, i.e. a waste treatment facility, on a 265-acre tract of land in **Effingham County**. Wastewater collected in the City's sewer system would enter the facility where it would undergo a series of treatments, after which the treated water would be sprayed on fields at the site. About 44 acres would be devoted to the spray irrigation, which would operate up to five days a week.

The site is bound on one side by a dirt road, across which lies a 2400-acre farm owned by **Craig Barrow, III.** On the other side of Barrow's farm is the Ogeechee River. Barrow uses his farm for pine forestry and recreation. He also promotes wildlife by growing food plots for animals such as turkey and deer. One section of his land is wetlands that provide a habitat for animals including frogs, toads, salamanders, and turtles. Barrows appealed the permit, complaining to an Administrative Law Judge that it would pollute and degrade the waters on his

property and harm the wetlands and various plant and animal life. He claimed that the EPD had issued the permit without complying with Georgia's "anti-degradation rule," which has to do with the degrading of water quality. The rule states that water quality levels that support fish, wildlife, and recreation "shall be maintained and protected unless the division finds…that lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located." The EPD and the City claimed that issuance of the permit was not in violation of the anti-degradation rule.

Following a hearing, the Administrative Law Judge upheld the EPD's issuance of the permit. The judge ruled that while EPD's guidelines specify that the anti-degradation analysis is triggered when a new "point source" discharge could degrade water quality, the guidelines did not specify that the analysis is required for "non-point" source discharges, such as the waste treatment facility. Therefore the rule does not apply. (The Georgia Water Quality Control Act defines "point source" as "any discernible, confined, or discrete conveyance," such as a pipe, ditch, channel, tunnel or wall. It defines a "non-point source" as "any source which discharges pollutants into the waters of the state other than a point source.") Barrow then petitioned the superior court for judicial review, maintaining that the EPD had issued the permit without complying with the anti-degradation rule. The superior court also upheld the issuance of the permit as legal. Barrow then appealed to the Georgia Court of Appeals, the state's intermediate appellate court, which reversed the decision, finding that the administrative law judge and superior court had erred in their interpretation of the anti-degradation rule. "The proper interpretation of the anti-degradation rule, which adheres to its plain language, is that before a permit can be issued that allows lower water quality, the EPD must find that degradation of the water quality is necessary to accommodate important economic or social development in the relevant area. Notably, the anti-degradation rule does not limit its application to point source discharges."

The EPD and City of Guyton now appeal to the state Supreme Court, which has agreed to review the case to answer two questions: What level of judicial deference should be afforded to a state agency in its interpretation of its own internal rules and regulations? And does the EPD's anti-degradation rule require an anti-degradation analysis before issuing a permit that will discharge pollutants from a "non-point source" into the waters of this state?

ARGUMENTS: Attorneys representing the state EPD and City of Guyton argue that the anti-degradation rule requires an extensive review process – and "anti-degradation analysis" – before allowing a discharge that will lower the quality of certain surface waters. "In isolation, the rule's text could be read to suggest that this requirement applies whatever the source of the discharge," the attorneys argue in briefs. But that reading, which the Court of Appeals adopted, "would impose this costly regulatory process on innumerable individuals, municipalities, and other entities engaging in widespread activities like farming and mining, since runoff from those activities, or even wastewater that percolates through soil, can degrade nearby waters." The rule's legal context forecloses that expansive reading, the attorneys contend. EPD adopted the anti-degradation rule because the federal Environmental Protection Agency (EPA) required it as part of the state's obligations under the federal Clean Water Act. That Act does not authorize EPA to regulate discharges of pollutants from "non-point sources," such as runoff from agriculture or mining, or such as the wastewater discharged by the City of Guyton's land application system at issue in this case, which percolates through vegetation and soil and

eventually makes its way to groundwater. EPA's required rule cannot – and thus EPD's rule does not – require anti-degradation analysis for non-point sources. "Moreover, the Court of Appeals' contrary reading would dramatically expand the regulatory landscape with the clear textual commitment one would expect to effect such an expansion," the governments' lawyers argue. "For these reasons and more, the director of EPD reasonably (and indeed, correctly) interpreted the rule to require anti-degradation analysis only for discharges from point sources to surface waters." Furthermore, great deference should be afforded to the Department of Natural Resources' interpretation of its own administrative rule as it has "expertise, knowledge, and understanding that is simply not available to the courts," the attorneys argue.

Barrow's attorney argues that the Court of Appeals ruled correctly and that in "deciding whether an anti-degradation analysis is required for non-point source discharges to high-quality surface waters, this Court only needs to employ the ordinary rules of statutory and regulatory construction. Because those rules do not lead to any ambiguity or absurdity, the Court should apply the plain language of the statute and regulation," which states the discharge must comply with "all water quality standards," including the anti-degradation rule. That rule "prohibits the degradation of any high-quality surface waters unless the EPD determines such degradation is 'necessary to accommodate important social or economic development,'" the attorney argues. EPD's anti-degradation rule applies to point and non-point source discharges and the division's position "is plainly erroneous." "There is no context or reasonable interpretation that could authorize allowing a non-point source to degrade high-quality surface waters without undertaking an anti-degradation analysis." Finally, EPD is not entitled to deference in this case, the attorney contends. "Courts do not defer to agency interpretations of unambiguous statutes and regulations," and even the City of Guyton's attorney has characterized the anti-degradation rule as "unambiguous."

Attorneys for Appellants (EPD, Guyton): Christopher Carr, Attorney General, Isaac Byrd, Dep. A.G., Margaret Eckrote, Sr. Asst. A.G., Suzanne Osborne, Sr. Asst. A.G., Andrew Pinson, Solicitor General, Ross Bergethon, Dep. Sol. Gen., Jameson Bilsborrow, Asst. A.G., Ray Smith
Attorney for Appellee (Barrow): Jon Schwartz

NORDAHL V. THE STATE (S18G0947)

A man who pleaded guilty to several counts of burglary is appealing a Georgia Court of Appeals opinion upholding his enhanced sentence as a repeat offender that was based on previous out-of-state convictions.

FACTS: In 2013, **Blane Nordahl** was charged in a **Fulton County** indictment with three counts of burglary, one count of attempted burglary, and four counts of burglary in the first degree. In June 2016, the State filed notice that it intended to seek punishment of Nordahl as a recidivist – or habitual offender – under Georgia Code § 17-10-7, based on Nordahl's previous convictions in New York and New Jersey on charges of burglary and also based on his federal conviction of conspiracy to transport stolen goods. Nordahl pleaded guilty to the charges but challenged the State's request for the harsher recidivist punishment.

Georgia Code § 17-10-7 states that anyone convicted of three felonies who commits a fourth offense, must "serve the maximum time provided in the sentence of the judge based upon such conviction and shall not be eligible for parole until the maximum sentence has been served." Under the statute, included among the three felonies are those for which a person has

been convicted not only under Georgia law but also "under the laws of any other state or of the United States…which if committed within this state would be felonies." The trial judge decided that Nordahl's prior convictions were for crimes that in Georgia amounted to burglary and conspiracy to commit felony theft by receiving stolen property. The judge sentenced Nordahl as a recidivist to concurrent terms of 20 years in prison for each of the three burglaries with the first 10 years to be served in prison and the balance suspended; 10 years in prison for the attempted burglary; and 25 years in prison for each of the four first degree burglaries with the first 10 years to be served in prison and the balance suspended. In summary, the court imposed on Nordahl a sentence of 25 years to serve 10 as a recidivist (with the balance suspended.) Nordahl then appealed to the Court of Appeals, Georgia's intermediate appellate court, arguing that the State failed to provide sufficient notice of its intent to seek recidivist punishment. Specifically, he claimed that the indictment should have included a recidivism count, arguing that any fact that increases the penalty for a crime must be submitted to a jury. He also argued the appellate court failed to establish that his prior federal conviction was a crime, which, if committed in Georgia, would be considered a felony.

The Court of Appeals upheld the lower court's ruling, focusing on the "conduct" underlying the prior convictions rather than on the "elements" of the prior crimes. The conduct approach "requires the trial court to look only to the fact of conviction in the statutory definition of the prior offense" and not to the actual facts of the defendant's prior crime. The appellate court explained that under its1998 decision in *Almendarez-Torres v. United States*, the U.S. Supreme Court held that the Sixth Amendment does not require that a defendant's recidivism be treated as an element of an offense to be determined by a jury. And in its 2000 decision in *Apprendi v. New Jersey*, the high court reiterated that, "*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

Nordahl now appeals to the state Supreme Court, which has agreed to review the case to determine whether the Court of Appeals' approach to deciding whether a prior federal conviction or a prior out-of-state conviction was for a crime that would be a felony in Georgia violates the Sixth Amendment to the Constitution. The Sixth Amendment guarantees a number of rights of criminal defendants such as the right to a speedy and public trial and the right to be informed of the nature and cause of the accusation.

ARGUMENTS: Nordahl's attorney argues the Court of Appeals erred. Under its ruling, the appellate court held that the State provided sufficient notice of its intent to seek recidivist punishment even though the indictment did not include a recidivism count. Its use of the "conduct approach" in deciding whether a prior out-of-state or federal conviction was for a crime that would be a felony under Georgia law, violates the Sixth Amendment, the attorney argues. The Court of Appeals explicitly refused to apply an "elements-only" test, asking only whether the State showed that Nordahl's prior convictions were for "conduct which would be considered felonious under the laws of this state." But it was not enough just to prove he had a prior conviction. Rather, the "elements" of his prior convictions had to be decided by a jury, the attorney contends. "The approach used by the Georgia Court of Appeals is the exact opposite of the approach required by the U.S. Supreme Court," the attorney argues, referring to the high court's 2016 decision in *Mathis v. United States*. The appellate court "made no mention whatsoever of the 'serious Sixth Amendment concerns' that arise from using an approach other

than the 'elements-only' approach. Those 'serious Sixth Amendment concerns' make the Court of Appeals approach unconstitutional." "In short, to talk about a conviction – the statutory language here in Georgia – is to only talk about *elements*," Nordahl's attorney argues. "Any other course that this Court takes would be a violation of the Sixth Amendment."

The State, represented by the Attorney General's office, argues that under *Almandarez-Torres*, "the fact of a prior conviction is not an 'element' that must be found by a jury." Nordahl "has no protected Sixth Amendment interest in a mandatory minimum sentence aggravated *only* by prior convictions." Under *Apprendi*, the exception is that "any fact ***other than a prior conviction***" that is sufficient to increase the sentence "must be found by a jury, in the absence of any waiver of rights by the defendant." In other words, "Prior convictions need not be alleged or found by the jury beyond a reasonable doubt," the State contends. "Since the notice and jury trial protections of the Sixth Amendment are not implicated by proof of the ***fact*** of a prior conviction for recidivist sentencing purposes, the Court of Appeals did not violate Nordahl's Sixth Amendment rights by affirming the sentencing court's determination that Nordahl's federal conviction amounted to a Georgia felony, based on a conduct-based analysis."
Attorney for Appellant (Nordahl): Bruce Harvey
Attorneys for Appellee (State): Paul Howard, Jr., District Attorney, Lyndsey Rudder, Dep. D.A., Marc Mallon, Sr. Asst. D.A.

WILKES & MCHUGH, P.A. ET AL. V. LTC CONSULTING, L.P. ET AL. (S19A0146)

An out-of-state law firm is appealing a **Cobb County** court's denial of its motion to dismiss a lawsuit against it filed by three nursing home companies.

FACTS: In 2016, **Wilkes & McHugh** and one of its attorneys took out three advertisements in local newspapers in Georgia regarding three nursing homes: Rockdale Healthcare Center (owned by **LTC Consulting, L.P.**), Powder Springs Transitional Care and Rehab (owned by 3460 Powder Springs Road Associates, L.P.), and Bonterra Transitional Care and Rehab (owned by 2801 Felton Avenue, L.P.) At the top of each of the ads, which appeared in newspapers in Cobb County and Rockdale County, were the words, "IMPORTANT NOTICE." The ads stated that each nursing home "has been cited" for various regulatory violations uncovered by the annual surveys that the Georgia Department of Community Health conducted as required by federal law. The nursing homes complained that many of the citations in the ads were several years old and since had been remedied. The ads did not disclose that no harm had resulted to any patients. Rather they implied, the nursing homes claimed, that the nursing homes' residents may have suffered "bedsores," "broken bones," and "death" as a result of the cited deficiencies.

In October 2017, the nursing homes sued the law firm and attorney Gary Wimbish, alleging that the ads were false, fraudulent, deceptive, and misleading, and that they failed to comply with the requirements of Georgia Code § 31-7-3.2 (j), which restricts the use of nursing home survey report data in advertisements unless specific disclosures accompany the ads. The nursing home companies sought a court-ordered injunction to stop the ads based on Wilkes & McHugh's violations of the Georgia Uniform Deceptive Trade Practices Act. Georgia law Under § 31-7-3.2 (j), an advertiser must state the "number of findings and deficiencies cited in the statement of deficiencies on the basis of the survey and a disclosure of the severity level for each finding and deficiency." The statute also requires an advertiser referencing a survey to include a

"disclosure of whether each finding or deficiency caused actual bodily harm to any residents and the number of residents harmed thereby." The nursing homes argued the ads failed to follow these directives.

On Oct. 20, 2017, the trial court issued a temporary restraining order against Wilkes & McHugh pending a hearing. On Nov. 9, the day before the scheduled hearing, Wilkes & McHugh filed a motion to dismiss/strike the nursing homes' motion for injunctive relief under Georgia's Anti-SLAPP statute. SLAPP stands for "Strategic Lawsuit Against Public Participation" and describes a lawsuit that is filed to silence or intimidate critics. On Nov. 10, 2017, the trial court ruled against the law firm and denied McHugh's motion to dismiss the lawsuit based on the Anti-SLAPP statute. The trial court ruled that the nursing homes' complaint "did not violate and does not come within the ambit of the Anti-SLAPP statute" and that the plaintiffs, i.e. the nursing homes, "have demonstrated a probability of prevailing on their claim." Wilkes & McHugh now appeals to the state Supreme Court.

ARGUMENTS: "This case involves a misguided effort by three nursing home companies to suppress constitutionally protected advertising speech concerning a state agency's findings of health and safety deficiencies at nursing homes," the law firm's attorneys argue in briefs. "Such speech enjoys extensive protections under state and federal law," including the First Amendment of the U.S. Constitution and Georgia's Anti-SLAPP statute. The nursing homes' claims against the law firm should be struck based on the Anti-SLAPP statute because they cannot "establish that there is a probability that they will prevail on the claims," the law firm argues. First, the trial court erred by applying an incorrect legal standard. "The lower court held that Plaintiffs had shown a probability of success on the merits simply because Plaintiffs had filed a verified complaint and had obtained an ex parte temporary restraining order. But these facts are irrelevant to the merits of Defendants' motion, which had not been filed at the time these procedural events occurred. Under both the Anti-SLAPP statute and Georgia Code § 9-11-12 (b) (6), the lower court was required to reach the substantive challenges that Defendants had raised to the legal basis for Plaintiffs' claims. Instead the trial court effectively sidestepped the legal grounds of Defendants' Motion." Second, the trial court erred in denying the law firm's motion. The nursing homes' claims "fail as a matter of law on both constitutional and statutory grounds," and the exclusive remedy under Georgia for claims alleging false advertising is an action for defamation. "For the sake of judicial economy, and to protect the free speech rights implicated by Defendants' motion, this Court should reach these substantive arguments, reverse, and remand with instructions that Plaintiffs' claims be struck or dismissed," the law firm's attorneys argue.

The trial court correctly ruled that it would not dismiss the nursing homes' lawsuit based on the Anti-SLAPP statute, the attorneys for the nursing homes argue. Wilkes & McHugh's claims are not covered by the Ati-SLAPP statute. In their brief, the law firm "makes no mention of the threshold inquiry necessary to trigger the Anti-SLAPP statute, i.e. whether the claim arises from any act which could reasonably be construed as an act in furtherance of the person's right of petition or free speech in connection with an issue of 'public interest or concern,'" the attorneys argue. These ads were not made in connection with an issue of public interest or concern, and simply referencing government survey data does not serve a public interest, as the law firm claimed. "Instead, the advertisements concerned a purely commercial endeavor by Appellants [Wilkes & McHugh] to generate business," the attorneys argue. The trial court also

correctly reached the second prong of the Anti-SLAPP statute, finding that there is a probability the nursing homes will prevail on the claim. "If as here, the trial court finds that there is a probability that the plaintiff will prevail on the underlying claim, then the anti-SLAPP motion must be denied. Once the court denies the anti-SLAPP motion, all other matters are stayed pending the outcome of a direct appeal of the anti-SLAPP ruling."
Attorneys for Appellants (Wilkes): Leighton Moore, Meredith Watts
Attorneys for Appellees (Nursing homes): Jason Bring, Kara Silverman

2:00 P.M. Session

LUCKIE V. BERRY, WARDEN (S19A0100)

A man convicted in **Fulton County** and sentenced to 30 years in prison for possession of heroin with intent to distribute is asking this Court to void his 2005 convictions due to the ineffective assistance of counsel he received in violation of his constitutional rights.

FACTS: The night of June 1, 2004, **Patrick Luckie** was arrested by Atlanta Police Department officers in the James P. Brawley Drive area near the Georgia Dome. At trial, two officers testified that they were patrolling the area known for drug activity when they saw Luckie walking through a parking lot. After shining a spotlight on Luckie, the officers testified they saw him throw down a bag which they discovered contained 13 smaller bags of a white substance later determined to be heroin. They arrested Luckie and charged him with possession with intent to distribute and abandonment of a controlled substance. To rebut their testimony, Luckie's attorney called two defense witnesses, each of whom testified that he was with Luckie in the parking lot on that night and that Luckie had thrown a cigarette, not a bag, to the ground.

The cross-examination of one of the witnesses, Gerald Hurst, is at issue in this appeal. Both Hurst and Luckie had been arrested together on another occasion for possession of heroin. The charges arising from that incident were still pending against both men when Hurst appeared in this case as a witness for Luckie. The following interchange took place between the State's prosecutor and Hurst:

Q – "Mr. Hurst, isn't it true that you have a pending possession of heroin with intent to distribute indictment against you here in Fulton Superior Court?"

A – "I'm accused of that."

Q – "And it's currently pending in Fulton County Superior court?"

A – "Yeah."

It was clear the State offered the testimony to demonstrate that under Georgia Code § 24-9-68, "Hurst and Luckie had a relationship that would give Hurst a motive to lie for Luckie."

Luckie's trial attorney made only one objection to the State's evidence of Hurst's pending charge: that Hurst's charge was not a conviction and therefore was inadmissible. The prosecutor argued the pending charge "goes to the motive of the witness testifying" but offered no additional information to support its argument. Luckie's attorney failed to object on the basis that the testimony was not proof of any relationship between him and Hurst. During the State's closing argument, the prosecutor again referred to Hurst's pending charge, alleging it was the reason Hurst felt compelled to testify: "And Mr. Hurst is here to testify for his friend. Mr. Hurst

knows he's got a pending heroin case, and he might need some help with his pending possession of heroin with intent to distribute. Let's stick together."

Following the two-day trial, the jury convicted Luckie and he was sentenced as a recidivist – or repeat offender – to 30 yearsin prison. Luckie appealed to the Georgia Court of Appeals, which upheld his convictions although stated twice in its opinion that it was "constrained" to do so. The state's intermediate appellate court noted that "Luckie might well be right that the specific testimony elicited at trial was not probative of any motive to testify favorably for Luckie." The appellate court noted that the State's questioning and the testimony elicited from Hurst made no reference to the fact that Luckie was present and arrested along with Hurst in the other incident. The Court of Appeals observed that "no one pointed out to the trial judge the rather obvious impossibility of proving a relationship between Hurst and Luckie by asking questions about Hurst having been arrested on another occasion without making any mention of the fact that Luckie too was present and arrested at the same time."

In 2015, Luckie filed a petition for a "writ of habeas corpus." Habeas corpus is a civil proceeding that allows already convicted prisoners to challenge their conviction on constitutional grounds in the county where they're incarcerated. They generally file the action against the prison warden, who in this case was **Walter Berry**. Following a hearing, in 2016, the habeas court denied Luckie's petition. Luckie now appeals to the state Supreme Court, which has agreed to review the case to address one issue: whether Luckie received "ineffective assistance of counsel" at the appellate level based on the attorney's failure to raise trial counsel's ineffectiveness for failing to object to the State's examination of a defense witness regarding that witness's pending drug charge.

ARGUMENTS: "This Court must reverse the habeas court's ruling because appellate counsel neglected to raise trial counsel's ineffectiveness in failing to properly object to the introduction of a defense witness's pending drug charge," Luckie's attorneys argue in briefs. "Appellate counsel's failure to raise ineffective assistance of counsel was objectively unreasonable and undermined the reliability of Mr. Luckie's direct appeal." This Court also should find that the State violated Luckie's constitutional rights by presenting evidence of Luckie's silence upon his arrest, allowing the jury to infer that the drugs police recovered belonged to Luckie. "The right to remain silent is a fundamental tenet of American constitutional jurisprudence," the attorneys argue. "The State's violation of Georgia's 'bright-line' prohibition against commenting on a defendant's silence at trial affected Mr. Luckie's substantial rights, resulting in structural error." Luckie's attorneys ask the high court to reverse the habeas court's denial of his petition or, as an alternative, remand the case to the habeas court to determine whether Luckie received ineffective assistance of counsel from his appellate attorney.

The State, represented by the Attorney General's office, argues that the habeas court properly denied Luckie's habeas petition. "In reviewing the grant or denial of a habeas corpus petition, this Court accepts the habeas court's factual findings and credibility determinations unless they are clearly erroneous,…" the attorneys argue in briefs. Here, Luckie has failed to satisfy the two prongs for determining ineffective assistance of counsel outlined in the U.S. Supreme Court's 1984 decision in *Strickland v. Washington*. In order to prevail, 1) counsel must have performed deficiently, and 2) but for that deficient performance, there is "a reasonable probability" that the outcome of the trial would have been different. As to the argument concerning a purported comment about Luckie's silence, Luckie's attorney failed to preserve the

argument for review as it was not raised first in the trial court. Alternatively, it "provides no basis for relief in habeas corpus," the State argues. The Supreme Court should affirm the habeas court's denial of relief.

Attorneys for Appellant (Luckie): Sarah Gerwig-Moore, J. Scott Key
Attorneys for Appellee (State): Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Crowder, Asst. A.G.

KALLON V. THE STATE (S19A0094) and THE STATE V. TURNQUEST (S19A1057)

At issue in these related appeals is whether police must issue *Miranda* warnings before administering breath tests to those charged with Driving Under the Influence (DUI). The facts in both cases are similar, although the trial courts reached different conclusions.

FACTS (S19A0094): In Jan. 2017, **Francis Gerard Kallon** struck a curb while driving in **Gwinnett County**. Kallon called a tow truck, but when the tow truck arrived, the driver found Kallon unconscious and called police. After waking Kallon by knocking on his window, police noticed an odor of alcohol and observed that Kallon's eyes were bloodshot and glazed. The officer had Kallon perform the standardized field sobriety evaluations, which included the Horizontal Gaze Nystagmus evaluation, the Walk and Turn evaluation, and the One-Leg Stand evaluation. Kallon performed poorly on all three. Immediately upon placing Kallon under arrest, the officer read Kallon the state's "Implied Consent Notice" from his state-issued card. The notice states:

> "Georgia law requires you to submit to state administered chemical tests of your blood, breath, urine, or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing, your Georgia driver's license or privilege to drive on the highways of this state will be suspended for a minimum period of one year. Your refusal to submit to the required testing may be offered into evidence against you at trial. If you submit to testing and the results indicate an alcohol concentration of 0.02 grams or more, your Georgia driver's license or privilege to drive on the highways of this state may be suspended for a minimum period of one year…Will you submit to the state administered chemical tests (designate which tests) under the implied consent law?"

The officer designated a breath test, and Kallon responded "yes, sir," with no further discussion. The officer did not read Kallon *Miranda* warnings or discuss his right against self-incrimination. Kallon was charged with DUI (Per Se), DUI (Less Safe), and Failure to Maintain Lane.

Prior to trial in Gwinnett County State Court, Kallon's attorney filed a motion to suppress his breath test results under Georgia Code § 24-5-506 (a) which states that, "No person who is charged in any criminal proceeding with the commission of any criminal offense shall be compellable to give evidence for or against himself or herself." The trial court denied Kallon's motion. In March 2018, Kallon proceeded to a "bench trial" – before a judge with no jury – and was convicted on all counts. He was sentenced to 12 months on probation and required to perform community service, attend an alcohol awareness class, and pay an $800 fine. He now appeals to the Georgia Supreme Court.

FACTS (S19A0157): In March 2017, an officer with the Lawrenceville Police Department responded to a single-vehicle wreck in Gwinnett County involving **Stephen**

Turnquest. The officer initiated an impaired driving investigation and ultimately developed probable cause to arrest Turnquest for DUI. After placing Turnquest under arrest, the officer read him Georgia's age-appropriate Implied Consent Notice as stated in Georgia Code § 40-5-67.1 (b) (2). Turnquest gave his consent to provide a breath sample. At no time did the officer deliver *Miranda*-like warnings, informing him that he had the right to remain silent, anything he said could be used against him in court, he had the right to an attorney, and one would be appointed for him if he couldn't afford it. Prior to trial, Turnquest's attorney filed a motion to suppress the admission of his State breath test results, based on his Georgia constitutional and statutory right against self-incrimination. Following a hearing, the trial judge ruled in Turnquest's favor, granting his motion and finding that the breath test was administered in violation of his statutory and constitutional rights against self-incrimination because the test was conducted in the absence of *Miranda*-style warnings. The State, represented by the Solicitor-General's office, now appeals that pre-trial ruling to the state Supreme Court.

Although the judges reached different conclusions in Kallon and Turnquest, both appeals involve a constitutional challenge to Georgia's Implied Consent statutes.

ARGUMENTS (Kallon and Turnquest): Attorneys for Kallon and Turnquest argue that in its 2017 decision in *Olevik v. State,* the state Supreme Court ruled that a state-administered breath test is an "act to produce evidence" that is protected by Georgia's right against self-incrimination. "An officer must read *Miranda* warnings before requesting that an in-custody suspect perform an act to produce evidence," the attorneys argue in briefs. "Our courts require *Miranda* warnings and a waiver of the suspect's right against self-incrimination before an officer may request that an in-custody suspect perform an act to produce evidence, including Alco-sensor breath testing." Under the constitutional and statutory law of Georgia, an arrestee may not be compelled to do an act that is incriminating. "Georgia's Implied Consent Notice cannot substitute for a *Miranda* warning," the attorneys argue. "Georgia's Implied Consent Notice completely fails to advise a suspect of his right against self-incrimination, the **constitutional** right to refuse the requested breath test, or even that the evidence he provides if he waives his right against self-incrimination – the breath test results – will be used against him at trial. The notice fails to inform a suspect that he has a right to counsel. It further advises the suspect that if he does invoke his right against self-incrimination, the invocation of his constitutional right will be admissible at trial." "Thus, prior to requesting that Turnquest submit to a state-administered breath test, the officer at issue should have given Turnquest prophylactic warnings similar to those outlined in *Miranda,*" Turnquest's attorney argues.

The State argues in both cases that neither Kallon's nor Turnquest's "constitutional protection against compelled self-incriminating 'testimony' nor his statutory privilege against compelled, self-incriminating 'evidence' was violated in this case. As an initial matter, the precedents applicable to this appeal have diverged from our state's historical interpretation of the laws at issue by treating Georgia's statutory protections as if they were coextensive with [i.e. equal to] our state Constitution. This flawed precedent must therefore be clarified and restored. Once the applicable law is clarified, it becomes abundantly clear that the statutory protections of § 24-5-506 (a) do not even *apply*" to either man's situation, and certainly do not mandate the relief either man seeks. Kallon further asks the high court to declare that after its decision in *Olevik,* Georgia's Implied Consent Notice must be preceded by a *Miranda*-style warning. "However, to do so would require this Court to expand the holding of *Olevik* beyond its actual

contours – and there is no need to do so, because our implied consent laws already satisfy the requirements of *Miranda.*" Therefore, the State argues, the Supreme Court should uphold Kallon's conviction and affirm the trial court's decision to admit his breath test results on both constitutional and statutory grounds. Meanwhile, it should find the trial court erred in Turnquest's decision to exclude his test results and reverse that ruling.
Attorneys for Kallon and Turnquest: Lance Tyler, Fakina Khan, Kendra Mitchell
Attorneys for State: Rosanna Szabo, Solicitor-General, Samuel d-Entremont, Asst. Sol.-Gen.