Supreme Court of Georgia
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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Tuesday, June 20, 2017

10:00 A.M. Session

CITY OF MARIETTA V. SUMMEROUR (S17G0057)

The City of Marietta is appealing a Georgia Court of Appeals decision in a case stemming from the City's condemnation of a man's property in **Cobb County**.

FACTS: According to the Court of Appeals, the record shows that in 2009, the voters of the City of Marietta approved a referendum for a $25 million parks bond, which included $3.75 million for the expansion of the Elizabeth Porter Recreation Center. At the time of the referendum, Ray D. Summerour owned commercial property on Allgood Road, where he had a small grocery store called "Brenda's Grocery Store." Located in the Baptist Town district of Marietta, which primarily serves low-income and minority populations, the store is adjacent to the recreation center's eastern border, and the City identified his property as one of nine it needed to acquire for the expansion. The City contacted Summerour, via letter, in June 2010, informing him of its interest in purchasing his property, and letting him know it had hired an appraiser to determine the value of his property. Subsequently the City sent Summerour a letter informing him the appraiser had valued his property at $85,000 and it offered to purchase it for that price. Summerour did not respond, and in October, the City sent another letter making the same offer. Again, Summerour did not respond.

In 2013, the City again sent a letter to Summerour expressing its interest in purchasing his property and stating that its current appraisal was $95,000 and that the small grocery on the story had an appraisal value of $46,700. The City offered to purchase the property for $141,700. In August 2013, Summerour sent a letter to the City saying the offer was lower than he expected and requesting a summary of the appraisal. He added he would be hiring his own appraiser and had learned by attending City Council meetings that the City was considering acquiring his property through eminent domain. Initially, the City did not respond to Summerour's correspondence, and on Dec. 4, 2013, Summerour sent the City another letter offering to sell the property for $375,000. The City responded in a Dec. 10, 2013 letter in which it increased its offer to $152,000, stating that unless Summerour provided his own certified appraisal, the current offer likely would be its highest. It asked Summerour to respond by Dec. 18, 2013. On Dec. 17, Summerour hand delivered a letter to the City, rejecting its offer but requesting a meeting so the parties could discuss the differences in their appraisals. During the next several months, Summerour hired an attorney and an appraiser and requested that the City postpone any formal action until his appraiser determined the property's value. The City complied, and informal discussions continued, with the City stressing it did not believe that formal settlement meetings would be productive unless Summerour first provided the appraisal value of his property from his licensed appraiser. On May 8, 2014, Summerour's attorney wrote the City complaining that the City had never provided copies of its appraisals, or summaries of them, as required by Georgia Code § 22-1-9 (3). Soon after, the City delivered a summary of its appraiser's report to Summerour. In July 2014, the City sent a full appraisal report, dated July 17, 2013, and offered to purchase his property for $139,400. Summerour rejected the offer, negotiations broke down, and in January 2014, the City wrote a letter to Summerour informing him it was moving forward to acquire his property through condemnation. In October 2014, the City filed a condemnation petition to acquire Summerour's property in Cobb County Superior Court. Following a hearing, the court-appointed "special master" (a lawyer appointed by the judge to assist the judge in a particular case) condemned the property and awarded Summerour $225,000. After both parties appealed, the trial court held its own hearing and adopted the special master's findings. Summerour then appealed to the Court of Appeals, which ruled that initially, the City failed to provide a summary of the basis for its offer in violation of § 22-1-9 (3). As a result, the Court of Appeals threw out the trial court's ruling and sent it back to the trial court for further proceedings. In a pre-trial appeal, the City of Marietta now appeals to the Georgia Supreme Court, which has agreed to review the case to determine whether the appellate court misconstrued the statute by mandating pre-condemnation procedures that were not intended by the Georgia Legislature.

ARGUMENTS: The City's attorneys argue the Court of Appeals erred because the plain language of § 22-1-9 demonstrates that its provisions are guidelines, not mandatory prerequisites before condemning property. Even the preamble to the statute says that "all condemnations and potential condemnations shall, to the greatest extent practicable, be guided by the following policies and practices…." The provisions of this statute "are not intended as compulsory prerequisites to condemnation, but are specifically designated as guiding policies and practices meant to encourage voluntary acquisition of properties needed for public use," the attorneys argue in briefs. The Court of Appeals erred in determining that the City failed to comply with § 22-1-9 (3). "Both the special master and the trial court found that the City complied with the

policies and practices set forth in § 22-1-9 in its negotiations with Summerour," the City's attorneys argue. "Despite these findings, the Court of Appeals substituted its own judgment for that of the trial court and held that the City failed to comply with § 22-1-9 (3) because it did not provide Summerour with a summary appraisal of the subject property 'before the initiation of negotiations.'" Among other arguments, the Court of Appeals' ruling is also inconsistent with the legislature's recent update of the Open Records Act in 2012 (exempting public disclosure of real estate appraisals until the property is acquired or the proposed transaction has been terminated) and the state Supreme Court's 1992 ruling in *Black v. Department of Transportation*, which stated that records of the Department of Transportation could not be the subject of an Open Records request until the litigation was concluded. "Thus, it logically follows that the Legislature did not intend to require condemning authorities to disclose their appraisals at the outset of negotiations despite the language of § 22-1-9 (3) requiring the City to disclose the 'summary of the basis' for the amount offered," the City's attorneys argue. The City asks the state Supreme Court to throw out the Court of Appeals ruling and affirm the decision of the trial court and the special master and allow the case to proceed to trial over the value of the property.

Summerour's attorney argues the Court of Appeals ruled correctly. The statute, § 22-1-9, was passed by the General Assembly in 2006 as part of the "Landowners Bill of Rights" and "manifests a clear legislative intent to curtail certain perceived abuses in eminent domain," the attorney argues in briefs. In this case the City "knowingly and intentionally refused to comply with § 22-1-9 (3) for nearly four years. Moreover, the trial court upheld the special master's finding that the City had negotiated in good faith despite undisputed evidence to the contrary." The Court of Appeals correctly interpreted § 22-1-9 as mandatory and its analysis should be confirmed. This is a condemnation statute and it includes specific procedures for the exercise of eminent domain authority to condemn land. As the Georgia Supreme Court has noted over the years, statutes permitting use of the State's inherent power of eminent domain are strictly construed against the power of eminent domain and in favor of the private landowner. The second feature of the statute is its clear remedial purpose. It was enacted as part of the "Landowner's Bill of Rights" "to assure consistent treatment for property owners, and to promote public confidence in land acquisition practices." While the statute says the condemning authority must comply with the statute's terms "to greatest extent practicable," the language does not permit the condemnor to decide whether or not to comply, the attorney argues. Rather that language applies to circumstances that make literal compliance impossible. Similar language is used in other statutes. The Court of Appeals was correct in ruling that the City failed to comply with § 22-1-9 (3), which specifically states: "The condemning authority shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount it established as compensation." The City's "deliberate actions were precisely the harm that § 22-1-9 (3) was intended to correct," the attorney argues. "It was only when Summerour spent the money to employ an attorney and an appraiser did the City provide any useful information concerning its appraisal." However, the plain purpose of that requirement is to enable the parties to negotiate without imposing such costs on the landowner. "The consequence of the City's failure to comply with § 22-1-9 is that its condemnation must be set aside," Summerour's attorney argues.

Attorneys for Appellants (City): Douglas Haynie, Daniel White, Sarah Hegener
Attorney for Appellee (Summerour): Donald Evans, Jr.

DANIEL V. THE STATE (S17G0107)

A man is appealing his **Fulton County** burglary conviction, arguing the Georgia Court of Appeals was wrong to uphold a jury's guilty verdict because the judge refused to instruct jurors they also could have considered whether he was guilty of the less serious crime of criminal trespass.

FACTS: The evidence at trial showed that at 9:30 a.m. on Nov. 25, 2009, Desmond Daniel opened a fence gate of a family's home in East Point and knocked on the back door. When no one answered, Daniel broke in the door and entered an enclosed porch. He then attempted to remove the hinges of the door leading into the house, where the family had a number of valuable items, including a computer, television, video game consoles and leather goods. At the time, 11-year-old M.R. was home alone while both of his parents were at work. M.R. called 9-1-1 when he heard the disturbance. An officer with the East Point Police Department responded within two minutes. As he arrived, the officer heard a loud metal-on-metal noise as Daniel was still trying to gain entry through the back door. The officer confronted Daniel with his weapon drawn and ordered him to show his hands. Daniel came out from the porch with his hands up and said, "You got me." As the officer handcuffed him, Daniel offered to help turn in a criminal, saying, "I can get you a murderer." Daniel was charged with burglary for illegally entering the family's premises with the intent to commit a theft.

Following a November 2009 trial, the jury convicted Daniel of burglary and as a repeat offender, he was sentenced to 20 years, to serve 13 in prison. He then appealed to the Court of Appeals, which affirmed the lower court's decision in June 2016. The appellate court quoted its 2000 decision in *Hiley v. State,* which stated that a trial judge must instruct the jury on trespass as a lesser included offense of burglary "where the testimony of the accused, if believed, would negate an element of the crime of burglary…specifically, where the accused admits the unauthorized entry but denies the intent to commit a felony or theft." The Court of Appeals held that the State presented evidence from which the jury could infer an intent to steal and, noting that Daniel did not testify, held that there was no evidence that Daniel was merely seeking shelter.

Daniel now appeals to the Georgia Supreme Court, which has agreed to review the case to deal with one issue: whether the Court of Appeals was wrong to rule that in a prosecution for burglary, a defendant must present evidence to counter the "inference of specific intent" to commit burglary in order to receive a jury instruction on the lesser-included offense of criminal trespass.

ARGUMENTS: Daniel's attorney argues the Court of Appeals erred by ruling it was proper to refuse to instruct the jury on the lesser included offense of criminal trespass and to require Daniel to testify and present evidence that he did not intend to steal. "Whether or not Mr. Daniel had burglary's required intent to commit a theft is unusually difficult to say on this evidence," the attorney argues in briefs. "The jury could speculate that he did, or it could hold the State to its burden and maintain a reasonable doubt on that issue," and decide that he did not. "Under this evidence, the lesser included offense of criminal trespass was required." But the jury was not given the option. "It was instead forced into the difficult choice between acquitting a man who was obviously not entirely innocent, or convicting him of something for which he might not be precisely guilty. Had the jury been given the option of criminal trespass, there is

here an eminently reasonable probability that the jury would have chosen that option." Also, Daniel received "ineffective assistance of counsel" from his trial attorney, in violation of his constitutional rights, for her failure to renew her continuing objection to the judge's refusal to charge the jury on trespass. As a result, the jury was deprived of the opportunity to convict Daniel of the crime the evidence clearly proved. She made every effort to obtain the charge, but then "inexplicably stated that she had 'no' objections" after the jury was given no instruction on criminal trespass. "The jury was forced to determine Mr. Daniel's intent without any significant evidence," his attorney argues. "But the jury also knew that Mr. Daniel was not innocent. There is a reasonable likelihood that, had the jury been given the option, it would have chosen the lesser crime that the evidence actually established." This Court should reverse Daniel's conviction and order a new trial, his attorney argues.

The State, represented by the Fulton County District Attorney's office, argues the Court of Appeals ruled correctly, and the requested jury charge on criminal trespass "was not authorized because there is no evidence – direct or circumstantial – that Daniel had any unlawful purpose except the intent to steal valuables from the Baldwin dwelling." The Court of Appeals did not effectively rule that Daniel had to testify or present evidence to prove his intent. "In the Court of Appeals, Daniel argued the evidence was insufficient to exclude the reasonable hypothesis that he entered the porch and started removing the hinges of an interior door simply to seek shelter from the cold," the State argues in briefs. "There is direct evidence of Daniel's unauthorized entry, including his confessional outburst, 'You got me' upon being apprehended. But there is *no* direct evidence or testimony that Daniel was seeking shelter from the elements." Circumstantial evidence also did not authorize a finding that Daniel was only seeking shelter because it failed to show that the weather was inclement on Nov. 25. "Georgia law does not require testimony from the defendant as to his intent, and the Court of Appeals did not so hold," the State contends. Also, the Supreme Court should decline to review Daniel's claim that he received ineffective assistance of counsel, the State argues, as this "nowhere addresses how (or whether) the Court of Appeals erred in its statement of the law regarding the absence of evidence to support a charge on criminal trespass," which the Supreme Court ordered the parties to address. Furthermore, "As the trial court would not have been authorized to charge the jury on criminal trespass as a lesser included offense of burglary, it logically follows that [Daniel] cannot show that his trial counsel's failure to request such a charge was ineffective," the State argues, quoting the Georgia Court of Appeals' 2013 decision in *Dillard v. State.* "Consequently, the Court of Appeals did not err in affirming the trial court's denial of a new trial based on ineffective assistance."

Attorney for Appellant (Daniel): Gerard Kleinrock
Attorneys for Appellee (State): Paul Howard, Jr., District Attorney, Lyndset Rudder, Dep. D.A., Marc Mallon, Sr. Asst. D.A.

RES-GA MCDONOUGH, LLC V. TAYLOR ENGLISH DUMA, LLP ET AL. (S17A1125)

A company is appealing a **Fulton County** court ruling that dismissed its legal malpractice lawsuit against a group of lawyers.

FACTS: RES-GA McDonough, LLC is a six-year-old Limited Liability Company. A limited liability company is one whose owners have limited liability and their individual assets cannot be used to satisfy the company's debts or obligations. In May 2015, RES-GA

McDonough, LLC filed a legal malpractice lawsuit against the law firm of Taylor English Duma, LLP and individual attorneys John J. Richard and Donald P. Boyle, Jr. The lawsuit arose from the attorneys' representation of RES-GA in a prior lawsuit to collect amounts owed to RES-GA on a 2006 promissory note and guaranties of the note. The promissory note and guaranties were originally held by a federally insured bank that became insolvent and was placed into Federal Deposit Insurance Corporation (FDIC) receivership. RES-GA obtained the note and guaranties in 2010 by "assignment" – or transfer – from an FDIC assignee/transferee, Multibank 2009-1 RES-ADC Venture, LLC, which was a plaintiff in a pending action to collect on the note and guaranties. After being substituted as the plaintiff in the pending action, RES-GA's attorneys added a claim in 2012 against the personal guarantor, Michael Langino, under the Uniform Fraudulent Transfers Act (former Georgia Code § 18-2-70). RES-GA alleged that in 2008, Langino transferred certain real estate to his wife, Debbie Langino, so it would be outside the reach of Michael's creditors. Res-GA claimed it informed its attorneys of the fraudulent transfer when it discovered it in June 2012. In August 2012, the attorneys filed an amended complaint to raise the Uniform Fraudulent Transfers Act claim. But they did not file a motion to add Debbie Langino to the claim until five months later. By the time they did so, and while the motion to add Debbie was pending, she sold the property to a third party, Kent Starke. She transferred half the proceeds to her husband who then spent it. In March 2013, the trial court added Debbie as a defendant in the underlying action. The attorneys also filed a motion to add Starke in an effort to void the sale of the property. But the court denied that motion. In May 2013, the court entered a judgment against Michael Langino for $1.351 million plus interest and fees. RES-GA's legal malpractice lawsuit alleged that, because its attorneys had negligently handled the prior lawsuit, RES-GA was damaged by the inability to collect its judgment as Langino had fraudulently transferred his only asset. In its lawsuit against the law firm and attorneys, RES-GA sought damages for legal malpractice, breach of fiduciary duty, punitive damages and attorneys' fees. The attorneys filed a motion to dismiss the case, which the trial court granted on the ground that RES-GA could not prove that the attorneys' malpractice in the prior lawsuit was the "proximate cause" – or the direct cause – of the damage alleged by RES-GA. The trial court also ruled that the provisions of Georgia Code § 44-12-24 against assignment of fraud actions precluded RES-GA from bringing the prior lawsuit and therefore, RES-GA had no standing to pursue the fraud action against Langino and no basis to prove that legal malpractice in that action caused the judgment to be uncollectible.

RES-GA now appeals to the state Supreme Court, arguing that the trial court erred by rejecting its argument that it had standing to bring the prior action against Langino because the federal Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as it applies to the assignees, Multibank and subsequently RES-GA, preempts the non-assignment provisions of Georgia Code § 44-12-24.

ARGUMENTS: RES-GA's attorneys argue the trial court made a number of errors, including by dismissing its complaint, which sufficiently alleged a claim due to the attorneys' legal malpractice. "In the instant case, Appellant's [i.e. RES-GA's] legal malpractice claim was based on the attorneys' failure to timely and properly handle Appellant's Uniform Fraudulent Transfer Act (UFTA) claim in the underlying action," the attorneys for RES-GA's appeal argue in briefs. "The complaint was more than sufficient to allege a claim for legal malpractice, and thus, the trial court erred by dismissing that claim." The company's complaint clearly alleged

that its damages – the loss of its right to use the property to satisfy at least part of its judgment against Langino – "were caused by the attorneys' gross mishandling of Appellant's UFTA claim." Had it not been for the attorneys' failures to a) timely file a motion to add Debbie as a defendant in the action against her husband, b) timely raise a UFTA claim against Debbie, and c) timely record formal notice of the pending legal action, RES-GA would have been able to void the transfer of the property from Langino to his wife, prevent Debbie's sale of the property to a third party, and prevent the wasting of any resulting sale proceeds. Among other arguments, RES-GA's attorneys contend the trial court used the wrong legal test to determine whether the company's legal malpractice claim sufficiently alleged proximate cause. Even if it did use the right test, "that test was not correctly applied," the attorneys argue. Furthermore, the Uniform Commercial Code (UCC) preempted Georgia Code § 44-12-24 and gave RES-GA standing in the prior lawsuit because the promissory note and guaranties were negotiable instruments governed by the Uniform Commercial Code, the company's lawyers argue. Although § 44-12-24 states that, "A right of action…for injuries arising from fraud to the assignor may not be assigned," or transferred, RES-GA's rights under the Uniform Commercial Code preempted § 44-12-24, its attorneys contend. Among other arguments, RES-GA argues that the trial court still erred because under the federal Financial Institutions Reform, Recovery, and Enforcement Act of 1989, RES-GA was an assignee/transferred of the FDIC with regard to the loan, "and thus, it stood in the shoes of the FDIC and had the right to collect the judgment against the debtor, including by seeking to void the fraudulent transfer." Because § 44-12-24 conflicts with the provisions of the federal Financial Institutions Reform act, § 44-12-24 was preempted and RES-GA had standing, its appeal attorneys argue. Finally, its complaint sufficiently alleged a claim for breach of fiduciary duty that was not in duplication of its legal malpractice claim, the attorneys contend.

"The issue in this appeal is simple: In a legal malpractice case, a plaintiff is required to prove that the underlying claim was valid," the attorneys for Taylor English Duma LLP argue in briefs. "RES-GA's underlying UFTA claims were never valid. Therefore, nothing these attorneys [i.e. attorneys being sued for malpractice] had any impact on the UFTA claims." The trial court correctly ruled that RES-GA's complaint failed to state a malpractice claim because RES-GA lacked standing to pursue the UFTA claim in the underlying action. "At all times, RES-GA, as an assignee of debt, lacked standing to pursue UFTA claims in the underlying action," the attorneys contend. The trial court also did not use the wrong legal test and "did not err when concluding that RES-GA cannot be harmed by losing a 'right' it never had," the attorneys argue. Nor did the Uniform Commercial Code give RES-GA standing to bring UFTA claims in the underlying action. "RES-GA cannot use the Uniform Commercial Code to breathe life into a case that was never viable." "Georgia's adoption of the Uniform Commercial Code does not negate the existence of § 44-12-24, which specifically prohibits the assignment of fraud claims and therefore controls over the more general provisions of the UCC," the attorneys argue. RES-GA also is mistaken that the federal Financial Institutions Reform, Recovery, and Enforcement Act of 1989 preempts § 44-12-24 and provides standing in the underlying action. "Courts should not interpret federal law to preempt state sovereignty unless the federal law clearly compels the intrusion," the attorneys argue, quoting a 2014 Court of Appeals decision in *Gottschalk v. Woods*. The Financial Institutions Reform Act "does not clearly compel the intrusion that RES-GA suggests. In fact, by its very words, it is inapplicable." "The transfer/assignment in the

underlying action from Multibank to RES-Ga did not involve the FDIC; it involved the assignment of loan documents and the attempted assignment of the fraudulent transfer claim from one private, non-FDIC party (Multibank), to another private party (RES-GA)." The Financial Institutions Reform Act "does not address subsequent sales or assignments of a failed bank's assets from one private party to another." Finally, the trial court correctly ruled that RES-GA's complaint did not sufficiently allege an independent claim for breach of fiduciary duty, the law firm's attorneys argue. For one thing, "the damages claimed for the alleged breach of fiduciary duty are indistinguishable from those claimed for the alleged malpractice."
Attorneys for Appellant (RES-GA): Shawn Stafford, Emilie Denmark, Kate Klug
Attorneys for Appellees (Taylor): Dana Maine, Kevin Stone

THE STATE V. PRICE ET AL. (S17A1327)

The District Attorney is appealing a **Dougherty County** court ruling that when a murder case goes to trial against a number of defendants, cellphone evidence the State planned to use against them will be excluded.

FACTS: The record shows that **Kovarious Javan Price**, Demonta Montrell Price, Demetrice Lugene Price, Jr., Anthony Bernard Jackson, and Fredrico Raymon Kennedy were charged with the 2013 murder of Jamey Spurlock and the aggravated assault of Richard Corley. The Prices are brothers, and Kennedy is their uncle. The State hopes to prove at trial that on Dec. 22, 2013, Corley was driving his 1989 Honda Accord, accompanied by Spurlock, when he lost control of the car and they became stuck in an embankment on Silica Drive, a dirt road in Albany, GA. Corley called his mother and asked her to bring a chain to pull the car out of the embankment. She and Corley's wife came to Silica Drive in a Chevrolet pickup truck to extract the car. But once they pulled the car out, they realized it had a flat tire. As the women left to go get a car jack, they noticed a group of men walking toward Corley and Spurlock. According to the State, Corley was lying on his back partially under the car and had started working on it. He asked Spurlock to light a cigarette for him, and as Spurlock was getting the cigarette from the driver's side of the door, a man holding a gun approached and shot Spurlock in the back. Another armed man approached Corley, and while standing over Corley pointing a gun at him, demanded he hand over his belongings. Corley gave him his wallet and his white Samsung Galaxy S2 cellphone, which was enclosed in a black otter box cover. When the women returned after the shooting, they called 911 but emergency medical professionals were unable to save Spurlock and he died from the gunshot wound.

At issue in this appeal is Corley's cellphone. During their investigation, police found a cellphone matching the description of Corley's stolen phone in the possession of Laquacious Taylor. She told police that Kennedy and Jackson had given it to her on the night of Dec. 22, 2013 when the two came to her home, which was near the crime scene, shortly after the murder and robbery took place. She also overheard the two men discussing the murder and mentioning that Kovarious Price had shot a man before they gave her the phone for disposal. She told an investigator with the Albany Police Department they had removed the battery before giving it to her, but she later replaced it. On the phone, she saw a picture of a white male and a white female on the screen. Corley had told the investigator that his cellphone had a picture of his wife and himself. Corley and his wife are both white.

As the State planned to use this cellphone as evidence at trial, Jackson's defense attorney asked repeatedly to be able to view the phone. During at least two hearings well before the date of the trial, the trial court instructed the State to make the cellphone available to the defendants. At that point, the state gave no indication that the cellphone was unavailable. In the meantime, a number of other issues arose concerning the handling of the evidence in the case, including a detective's intentional decision not to preserve recordings of jailhouse phone calls which the State admitted could have been helpful to the defendants' case, and the police's failure to preserve recorded interviews of witnesses.

On Jan. 18, 2017 – five days before the trial was originally scheduled to start – the State notified the parties that the cellphone had been lost. On Jan. 20, Jackson's attorney filed a motion requesting that either the indictment be dismissed or that the evidence regarding the cellphone be excluded. The remaining defendants joined the motion. Following a hearing, the trial court denied their request to dismiss the indictment but excluded evidence of the cellphone in the trials of the defendants, stating that "all evidence related to the cellphone allegedly taken from Richard Corley is excluded from trial." The trial court listed eight reasons for its decision, including that police deliberately chose not to preserve jailhouse phone calls made by Jackson which could have contained evidence bolstering the defendants' innocence; police deliberately chose not to follow the department's rule for handling chain of custody documentation with regard to the cellphone; and police deliberately disregarded a court order to meet with defense counsel to allow examination of the cellphone. That same day, the State filed a notice to appeal the decision to the Georgia Supreme Court. Jackson then filed a motion to dismiss that appeal. Following a hearing, the trial court dismissed the State's notice of appeal, finding that the State did not have a right to appeal under Georgia Code § 5-7-1 (a) (5) because the motion being appealed had not been filed at least 30 days before trial. At the same time, the trial court said trial would proceed Feb. 6, 2017, and it severed the trials of the defendants, allowing the State to decide which trial it wanted first to pursue. On Feb. 3, 2017, the State filed an emergency motion in the state Supreme Court and on Feb. 6, this Court granted the motion, staying the trial court's order that dismissed the State's notice of appeal. The State now appeals the order excluding the cellphone evidence to the Georgia Supreme Court.

ARGUMENTS: The District Attorney's office, representing the State, argues that "the exclusion of the pertinent cellphone evidence in this matter is a clear abuse of discretion by the trial court. The trial court erred by finding "bad faith" and by "blindly concluding" that the defendants were prejudiced – or their case damaged – "although no actual prejudice was identified by the trial court." The reasons listed by the trial court are "erroneous and replete with mischaracterizations," the State argues. The court's order effectively strips the State of its duty and ability to introduce evidence that helps proves its case, and it further hamstrings the State from challenging any evidence on the cellphone or rebutting such evidence that might be introduced by Price and the others. The order restricting the State from using the cellphone evidence is "too broad," "demonstrates judicial bias," and should be overturned by the Georgia Supreme Court, the State argues.

Attorneys for Price and the other defendants argue the trial court did not err in its order to exclude certain testimony about the lost cellphone. The judge correctly conducted the balancing test required under Georgia Code § 24-4-403, which states that, "Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." As

the trial court stated in its order, the cellphone has "scant probative value." "Therefore, although the cellphone may be relevant to show that a cellphone may have been taken and delivered to Laquacious Taylor, the Court finds that the scant probative value is substantially outweighed by the danger of unfair prejudice to defendants." Here the trial court "saw and heard the testimony, and the credibility of the witnesses, and did not err in its alternative ground that the police acted in bad faith," the attorneys argue. The trial court did not abuse its discretion in ordering that the cellphone evidence be excluded. The Georgia Supreme Court should deny the State's appeal and affirm the trial court's order granting the motion to exclude the evidence, the attorneys argue.
Attorneys for Appellant (State): Gregory Edwards, District Attorney, M. April Wynne, Chief Asst. D.A.
Attorneys for Appellees (Price et al.): Troy Golden, Jeffrey Lee

2:00 P.M. Session

JONES V. MEDLIN, WARDEN ET AL. (S17A1291)
GARDINER V. MEDLIN, WARDEN ET AL. (S17A1292)
LUCCI V. MEDLIN, WARDEN ET AL. (S17A1293)

Three U.S. servicemen who are serving life prison sentences for the 1992 murder of a man in **Chatham County** are appealing a Wheeler County court ruling that State prosecutors did not improperly withhold evidence that would have been helpful to their defense.

FACTS: On Jan. 31, 1992, Stanley Jackson, an African-American, was shot and killed at about 10:00 p.m. while standing on a street corner in a crime-ridden neighborhood in Savannah. He was shot with a semi-automatic assault type weapon. Less than an hour later, Mark Jones, Kenneth Gardiner and Dominic Lucci, who were Army servicemen stationed at Fort Stewart, GA, were arrested for his murder. All three men are white. Following trial, in November 1992, all three were convicted of malice murder and possession of a firearm during the commission of a crime and sentenced to life in prison plus five years. In June 1994, the Supreme Court of Georgia upheld their convictions. According to the high court's opinion, the facts were as follows:

"Earlier on the day of the shooting, Jones approached a fellow serviceperson on base and asked to borrow certain heavy duty gear used for military maneuvers. She declined. They went on to discuss Jones' plans for the weekend. He told her that he was going to Savannah that night because 'he had somebody that he was going to shoot.' When asked who, he replied, 'I got a black guy up there I got to get.' She urged him to avoid trouble and warned him of the possibility of getting caught. He responded, 'The object is to not get caught.' Shortly after 10:00 p.m. that night, an eyewitness to the shooting heard rapidly repeating gunfire and observed a black 1992 Chevrolet Cavalier automobile come to a screeching halt at the intersection of East Broad and 33rd Street in Savannah. He observed two Caucasian men, later identified by him as defendants Gardiner and Jones, leaning out of the front and rear passenger windows firing guns. The car then sped away. A third person was driving. The body of the victim was found lying in the intersection. He died as a result of multiple gunshot wounds inflicted by a high-powered weapon such as an AK-47."

According to the 1994 Supreme Court opinion, "The three defendants were seen together by various witnesses in close proximity to, and within a short period of time, of the shooting." Other servicemen testified that Gardiner and Lucci were preoccupied with the fantasy role-playing game called Dungeons and Dragons, in which a team of assassins plot to kill people. The evidence against Lucci was circumstantial, although the proven facts "were consistent with Lucci's guilt and inconsistent with any reasonable theory of innocence," the Supreme Court ruled. "The evidence against Gardiner and Jones was both direct and circumstantial."

In May 2012, Jones, Gardiner and Lucci filed petitions 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 Jason Medlin.) The "habeas court" denied their petitions, but the Georgia Supreme Court reversed the ruling and sent the case back to the habeas court, stating that the petitioners "have raised an issue of arguable merit concerning the proper analysis of their claims of violations under *Brady v. Maryland.*" Under the U.S. Supreme Court's 1963 *Brady* decision, the suppression by the prosecution of evidence favorable to a defendant violates due process where the evidence is material either to guilt or punishment. In March 2016, the habeas court analyzed the prisoners' claims under *Brady* and again ruled against them, denying them relief, i.e. refusing to reverse their convictions. Jones, Gardiner and Lucci again appeal to the state Supreme Court, which granted their application to appeal.

ARGUMENTS: The attorneys for Jones, Gardiner and Lucci argue the habeas court erred by denying habeas relief based on their *Brady* claim and by therefore denying their right to due process of law as guaranteed by the U.S. and Georgia constitutions. The State failed to disclose a critical report documenting a strikingly similar incident that occurred after the three men were already in custody, the attorneys contend. Less than three hours after their arrest, white men with military style haircuts and carrying semi-automatic weapons drove through the Yamacraw Village public housing project, threatening "to shoot blacks who hung out on street corners." A citizen reported the incident to a police officer who wrote a report that made its way into the Stanley Jackson police case file. But the report was never disclosed to the defendants' defense counsel and only came to light after a 2010 Open Records Act request. At the habeas hearing, three police officers testified about the marked similarities between the Yamacraw incident and the Jackson murder. At trial, the three men maintained they had no involvement in Jackson's murder and were about 48 miles from the shooting following a wedding rehearsal dinner. Rather, the men were convicted "primarily on the testimony of one eyewitness, James White, who was 72 feet from the shooters' car, which was in a dimly lit intersection at night, and viewed the shooters at an angle with part of each face being blocked, in an incident that lasted mere seconds." At trial, when asked if Jones, Gardiner and Lucci were the shooters, White responded, "I'm positive." When asked if they were the ones he'd seen leaning out the window of the car from which the shots were fired, he responded, "Definitely." But years later, at the habeas hearing, White admitted he had lied when he identified the three, noting he could not see the faces of the shooters given the few seconds in which the incident took place, the darkness, the distance, and his terrified state. "White's testimony that he was unable to see the faces of the shooters was corroborated by two forensic experts who testified that given the conditions under which White witnessed the shooting, it was highly unlikely, if not impossible, for him to have been able to make an accurate identification," the men's attorneys argue in briefs. "The

undisputed failure to disclose the report of the Yamacraw incident and the failure to disclose White's inability to identify Appellants constitute a meritorious *Brady* claim, such that the habeas court erred by denying the petitions for writ of habeas corpus," the men's attorneys argue.

The Attorney General's office, representing the prison warden, i.e. the State, argues the habeas court did not err in denying relief to Jones, Gardiner and Lucci on their *Brady* claims. In order to establish a *Brady* violation, a defendant must show that: 1) the State possessed evidence that was favorable to the defense; 2) the defendant did not possess that evidence and could not obtain it; 3) the State suppressed the evidence; and 4) there is a reasonable probability that the outcome of the trial would have been different had the evidence been disclosed to the defendant. "However, 'the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense,'" the State's attorneys argue, quoting the U.S. Supreme Court's 1995 decision in *Kyles v. Whitley.* In its 1992 decision, *Giglio v. United States,* the high court stated it did not "automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict…." The habeas court found that the Yamacraw Report "lacks sufficient relevance for admission due to the key distinctions between the Yamacraw threats and the murder and the lack of any direct correlation between the incidents." "Because the report would not have been admissible at trial, disclosure of it could have had no direct effect on the outcome," the State argues. "The Yamacraw Report is pure speculation and provides nothing more than a mere possibility that it may have helped the defense." The State acknowledges that at the habeas hearing, White testified that his trial testimony identifying the three men "was not true because he did not know that they were the shooters. He testified that he did not get a good look at the faces of the people who did the shooting. White admitted that he never bothered to contact any of the defense attorneys to tell them that he had lied at trial." And, "Despite his testimony that he had been 'tortured' for 21 years about his allegedly false testimony, he did not tell anyone about it other than his wife" and the organization that had filed the Open Records Act request in its effort to help people who may be in prison unfairly. The habeas court found that White's testimony at the habeas hearing "lacked credibility," noting that in addition to not coming forward with his story, White "also suffered from a series of physical and psychological ailments in the years after his trial testimony that cast doubts on the accuracy of his recollection." Furthermore, statements made at the bond hearing and pretrial motions hearing "explicitly establish that the defense team was aware before trial…that White was unable to identify [Jones, Gardiner and Lucci] on the night of the shooting," the State argues. "There is no *Brady* violation when the material for which pretrial disclosure is sought is known to or in the possession of the defendant." The habeas court also correctly found that the allegations that prosecutors had coerced White to obtain his testimony "were completely rebutted" and "did not credit White's testimony that he was threatened or coerced," the State contends. "Because there were no *Brady* violations with regard to either the Yamacraw Report or the James White information, this Court should affirm the habeas court's decision denying relief."

Attorneys for Appellants (Jones, et al.): Steven Sparger, Peter Camiel

Attorneys for Appellees (State): Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Crowder, Asst. A.G.

STUCKEY V. THE STATE (S17A1175)

A young man who was 15 years old when he allegedly stabbed, beat and set on fire his grandmother and is now serving a lifetime prison sentence is appealing his convictions in **Douglas County**, arguing that during his trial, he had "ineffective assistance of counsel" in violation of his constitutional rights.

FACTS: According to the briefs of both parties, Dominique Javonte Stuckey had an unstable childhood growing up, stemming in part from his family's disapproval of his homosexuality. For a while, when he was a child, he lived with his mother, then with his father in Tennessee. He also lived in New York, South Carolina and Hinesville, GA. In 2009, when he was 15, Stuckey was living with his grandmother, Velma Stuckey, in Douglasville. Although she wanted to help the boy and had taken him in before, she was very religious and allegedly did not approve of his sexuality. Specifically, she did not approve of his talking to a number of men on the Internet, many of whom were much older than Stuckey. Stuckey communicated with a number of other gay men on a variety of web sites, including MySpace, Black Gay Chat (known as "BGC") and Yahoo Instant Messenger, as well as by text and telephone. Stuckey would post pictures of himself on the websites and engage in chats of a sexual nature. A cousin introduced him to Lequinton Lett, also 15, hoping to lure Stuckey away from meeting strangers on the Internet. Stuckey and Lett began contacting each other by cell phone and through BGC. In addition, they exchanged nude photos. Weeks before their first face-to-face meeting, Stuckey allegedly told Lett his grandmother did not like him because he was gay. He told his cousin that his grandmother was going to kick him out because "she don't like gays." The evening of March 28, 2009, Stuckey went to Arbor Place Mall to meet Lett. They talked and walked around the mall before Lett left to meet up with another friend. The intention, according to briefs, was that this was an initial meeting and that later the two would "hook up." Late that Saturday night, Stuckey reached out to Lett by text message and asked him to hang out. But Lett was babysitting and could not. They also communicated on BGC that night. Throughout the night, Stuckey was also communicating with Shannon Harshaw, a student at the University of West Georgia, whom Stuckey had met the previous year on Black Gay Chat. Harshaw later testified that during the early morning hours of March 29, 2009, he and Stuckey had been communicating on BGC and that by 5 or 6 a.m., they had made plans for Stuckey to visit Harshaw. After looking up directions to Harshaw's house in Carrollton, Stuckey took his grandmother's black SUV and began driving to Carrolton. But at some point, he contacted Harshaw, told him he had gotten lost, and had to get back home before his grandmother woke up. Phone records tracked his progress toward Carrollton, then showed he came back to Douglasville. On his way back, at about 8:30 a.m., Stuckey stopped at One Stop Convenience store on Chapel Hill Road where video surveillance showed him paying for $1 worth of gasoline. At 9 a.m., Stuckey called 911 and reported his grandmother's house was on fire. He claimed he had left the house and when he returned, the house was in flames, with his grandmother and two dogs inside. He also told the 911 dispatcher that someone had broken into the home and that his TV was missing. Upon arrival, firefighter Mike Shadix noticed that most of the smoke was coming from the top of the house. Shadix found Velma Stuckey's body on the floor of her bedroom. There were bloodstains on the bed coverings near her head. According to the medical examiner who later conducted the autopsy, Mrs. Stuckey had sustained a stab wound to the left side of her head, a stab wound to the left eye, and a stab wound to the right cheek. He believed she was set on fire while still alive

because he found significant amounts of carbon monoxide in her bloodstream, meaning she was still breathing. He concluded her cause of death was "blunt and sharp force injuries of head with smoke and soot inhalation."

During the investigation, law enforcement discovered that weeks before the murder, Stuckey had asked his cousin how to kill someone and get away with it. On his computer, law enforcement discovered he'd conducted an Internet search: "how+to+kill+someone+without+getting+caught." Although Stuckey was initially placed in the custody of the Department of Family and Children's Services, he was later arrested and charged with malice murder and arson in the first degree. Stuckey gave two separate statements to law enforcement: Initially he denied all involvement in the murder and arson. But eventually, he claimed that his boyfriend, Desmond Miles, had attacked his grandmother and it had been Miles' idea to do so. Stuckey said he then set the fire, believing his grandmother was dead. He admitted setting the fire to cover up the attack. He said he then staged the house to look like a burglary, taking his grandmother's jewelry and other things and hiding them in the woods off Charley Road, which someone later found. Law enforcement found no evidence that Miles had participated in the crimes and he later testified for the State. Following a jury trial, in December 2010, Stuckey was convicted of murder and arson and he was sentenced to life plus 20 years in prison. Stuckey now appeals to the state Supreme Court.

ARGUMENTS: Stuckey's attorney argues that four errors were made during Stuckey's trial, all having to do with his trial attorney's ineffectiveness. In the first error, the trial attorney was ineffective for not challenging the authenticity of a 400-page printout of Stuckey's MySpace account. "Documents from electronic sources such as the printouts from a website like MySpace are subject to the same rules of authentication as other more traditional documentary evidence and may be authenticated through circumstantial evidence," the Georgia Supreme Court ruled in 2013 in *Burgess v. State*. Here, the State prosecutors failed to lay a proper foundation for admitting the MySpace pages, and Stuckey's attorney failed to object. The trial attorney also failed to challenge the admissibility of the printout that included about 134 photographs, "which constituted inflammatory, irrelevant, and prejudicial character evidence," Stuckey's attorney for his appeal argues. The District Attorney said about the photos in his opening statement that, "In several, you'll see he looks like a girl. He has on a wig and he sends these pictures to friends and tells them that's who he is…." Stuckey's attorney, however, did not object to such statements, which were "extremely emphatic and prejudicial." In Stuckey's case, "it is not inconceivable that without the avalanche of prejudicial photos and comments, the jury would have been more disposed to consider whether his defense that he had committed only the arson, raised a reasonable doubt of his guilt as to the murder charge, thereby rendering counsel's ineffectiveness a reversible error," his attorney argues. Stuckey's trial attorney was also ineffective for not challenging the admissibility of photographs of Velma Stuckey's body that had nothing to do with her death, his appeal attorney argues. One of the photos, which showed her gown drawn up exposing her genitals in full view, was a "purely gratuitous and unnecessarily sensational autopsy photo" that had nothing to do with the injuries that caused her death. And the trial attorney was ineffective for not challenging the admissibility of multiple photos of Velma Stuckey in life with family members. The attorney's failure to object was deficient, "and the deficiency so prejudiced Appellant's [i.e. Stuckey's] defense that a reasonable probability exists that but for the deficiency, the result of the trial would have been different," Stuckey's attorney

argues. "Without the 'cumulative prejudicial effect of multiple attorney errors,' 'there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" "The Supreme Court of the United States has held that it is the prejudice arising from 'counsel's errors' that is constitutionally relevant, not that each individual error by counsel should be considered in a vacuum."

The State, represented by the District Attorney's and Attorney General's offices, argues that Stuckey's trial attorney was not ineffective for not challenging the authenticity of her client's MySpace account. His attorney made a tactical decision not to do so because her client admitted that the photographs were his, and she believed she had no grounds to challenge the authenticity. Because the MySpace photos were "a very minor part of the State's overwhelming evidence of Appellant's guilt," Stuckey cannot prove that without them, it is likely the trial would have come out differently. His trial counsel also was not ineffective for not challenging the admissibility of the MySpace evidence. The attorney even testified that she did not object to the evidence "because she felt that the photos benefited the defense theory and she did not feel that the photos were overly prejudicial," the State argues. The attorney "explained that she felt that evidence of Appellant being coerced and exploited by older men on the Internet was useful to the defense theory that Appellant's older boyfriend had committed the murder and therefore, she felt that the MySpace photographs reinforced this theory." The State contends Stuckey also fails to prove that his trial counsel was ineffective for not challenging the admissibility of relevant photos from the crime scene and of the victim's inju./ries. These photos "were not duplicative and they were relevant to explain the injuries caused to the victim, relevant to the medical examiner's expert conclusions, and relevant to the State's burden of proving Appellant guilty of malice murder and arson." Again, the trial attorney later testified that it was part of her trial strategy not to object because "when you object, it tends to draw more attention to something." As to the photos depicting Velma Stuckey alive, the trial attorney later said she had no objection to the family pictures. She said she believed that "the fact that [Appellant] had family members could be a positive thing for [Appellant] and could invoke some sympathy." Stuckey has failed to meet his burden of proving ineffective assistance of counsel and his convictions should be upheld, the State argues.

Attorney for Appellant (Stuckey): Christy Draper

Attorneys for Appellee (State): Brian Fortner, District Attorney, Emily Richardson, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Meghan Hill, Asst. A.G.,

LEWIS V. THE STATE (S17A1143)

A man sentenced to life in prison with no chance of parole is appealing his murder conviction in **Houston County** for allegedly hiring a hitman to kill his former business partner who was prepared to testify against him in a pending federal criminal case. The hitman subsequently killed the wrong man.

FACTS: Devasko Lewis owned a trucking company which employed Corey Daniels as a truck driver. According to state prosecutors, Lewis went to Daniels and said he needed to put everything – the company, its truck titles, and bank accounts – in Daniels' name. Daniels later learned that several years earlier, one of Lewis's drivers was in an accident that killed at least six correctional officers. After transferring the business into Daniels' name, Lewis remained a silent

partner, but still controlled the drivers, paperwork and payroll. Lewis and Daniels were eventually indicted in federal court for issues related to the business. Daniels' attorney told him that federal authorities really wanted Lewis, and Daniels agreed to testify against him. When Lewis learned Daniels planned to testify against him, he approached a man about finding someone to kill Daniels. The man introduced him to his nephew, Jamarcus Clark. Lewis wanted Clark first to shoot at Daniels' mother's house and kill her. Clark later testified that on Jan. 9, 2014, Lewis drove him to Houston County, gave him $400 and paid for his hotel room. Later that evening, Clark walked to the home of Ernestine McGhee, Daniels' mother, on Jewel Drive and fired shots into the living room and kitchen. McGhee escaped injury. The next day, Lewis told Clark there was more work that needed to be done, and he gave Clark $1,000 to kill Daniels. Lewis drove Clark to Daniels' home to show him where he lived. Lewis instructed Clark to approach Daniels by saying he was interested in buying his race car. Lewis promised to pay Clark $5,000 once the hit was completed.

On Jan. 14, 2014, Lewis met Clark in Tifton, GA and took him to a shop where he gave Clark a truck to drive back to Houston County and kill Daniels. Clark drove the truck to Daniels' house and pulled into his yard. Daniels was not at home, but his nephew, Kerry Glenn, who lived with Daniels, came outside to find out what Clark wanted. Clark, who had never met either Daniels or Glenn, assumed that Glenn was Daniels. Clark asked him about buying the race car, and Glenn took him to the back of the house to show Clark the car. Glenn opened the car's doors and said that Clark could look at the motor but could not take pictures of it. Clark asked Glenn about the carburetor. Glenn was telling him about the motor when Clark, who was behind Glenn, aimed the gun at Clark's head and fired one shot, killing him. Clark then drove back to Ashburn, GA, where he hid the gun at his aunt's apartment. The next day, Clark met with Lewis who told him he did a good job, but that he got the wrong man. Lewis paid him about $2,500, and Clark asked about getting all the money Lewis had promised. Lewis said he would get it for him at a later date. Clark later identified Lewis in a photographic lineup that officers showed him, and he identified Lewis in court as the man who had planned both incidents.

In March 2014, a Houston County grand jury indicted Devasko Lewis and Jamarcus Clark for malice murder, felony murder, and aggravated battery related to the shooting death of Kerry Glenn, and for conspiracy to commit the murder of Corey Daniels and Ernestine McGhee. Following trial in April 2015, Lewis was convicted on all counts except for conspiracy to murder McGhee. Lewis was sentenced to life without parole plus 10 years. Lewis now appeals to the state Supreme Court.

ARGUMENTS: Lewis's attorneys argue the evidence was insufficient to convict him of the charges against him. Lewis took the stand in his defense and adamantly denied ever hiring Clark to kill Daniels. "Although Corey Daniels had misappropriated some of the property from their trucking business and was going to testify against Mr. Lewis in a pending federal trucking case, this was not a motive for murder," the attorneys argue in briefs. "Even with Corey's testimony in the federal case, Mr. Lewis thought he would only be facing 12 months in prison at most." "No rational trier of fact would have found Mr. Lewis guilty of the charged crimes based upon the uncorroborated testimony of co-defendant and alleged co-conspirator Jamarcus Clark, which testimony was disputed and contradicted by other evidence at trial." The only evidence directly implicating Lewis in the murder of Glenn or the conspiracy to murder Daniels was the testimony of Jamarcus Clark. Furthermore, Lewis presented evidence at trial that Clark and his

cousin conspired to rob Daniels, and that they killed his nephew, Glenn, in a botched robbery attempt. "After the trial, defense counsel received a letter from Jamarcus Clark – the alleged hitman – in which Clark admitted lying at trial, denied having ever been hired by Mr. Lewis to kill anyone, and disclosed that he and his cousin planned the robbery and were solely responsible for the shooting death of the nephew," the attorneys contend. "Mr. Lewis is entitled to a new trial based upon the knowing and willful swearing of Jamarcus Clark at trial, which testimony was later repudiated and recanted in full." If the state Supreme Court determines that Lewis is not entitled to a new trial based on Clark's repudiation of his trial testimony, simply because Clark has not been convicted of perjury, then this Court should "find that the current scheme in Georgia for granting a new trial based upon repudiated testimony is unconstitutional," as it violates both the due process and equal protection clauses of the U.S. and Georgia constitutions. Lewis's attorneys also argue that his sentence of life without parole should be set aside because the sentencing scheme is unconstitutional. In Georgia, when the state has not sought the death penalty, there are two sentencing options: life with the possibility of parole, and life without the possibility of parole. "Georgia law does not set forth how to distinguish between the two sentencing options or what the disparity in the sentencing range is based upon, except to say that the legislature has, without any notice to the citizenry as to what triggers the more harsh punishment, authorized it," the attorneys argue. "Such a scheme does not pass constitutional muster."

The State, represented by the District Attorney's and Attorney General's offices, argues that the evidence at trial was sufficient to support the jury's verdict of guilt. Further, there was sufficient evidence to corroborate the testimony of co-conspirator Clark that Lewis "actively planned and helped carry out the events which resulted in the murder of Kerry Glenn." At the same time there was no evidence that Jamarcus Clark committed perjury. Following Lewis's trial, at a hearing on Lewis's motion requesting a new trial, Clark neither acknowledged that he had written a letter or that his testimony at trial had been false. "Nor was there any evidence that Clark authored the letter," the State's attorneys argue. "Further, Clark was never charged with nor convicted of perjury." Although Lewis presented a letter at this hearing, "there is no credible evidence to support that the alleged recantation letter was ever drafted, dictated by, or even assented to by Clark," the State argues. Also, under Georgia law, a verdict must be set aside "only when it could not have been obtained without perjured evidence, and the perjurer has been duly convicted thereof." The current scheme in Georgia for granting a new trial based upon the repudiation of trial testimony by a pivotal State's witness does not violate the due process and equal protection clauses of the Constitution, the State contends. Finally, Lewis's constitutional challenge of the life-without-parole portion of Georgia's sentencing scheme for murder was not raised at the trial level and cannot be raised for the first time on appeal. Despite that procedural problem, the argument has no merit, the State contends. "While the mandatory minimum sentence for murder is always life with the possibility of parole, the trial court has the discretion to impose life without parole," the State argues.

Attorneys for Appellant (Lewis): Laura Hogue, Susan Raymond

Attorneys for Appellee (State): George Hartwig III, District Attorney, Daniel Bibler, Dep. Chief Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Crowder, Asst. A.G