The Appellate Review

The Newsletter of the Appellate Practice Section
State Bar of Georgia
Spring 2015

Survey of Recent Appellate Court Decisions

Civil

U.S. Supreme Court Cases

by Eric J. Marlett

Holt v. Hobbs (No. 13-6827) (Jan. 20, 2015)

Justice Alito, writing for a unanimous Court, held that the grooming policy of the Arkansas Department of Correction, as applied in this case, violated the petitioner's rights under the Religious Land Use and Institutionalized Persons Act of 2000. Although the Court acknowledged that the Department had a compelling interest in preventing the concealment of illegal items, "the argument that this interest would be seriously compromised by allowing an inmate to grow a ½-inch beard is hard to take seriously." And even though the Department had a further compelling interest in facilitating the identification of prisoners, the prohibition against a ½-inch beard grown for religious purposes was not the least restrictive method of furthering this goal, particularly when "mustaches, head hair, or ¼-inch beards for medical reasons" were allowed. Reversed and remanded, 9-0 (Ginsburg, J. and Sotomayor, J., concurring).

Department of Transportation v. Association of American Railroads (No. 13-1080) (March 9, 2015)

Justice Kennedy, writing for the Court, held that Amtrak is indeed a governmental entity for purposes of the issues raised in this case regarding the delegated joint authority of Amtrak and the Federal Railroad Administration (FRA) to issue metrics and standards for passenger rail service. Looking at Amtrak's creation, the composition of its leadership, its purpose, its funding, and its operations, the Court concluded that it was, as a practical matter, a governmental actor, despite statutory language to the contrary. The decision of the Court, however, was a narrow one, limited only to answering that one question, and leaving open many other issues regarding the propriety of the actions taken by Amtrak and the FRA in issuing the metrics and standards, issues which must now be decided first by the D.C. Circuit, under the guidance of the Supreme Court's opinion. Both Justice Alito, concurring, and Justice Thomas, concurring in a lengthy separate opinion, discuss many of these remaining concerns in greater detail. Vacated and remanded, 8-1 (Alito, J., concurring, and Thomas, J., concurring in the judgment).

North Carolina State Board of Dental Examiners v. Federal Trade Commission (No. 13-534) (Feb. 25, 2015)

Justice Kennedy, writing for the majority, held that the North Carolina State Board of Dental Examiners was not entitled to state-action immunity in an antitrust proceeding arising from the efforts of the Board to restrict teeth whitening procedures solely to licensed dentists. Since a "controlling number" of the Board are "active market participants" in the very profession being regulated, the potential for conflict between the private interests of the Board and the interests of the state requires a greater showing for the benefit of immunity than the mere existence of the Board as a state agency. Specifically, the actions of the Board must be "clearly articulated" as state policy, but must also be "actively supervised" by the state. Although the prevention of unlicensed dental practices was deemed a clearly articulated state policy, the Board could not show that it was actively supervised by the State of North Carolina when it concluded that teeth whitening fell within that definition and when it sought to implement that prohibition. As such, the Board was not entitled to immunity. Justice Alito, writing for the dissent, argued that no such heightened analysis was necessary, regardless of whether the Board was largely composed of practicing dentists, because it was a state agency, "the Sherman Act (and the Federal Trade Commission Act …) do not apply to state agencies … and that is the end of the matter." Affirmed, 6-3 (Alito, J., Scalia, J., and Thomas, J., dissenting).

Looking ahead, two of the most closely watched cases this term are the widely anticipated decisions regarding the availability of Affordable Care Act (ACA) tax subsidies and the constitutional status of same sex marriage:

See Decisions on page 3

A Note from the Editor

This edition of *The Appellate Review* was inspired by a conversation I had with a law student intern in my office. As we reviewed her draft of an appellate brief, I made several suggestions about cases she could add and how she could use them to support her argument. When we finished, she looked at me and said: "How long do you have to be a lawyer before you know all of that law off the top of your head?"

That question struck me. I wanted to tell her that I picked up most of it just by regularly reading cases. But that wasn't what she asked me. How long do you have to be a lawyer, is what she wanted to know.

Unfortunately, there is no real answer to that question. It's like asking how long you have to be on a baseball team before you're named MVP, or how long you have to play chess before you're named grandmaster. When it comes to lawyering, just like any other area that requires skill, there is no correlation between the amount of empty hours you pour into it and your skill level. Mastery at this level can only be achieved through hard work, critical thinking, and immersing yourself in your craft.

To that end, this edition of The Appellate Review focuses on one of the main tools of our trade: case law. What follows are selected summaries of recently decided cases with significant holdings in the U.S. Supreme Court, Supreme Court of Georgia and Court of Appeals of Georgia. Although this is neither an all-inclusive list nor a source of legal authority, I hope that this survey will provide some insight into recent developments in our jurisprudence.

Sincerely,

Margaret E. Flynt, Editor

Inside This Issue

Section Officers

During the June 19, 2014, Planning Meeting of the section, the following officers were elected for the 2014-15 Bar year:

- **Bryan Tyson, chair**
- **Darren Summerville, vice-chair**
- **Scott Key, immediate past chair**
- **Margaret Flynt, secretary**
- **Leland Kynes, treasurer**

The following committees and chairs were designated for the 2014-15 Bar year:

- **State Practice and Legislation Committee: Leland Kynes**
- **Federal Practice Committee: Andy Tuck**
- **Programming and Events Committee: Jason Naunas**
- **Communications Committee (Newsletter): Margaret Flynt**

The opinions expressed within *The Appellate Review* are those of the authors and do not necessarily reflect the opinions of the State Bar of Georgia, the Appellate Practice Section, the Section's executive committee or editor of *The Appellate Review*.

Decisions from page 1

King v. Burwell (No. 14-114)

With regard to the ACA, as referenced in the last issue of this newsletter, the Fourth Circuit Court of Appeals affirmed a district court judgment that dismissed a challenge to the IRS rule implementing Section 36B of the Internal Revenue Code, which provides for the availability of premium tax credits for those enrolled "through an Exchange established by the State under section 1311." The IRS rule that was upheld interprets this provision as permitting tax credits for both state run exchanges as well as exchanges run by the federal government in the thirty four states that did not set up their own exchanges. The petitioners argue that the clear meaning of the ACA was to limit premium tax credit availability to exchanges established by the states. Due to the large number of states and individuals affected, the ongoing viability of the ACA may hinge on the outcome of this case. Argument was held on March 4, 2015, and a decision is expected later this term. A similar case in the D.C. Circuit that reached the opposite conclusion to that of the Fourth Circuit was vacated pending a full court rehearing, and is currently on hold pending the Supreme Court's decision in *King v. Burwell*.

DeBoer v. Snyder (No. 14-571), *Obergefell v. Hodges* (No. 14-556), *Tanco v. Haslam* (No. 14-562) and *Bourke v. Beshear* (No. 14-574)

This group of cases challenged same sex marriage bans in the four states of the Sixth Circuit – Kentucky, Michigan, Ohio and Tennessee. In each instance, the district courts ruled in favor of the plaintiff challengers, however the Sixth Circuit sided with the states and reversed. The central issue now before the Supreme Court is whether the Fourteenth Amendment of the U.S. Constitution requires states to issue marriage licenses to same sex couples and/or to recognize same sex marriages lawfully entered into in other jurisdictions. The resolution of these cases could effectively end the national debate, or else allow the states to continue to decide the question of same sex marriage as a matter of state law. Argument was held on April 28, 2015, and a decision is expected by the end of the term.

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Georgia Cases

by John Hadden

HTTP Hypothermia Therapy v. Kimberly-Clark Corp., A14A2219 (Feb. 12, 2015)

After receiving an adverse summary judgment ruling, HTTP Hypothermia Therapy sought to appeal. Its notice of appeal requested that the entire record be transmitted to the appellate court, and stated that "The transcript shall be ordered by Plaintiff and transmitted by the Clerk of the Superior Court to the Georgia Court of Appeals." But HTTP only intended that certain deposition transcripts be sent up, not the transcript of evidence and proceedings (i.e., the hearing transcript), as provided by O.C.G.A. § 5-6-37. About ten months after the original notice was filed, HTTP filed an amended notice upon discovering that the clerk had not prepared the record because the transcript had not been received. The amended notice clarified that there was no hearing transcript but that "numerous deposition transcripts" would be filed, although that, too, appears to have been incorrect - those depositions were already in the record. Appellee Kimberly-Clark then filed a motion to dismiss the appeal. The trial court granted the motion, finding that the delay in record preparation was caused by HTTP's erroneous statement regarding the transcript in the notice of appeal and rejecting HTTP's claim that the delay was caused by the large size of the record, since the record demonstrated that the clerk was waiting to prepare the record until it received the transcript. The Court of Appeals affirmed, noting that a delay of more than 30 days in filing a hearing transcript after the filing of the notice of appeal is "prima facie unreasonable," though subject to rebuttal, and that the delay in this case was caused, first, by HTTP's erroneous statement regarding a non-existent hearing transcript, and, second, by the statement in its amended notice suggesting additional deposition transcripts would be filed, further delaying preparation of the record. Having affirmed dismissal of the appeal, HTTP's substantive contentions on appeal were deemed moot.

Hooks v. McCondichie Properties 1, LP, A14A2333 (Jan. 14, 2015)

Plaintiff Hooks filed suit against several McCondichie entities and attempted to serve their registered agent as provided by O.C.G.A. § 14-9-104. The process server discovered that the registered agent's purported office was actually a virtual office, and concluded that further attempts at service there would be futile based on repeated assertions by the receptionist that no one was available to accept service. Hooks then attempted to perfect service under O.C.G.A. § 14-9-104(g), which provides for substituted service upon the Secretary of State where a partnership has failed to maintain a registered agent or office. The action was served upon the Secretary of State, and Hooks attempted to forward, via courier, a copy of the lawsuit to the registered agent's last known address as required by § 14-9-104(g). The office receptionist informed Hooks's courier that the agent was not present to accept or sign for the documents, and the courier returned the package to Hooks's attorney.

The defendants ultimately defaulted, but default was opened after the trial court concluded that Hooks's failure to obtain a signature and actually deliver the lawsuit, at least upon the registered agent's purported receptionist, rendered the substituted service invalid. The Court of Appeals disagreed and reversed. First, it found that substituted service under § 14-9-104(g) was appropriate because the registered agent failed to "continuously

maintain" a registered office, and in fact usually worked from a different location. Second, it found that the substituted service provision required only that the action be "forwarded" to the last known address of the registered agent, not that notice actually be given or received, and therefore Hooks's attempt was sufficient. Although not discussed in the decision, similar language appears in O.C.G.A. § 9-11-4(e)(1) and 14-11-209(f) with respect to substituted service upon corporations and limited liability companies, respectively, and therefore the decision would appear to be applicable in those contexts as well.

Mahalo Investments III, LLC v. First Citizens Bank & Trust Co., A14A1940 (Feb. 19, 2015)

In a case of first impression, the Court of Appeals held that an order under O.C.G.A. § 14-11-504, charging a judgment debtor's interest in a limited liability company to his share of the company, could be entered by the court entering the underlying judgment. Section 14-11-504 permits, "[o]n application to a court of competent jurisdiction," a judgment debtor's interest in an LLC to be charged with the payment, thereby giving the judgment creditor "the rights of an assignee of the limited liability company interest." Rejecting the appellant's arguments that an application for such an order had to be filed as a separate action, and that venue and personal jurisdiction were required to be proven as to the LLCs, the Court found that the term "jurisdiction" in the statute meant subject-matter jurisdiction, and that the limited interest provided by the statute provided adequate protections to other members of the LLC. Therefore, no collateral litigation was required, the trial court correctly entered an order in the underlying litigation.

Kight v. MCG Health, S15G0603 (March 2, 2015)

Kennestone Hospital, Inc. v. Travelers Home & Marine Insurance Co., A14A1707 (Jan. 16, 2015)

In a pair of recent cases, the Supreme Court and Court of Appeals clarified interpretation of the statutory scheme (O.C.G.A. § 44-14-470 et seq.) giving rise to hospital liens in personal injury cases. In *Kight*, the Supreme Court held that a hospital's otherwise properly-filed lien was not void ab initio because it stated an incorrect amount (because it failed to reflect insurance payments), which was later amended. The patient's contract with his insurer permitted the hospital to collect co-pays and deductibles directly from the patient, distinguishing this case from the Supreme Court's earlier decision in *MCG Health v. Owners Insurance Co.*, 288 Ga. 782 (2011), which had held a lien invalid where the purported charges were unauthorized under the relevant TRICARE rules. Notably, however, the Supreme Court in *Kight* did not "reach nor adopt" the "wide-ranging applications of the hospital lien law" discussed by the Court of Appeals, which appeared to allow, in some cases, hospitals to use the lien statutes to "balance bill" for services rendered despite contractual insurance payment agreements.

In *Kennestone*, the Court of Appeals considered whether a hospital had properly perfected a lien such

as to permit an action by the hospital against an insurer that had settled a personal injury claim. Generally, at least when properly filed, hospital liens permit a medical provider to pursue collection against a liability insurer settling with an injured party who has received treatment with the medical provider if the outstanding medical bills are not paid. Although the evidence was uncertain as to whether the insurer received proper notice, as that notice was sent to "Travelers," rather than "Travelers Home & Marine Insurance Co.," the Court ultimately held that Kennestone had not properly provided notice to the insured as required by statute, nor had it demonstrated that it simply did not know the identity of the insured, which could excuse the failure under § 44-14-471(a). Moreover, the Court further held that even if the insurer had actual notice of the lien claim, Kennestone's failure to send notice to the insured was fatal, because § 44-14-471(b), which deems liens valid notwithstanding certain defects in filing, does not apply to insurers. Summary judgment was therefore properly granted as to the insurer under on Kennestone's lien claim.

John Hadden is a trial attorney with the office of Turkheimer & Hadden in Atlanta. He is author of Green's Georgia Law of Evidence and co-author of Georgia Law of Torts—Trial Preparation and Practice.

Criminal

U.S. Supreme Court Cases

by Brandon A. Bullard

Lopez v. Smith (No. 13 946) (Oct. 6, 2014)

In its first opinion this term, the Court reverses under the Antiterrorism and Effective Death Penalty Act (AEPDA) the Ninth Circuit's affirmance of habeas corpus relief. The prosecution in respondent Smith's California murder trial asked for an aiding-and-abetting instruction and then argued to the jury that it could convict Smith on that theory. The District Court granted the habeas writ. And the Circuit Court affirmed, holding that since the prosecution proceeded through trial on the theory that he was the principal actor, Smith had no notice that he could be convicted on the alternative theory. The Supreme Court has never held, though, that such specific notice was a constitutional mandate. Because the AEDPA requires deference to state courts' reasonable interpretations of Supreme Court precedent, the Ninth Circuit's opinion was in error.

Heien v. North Carolina (No. 13 604) (Dec. 15, 2014)

On review of a traffic stop based on an officer's misinterpretation of North Carolina's brake-light statute, the Supreme Court held that a seizure predicated on an officer's good-faith mistake of law is no affront to the Fourth Amendment. Over Sotomayor's lone dissent, the Court notes that the lawyer's subjective interpretation of the law is not controlling, or even relevant, and the mistakes tolerated by the Fourth Amendment are less than those that would permit qualified immunity. Kagan concurs to suggest that the appropriate standard is vexata questio. But the bottom line is this: if an officer pulls citizens over on wrongfully believing that they violated a law, the stop is valid if the mistake of law is reasonable.

Whitfield v. United States (No. 13 9026) (Jan. 13, 2015)

In this opinion, the Court affirms the Fourth Circuit's interpretation of a federal statute that criminalizes "'forc[ing] any person to accompany [you]' in the course of committing or fleeing from a bank robbery." 18 USC §2113(e). Fleeing from his "botched" bank robbery, Petitioner Whitfield went into the home of a 79-year-old woman. Finding the woman inside, Whitfield directed her from the hallway to a computer room (an estimated seven-to-nine feet), where the woman suffered a fatal heart attack. Because the movement was insubstantial, Whitfield argued, the evidence was insufficient to support his conviction under the "accompanying" statute. Not so, says Justice Scalia, who, glazing usage references to Dickens and Austen, writes that "accompanying" embraces "movement from one place to another." While the statute requires more than de minimis movement, seven-to-nine feet surely sufficed.

Jennings v. Stevens (No. 13 7211) (Jan. 14, 2015)

Decided the day after Whitfield, the Court's opinion in *Jennings v. Stevens* distills Federal appellate procedure to determine the scope of grounds permissible to an appellee defending a habeas judgment. At a federal habeas proceeding, the district court sustained two errors raised by Petitioner Jennings but overruled a third. It ordered the convicting state to retry or release Jennings within 120 days. The warden appealed. Jennings neither took a cross-appeal nor sought a certificate of appealability, but argued on appeal that the district court erred in overruling his third error. The Fifth Circuit reversed on the Warden's arguments, but found that it could not reach Jennings's because he had not invoked its jurisdiction. The Supreme Court vacates and remands.

The majority focuses on the rule allowing an appellee to "urge in support of a decree any matter appearing before the record, although his argument may involve an attack upon the reasoning of the lower court." So long as the appellee does not "attack the decree with a view to enlarging his own rights thereunder or of lessening the rights of his adversary," he may respond to the appellant with any argument in the record. Because a judgment is separate from its underlying reasoning, and it is judgments that appellees seek to protect. Jennings had a right to be released or retried within 120 days. And he could urge any argument in the record to justify that result.

Justice Thomas dissents, contending that the habeas grant is an equitable judgment subject to different rules. Since the equitable judgment that Jennings sought to protect was his right to be retried without the specific errors on review, those were the only errors that he could argue. To earn a right to retrial free of the other error, he needed to seek a certificate of appealability.

Christeon v. Roper (No. 14 6873) (Jan. 20, 2015)

Following his state court conviction for murder and death sentence, Petitioner Christeon sought to pursue Federal habeas relief under the AEPDA. His two appointed lawyers did not meet with him, however, until six months after AEDPA's statute of limitations had run. At that point, the only way to reopen the final judgment was to argue that the habeas lawyers' abandonment of their client had equitably tolled the statute. Although the original habeas lawyers could not have argued their own deficiency on this point, the district court denied Christeon's motion to substitute counsel. The Eighth Circuit affirmed. But the Supreme Court reversed, noting that the district court did not account for all of the factors necessary to determine whether substitution of counsel was appropriate. *See Martel v. Clair*, 565 U.S. ___ (No. 10 1265) (Mar. 5, 2012). In particular, the district court overlooked the original habeas lawyers' conflict of interest in challenging their own conduct.

Joined in dissent by Justice Thomas, Justice Alito would have required briefing and argument before reversing the Circuit court. His concern is that allowing equitable tolling any time lawyers have ineffectively missed a deadline would render the AEPDA statute of limitations meaningless. The merits of Christeon's equitable tolling claim are too bound up with his motion for substitution, and the two ought to be considered together.

Yates v. United States (No. 13 7451) (Feb. 25, 2015)

In *Yates v. United States*, the Court gives a masterclass in statutory interpretation. The question is whether fish were the sort of "tangible objects," that when destroyed to obstruct an investigation into illegal commercial fishing, would invoke liability under the "anti-shredding" provision of the Sarbanes–Oxley Act. (for the statute's text, see http://tinyurl.com/anti-shredding.) Reversing the Eleventh Circuit, a plurality of the Court held that they were not.

Relying on several aspects of the Sarbanes–Oxley Act, the plurality found that the meaning of "tangible object" is limited. It applies only to objects that keep records or store data, but not to fish. The opinion notes that the "anti-shredding" provision sits among other provisions of definite character. That placement indicates that the anti-shredding provision is of like nature: specific rather than general. And to read it broadly would render surplus another piece of the Sarbanes–Oxley Act, which criminalizes the destruction of evidence to be used in an official proceeding. Since statutes in pari materia should be read together without rendering any portion as surplusage., the anti-shredding provision must cover different matter than the destruction-of-evidence provision.

The plurality further relies on two, related canons of construction: noscitur a sociis and ejusdem generis. In the anti-shredding provision, the list of nouns that ends with tangible object follows a list of verbs that, taken together, relate to records: alters, destroys, mutilates, conceals, covers up, falsifies, and makes a false entry. So too does it end a series of nouns with the same association: record and document. Under both canons, that context cabins the meaning of tangible objects to things like a document or record.

Finally, the plurality bolsters its position with the rule of lenity. Even if a broad reading of "tangible object" was supportable, lenity counsels that it is unstable. Thus, Yates should have escaped liability.

Concurring alone Justice Alito arrives at the same conclusion as the plurality, if by a shorter route. Applying both the noscitur a sociis and ejusdem generis canons, Alito concludes that the statutes nouns (records, documents, and tangible objects) are all of the same type. Fish do not swim to mind when you read that list. The verbs, he says, float in the same channel. Taken together, alters, destroys, mutilates, conceals, covers up, and makes a false entry in all apply to records or file-keeping. While some may have broad application, they should be read as a set. A man may destroy a fish, but it's a silly thing for him to falsify or make a false entry in one. Alito also finds persuasive the statute's title: "Destruction, alteration, or falsification of records in Federal investigations or bankruptcy." Although titles are not dispositive, this one reinforces the conclusion from the provision's nouns and verbs.

Writing for the dissenters, Justice Kagan finds the issue simple: If Congress says "tangible object," it means "tangible object." In the face of that plain meaning, the other canons are imagined fog on a clear sea. While context surely matters in interpretation, the context here shows that Congress cast a wide net. The wide array of verbs and nouns suggests not that Congress wanted to proscribe a narrow range of conduct, but a broad one. This is particularly shown by the adjective any, which proceeds record, document, and tangible object. Equally noteworthy is that where nearly identical language appears in the Federal witness and evidence tampering statute, it is broadly construed.

The dissent pulls the plug on the plurality's surplussage argument: Though the anti-shredding and destruction-of-evidence provisions overlap, each criminalizes behavior that the other does not. The anti-shredding provision protects "matters within the jurisdiction of any Federal department or agency," whereas the destruction-of-evidence provision protects "official proceedings." Kagan also shoots down the noscitur a sociis, ejusdem generis, and rule-of-lenity arguments. Those canons are used to resolve, rather than create, ambiguities. Since the anti-shredding provision was clear from the get-go, the clarifying canons have no place here.

Brandon Bullard is the executive staff attorney for the Georgia Public Defender Standards Council.

Georgia Cases

by M. Katherine Durant and Margaret E. Flynt

Howell v. State, A14A2073; A14A2074 (Feb. 11, 2015)

The Court of Appeals held that the trial court did not

err in allowing the court reporter to testify that she saw the criminal defendant "mouth" the words "I love you" to the victim while the victim was on the stand, because it was arguably relevant to the issue of guilt and the court reporter was subject to the same credibility determination by the jury as any other witness.

Chernowski v. State, A14A2151 (Feb. 12, 2015)

In this DUI appeal, the Court of Appeals vacated Chernowski's sentence sua sponte and remanded the case for resentencing for the trial court to merge her convictions for DUI less-safe and DUI per se. But the interesting part is that it took seven years to get from conviction to this opinion, and her speedy appeal claims were still denied because she did not preserve the issue. Remember: You must raise a speedy trial issue in the court below, otherwise the appellate courts have no power to review it.

Davis v. State, A14A1546 (Feb. 17, 2015)

This case is basically a mini-hornbook on criminal appellate jurisdiction and post-conviction remedies.

Sales v. State, S14A1478 (Feb. 16, 2015)

This is another case where the Supreme Court has ordered a retrial on the basis of its finding that the trial court erred in expressing its opinion as to a disputed fact at trial, thereby violating O.C.G.A. § 17-8-57. The Legislature" to: "The Legislature considered bills limiting retrial in cases where a judge states an opinion. As of May 6, the law now requires a contemporaneous objection to preserve the error for appeal, unless the violation constitutes plain error which affects substantive rights of the parties, see: http://tinyurl.com/retrialbill (Fulton Daily Report article.)

Anderson v. State, S14A1372 (Feb. 16, 2015)

While holding that the defendant did not show that his counsel was ineffective in failing to object to the trial judge's references to defense counsel as "Young Lady," "Ms. Young Lady" and "Miss Conflict," the Supreme Court noted that it did "not condone the trial judge's use of first names and potentially belittling monikers to refer to counsel, particularly in the presence of the jury. Judges should maintain a substantial degree of formality in their court proceedings. See Canon 3 (B) (3) of the Georgia Code of Judicial Conduct ('Judges shall require order and decorum in proceedings over which they preside.')."

Parker v. State, S14G1005 (Feb. 16, 2015)

Under O.C.G.A. § 24-1-2(b), the rules of evidence apply to a proceeding for issuance of a material witness certificate under the out-of-state witness act unless one of the exceptions in § 24-1-2(c) or (d) applies. Here, the Supreme Court found that an exception applied and the trial court, therefore, erred in applying the hearsay rules to exclude from evidence appellant's proffered documents in support of his motion for material witness certificates seeking the Intoxilyzer 5000 source code.

Palmer v. State, A14A1941 (March 3, 2015)

In this aggravated child molestation case and statutory rape case, the trial court instructed the jury that statements made by the child about the sexual or physical abuse were admissible as evidence "if the court finds that the circumstances of the statement provide sufficient indicia of reliability." Because the trial court told the jury that it had found "sufficient indicia of reliability," this instruction was an improper comment on the evidence under O.C.G.A. § 17-8-57.

State v. Kazmierczak, A14A2046 (March 30, 2015)

Here, a split Court of Appeals overturned years of case law, concluding that the odor of marijuana alone is sufficient to justify the issuance of a search warrant. (Doyle, P.J. concurred specially, while Phipps, C.J. and Ellington, P.J. dissented.)

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You can join other members of the Appellate Practice Section on our listserv, an electronic mailing list for sharing information among those who specialize in appellate practice. Once you join, you can customize how many emails you receive and easily sort messages from the list. Answers about everything from the rules to formatting to general practice tips are available because the entire Section membership can see your question. When sending emails to the list, be sure to remember that recipients may include judges or opposing counsel, and review the tips posted on the group page. This list is designed for appellate practice questions, so questions for other subject areas should be sent to other lists.

To join the list, send an email to mflynt@gpdsc.org and request an invitation.

Open Chambers: Briefing Tips

by Hon. Stephen Louis A. Dillard

(This is a three-part series of excerpts from Open Chambers: Demystifying the Inner Workings and Culture of the Georgia Court of Appeals by Judge Stephen Louis A. Dillard. The article was a special contribution to the Summer 2014 Mercer Law Review Journal. Please note that the footnotes correspond with those in the original article, which may be read in its entirety at: 65 Mercer L. Rev. 831. The Appellate Practice Section thanks Judge Dillard for granting permission to share these excerpts with its members.)

A great deal of ink has been spilled in recent years offering lawyers advice on crafting the perfect appellate brief, and I will refrain from rehashing these important but all-too-familiar pointers in this essay.[20] Instead, I will offer just a few suggestions to lawyers who regularly submit briefs to the court of appeals.

First, consider giving the court a roadmap of your argument at the outset of the brief. Specifically, I strongly recommend including a "Summary of Argument" section, even though our rules do not currently require it.[21] I am constantly amazed at how many times I read briefs that only get to the heart of the argument after spending ten to fifteen pages recounting largely unimportant background information and procedural history. Get to the point quickly. You do not want our judges and staff attorneys reading and re-reading your brief in an attempt to figure out the basis of your client's appeal, especially given the severe time constraints placed upon the court by its heavy docket and the aforementioned two-term rule.

Second, and I cannot emphasize this enough, be generous and absolutely precise with your record and legal citations. The quickest way to sabotage your appeal is to fail to substantiate legal arguments or key factual or procedural assertions. Court of Appeals Rule 25(a)[22] requires that appellant's brief, among other things, "contain a succinct and accurate statement of . . . the material facts relevant to the appeal and the citation of such parts of the record or transcript essential to a consideration of the errors complained of," as well as the "argument and citation of authorities," and that "[r]ecord and transcript citations shall be to the volume or part of the record or transcript and the page numbers that appear on the appellate record or transcript as sent from the trial court."[23] And when an appellant fails to support an enumeration of error in its brief by (1) citation of authority or argument, or (2) specific reference to the record or transcript, "the Court will not search for or consider such enumeration," which "may be deemed abandoned."[24]

Finally, lawyers who regularly practice before Georgia's appellate court need to understand the significant impact that the court of appeals "physical precedent" rule has on our state's body of jurisprudence,[25] and briefs to our court should specifically identify these precedents when they are used to support an argument.

A physical precedent of the court of appeals is neither binding on the state's trial courts nor on the court of appeals itself, but the opinion is instead merely persuasive authority.[26] Typically, a published opinion becomes a "physical precedent" when an opinion of a three-judge panel[27] includes a "concurrence in the judgment only,"[28] which is referred to internally as a "JO," or "a special concurrence without a statement of agreement with all that is said [in the majority opinion]."[29] As to the former, it is not always readily apparent that a published opinion includes a concurrence in judgment only by one of the three panel members. This is because the majority of concurrences in judgment only are done without an opinion, so the only way an attorney can identify an opinion as being or including a physical precedent is to read the judgment line (which is easy to overlook).[30] This is why I often write an actual opinion, highlighting my concurrence in judgment only, to make it absolutely clear to the bench and bar that the majority opinion is or includes[31] a physical precedent and is not binding authority.[32] And, as noted supra, the only way to tell if a special concurrence triggers the court's physical-precedent rule is to carefully read that concurrence and make sure that it can be reasonably understood as containing a statement of agreement with all that is said in the majority opinion. If no such statement is included, then the opinion (or any identified division of that opinion) is not binding in future cases.[33]

That said, I do not believe that a lawyer should shy away from citing a physical-precedent opinion to our court or the Georgia Supreme Court (especially if you believe that the reasoning contained in that opinion is persuasive), so long as you clearly designate the opinion as being or containing a physical precedent.[34] Indeed, at least some of my colleagues (and yours truly) believe that the physical precedents of our court are entitled to a greater degree of consideration and respect than opinions from other jurisdictions.[35] And once a physical precedent has been adopted by a unanimous three-judge panel of our court, by a majority of the judges in a seven-judge or twelve-judge "whole court" decision, or by the supreme court, that precedent then becomes binding authority in future cases.[36]

The foregoing briefing suggestions, of course, only begin to scratch the surface of what is necessary to craft a persuasive, "winning" brief with the court of appeals; but they are, in my view, the most overlooked or least known tips. To put it plainly, a lawyer's likelihood of success on appeal before our court is largely dependent upon the substance of the appellate brief(s). As my former colleague, Judge J.D. Smith, has rightly and astutely observed, "[t]he Court's procedures and its institutional

culture mean that the brief is almost always far, far more important, [and] far more likely to be outcome-determinative than oral argument."[37]

Endnotes:

20 While there are many excellent books and essays on the art of brief writing, I highly recommend ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES (2008).

21 *Id.* at 97 (noting that many judges "consider the Summary of Argument indispensible--indeed, the most important part of the brief").

22 CT. APPEALS R. 25(a).

23 *Id.*; see also CT. APPEALS R. 25(b)(1) (requiring the appellee to "point out any material inaccuracy or incompleteness of appellant's statement of facts and any additional statement of facts deemed necessary, plus such additional parts of the record or transcript deemed material," and noting that "[f]ailure to do so shall constitute consent to a decision based on the appellant's statement of facts," and that "[e]xcept as controverted, appellant's statement of facts may be accepted by this Court as true").

24 CT. APPEALS R. 25(c)(2); *see also Woods v. Hall*, 315 Ga. App. 93, 95, 726 S.E.2d 596, 598 (2012) (noting that even pro se litigants are required to comply with Court of Appeals Rule 25(c)(2)); *Johnson v. State*, 313 Ga. App. 895, 897 n.8, 723 S.E.2d 100, 105 n.8 (2012) (noting that the court of appeals will not cull the record on a party's behalf); *Nelson v. Bd. of Regents of Univ. Sys. of Ga.*, 307 Ga. App. 220, 226 n.22, 704 S.E.2d 868, 874 n.22 (2010) (noting that because "plaintiffs' arguments do not address the substantive merits of the trial court's decision ... those claims are deemed to be abandoned").

25 *See* Eugene Volokh, Supermajority Rules for Court Opinions, and "Physical Precedent," Volokh Conspiracy (July 13, 2011, 2:53 PM), http:// www.volokh.com/2011/07/13/supermajority-rules-for-court-opinions-and-physical-precedent/ ("Georgia seems to be one of the few American jurisdictions that requires a supermajority on a court to reach a binding decision--if the three-judge panel splits 2-1, the case must either be reheard by a larger court (if the one judge is in the dissent) or at least will lack full precedential value (if the one judge concurs only in the judgment).").

26 *Chaparral Boats, Inc. v. Heath*, 269 Ga. App. 339, 349-50, 606 S.E.2d 567, 575 (2004) (Barnes, J., concurring specially) (noting that a physical precedent "may be cited as persuasive authority, just as foreign case law or learned treatises may be persuasive, but it is not binding law for any other case").

27 *See* O.C.G.A. § 15-3-1(b) (2012) ("The court shall sit in divisions composed of three Judges in each division.").

28 *See Ga. Farm Bureaus Mut. Ins. Co. v. Franks*, 320 Ga. App. 131, 137 n.14, 739 S.E.2d 427, 433 n.14 (2013) ("When a panel judge concurs in the judgment only, a case serves as physical precedent only, which is not binding in subsequent cases.").

29 CT. APPEALS R. 33(a); *see also Whitfield v. Tequila Mexican Rest. No. 1, Inc.*, 323 Ga. App. 801, 803 n.2, 748 S.E.2d 281, 285 n.2 (2013) (noting that "[u]nder Court of Appeals Rule 33(a), a special concurrence that does not agree with all that is said renders the opinion to be physical precedent only").

30 *See*, e.g., *Jones v. Morris*, 325 Ga. App. 65, 70, 752 S.E.2d 99, 103 (2013); *Nixon v. Pierce Cnty. Sch. Dist.*, 322 Ga. App. 745, 751, 746 S.E.2d 225, 229 (2013).

31 It is important to keep in mind that many of the opinions published by the court of appeals have separate divisions and that our judges can and often do concur in judgment only as to a specific division (rather than the entire opinion). *See*, e.g., *Monitronics Int'l, Inc. v. Veasley*, 323 Ga. App. 126, 142, 746 S.E.2d 793, 807 (2013) (Boggs & McMillian, JJ., concurring in judgment only as to Division 2 of the majority opinion).

32 *See*, e.g., *Felton v. State*, 322 Ga. App. 630, 635-36, 745 S.E.2d 832, 837 (2013) (Dillard, J., concurring in judgment only); *Mauldin v. Mauldin*, 322 Ga. App. 507, 518, 745 S.E.2d 754, 763 (2013) (Dillard, J., concurring in judgment only).

33 In opinions published by a seven-judge or twelve-judge "whole court," there must be a majority of the judges fully concurring in the opinion or any particular division of that opinion for it to be binding precedent in future cases (four judges and seven judges, respectively). *See* ALSTON & BIRD, LLP, supra note 8, at 148 ("[W]hen fewer than a majority of the judges sitting as a seven-judge or [twelve]-judge court concur with all that is said in the decision, the decision constitutes a nonbinding 'physical' precedent only.").

34 *See*, e.g., *Whitfield*, 323 Ga. App. at 803 n.2, 748 S.E.2d at 284 n.2 (adopting the reasoning of a physical precedent because "we find the majority's discussion of an owner or occupier of land's potential liability for criminal acts of third parties to be highly persuasive, particularly in light of the similar fact pattern in this case"), *Muldrow v. State*, 322 Ga. App. 190, 195 n.29, 744 S.E.2d 413, 418 n.29 (2013) ("This is not to say, however, that a party on appeal should shy away from citing physical precedent as persuasive authority.... Nevertheless, it is crucial that litigants explicitly designate physical precedent as such, and thoroughly explain why this Court should adopt the reasoning from that particular opinion."). Even the Georgia Supreme Court has recognized and relied upon the physical precedents of our court from time to time. See, e.g., Couch v. Red Roof Inns, Inc., 291 Ga. 359, 365, 729 S.E.2d 378, 383 (2012) (noting that "there is already persuasive Georgia precedent on this issue," citing a physical precedent of the court of appeals).

35 *Muldrow*, 322 Ga. App. at 195 n.29, 744 S.E.2d at 418 n.29 (noting that "some of the judges on this Court are of the view that our physical-precedent cases should be afforded greater consideration than decisions from appellate courts in other jurisdictions").

36 *Johnson v. Butler*, 323 Ga. App. 743, 746 n.13, 748 S.E.2d 111, 113 n.13 (2013) ("Assuming arguendo that [*Tanner v. Golden*, 189 Ga. App. 894, 377 S.E.2d 875 (1989)] is only physical precedent, it is ultimately of no consequence because a subsequent, unanimous panel of this Court fully adopted the reasoning of Tanner in [*Troup Cnty. Bd. of Educ. v. Daniel*, 191 Ga. App. 370, 381 S.E.2d 586 (1989)] the opinion noted supra. The District's contention that Court of Appeals Rule 33(a) precludes a panel of this Court from fully adopting, and thus making fully precedential, a prior physical precedent is wholly without merit.").

37 *Smith*, supra note 3, at 8.

The Appellate Review is Looking for Submissions

The Communications committee is currently preparing for our final newsletter of the 2014–15 bar year. If you have any content you would like to submit, please contact the editor, Margaret Flynt, by email: mflynt@gpdsc.org.

Making Sense of the Justification Statute

by: Frances Kuo

Our Supreme Court recently decided the case of *Woodard v. State*, Case No. S14A1532 (decided March 27, 2015), a death penalty case where appellant was convicted of malice murder and other crimes in connection with the shooting deaths of two police officers. In one enumeration, appellant argued that trial counsel was ineffective because he did not object to the trial court's instruction tracking the language of the justification statute, O.C.G.A. § 16-3-21 (b) (2),.This code section provides:

> *A person is not justified in using force under the circumstances specified in subsection (a) of this Code section [i.e., defense of self or others] if he: . . . [i]s attempting to commit, committing or fleeing after the commission or attempted commission of a felony.*

Relying on *Heard v. State*, 261 Ga. 262 (1991), appellant argued that it does not make sense to apply the statutory exception above because the underlying felony for felony murder was possession of a firearm by a convicted felon, which is a "status" felony lacking any nexus to the officer's use of force against him.

In *Heard*, the defendant was charged with malice murder, felony murder, and possession of a firearm by a convicted felon and convicted of malice murder. 261 Ga. at 262. The trial court instructed the jury that self-defense is not a defense to felony murder. A majority of the Supreme Court reversed, holding that "where there is sufficient evidence of a confrontation between the defendant and a victim or other circumstances which ordinarily would support a charge on justification, the defendant is not precluded from raising justification as a defense." 261 Ga. at 262-263. It reasoned that O.C.G.A. § 16-3-21 (b) (2) should apply only "where it makes sense to do so, for example, to a burglar or robber who kills someone while fleeing," but not to a defendant who was a convicted felon in possession of a firearm. 261 Ga. at 263.

In *Woodard*, the Supreme Court rejected appellant's argument, finding that the trial court's instruction was a correct statement of the law and properly tracked the language of the statute. In doing so, it overruled *Heard*, supra, despite heavy dissent. The Supreme Court therefore concluded that trial counsel was not ineffective for failing to raise a meritless objection.

It's worth examining the now overruled Heard decision and *Smith v. State*, 290 Ga. 768, 776-779 (2012) in addition to *Woodard*. The arguments of the various Justices in each of these opinions are cause for pause. Diametrically opposed opinions regarding the interpretation of a statute fuels healthy debate and further analysis. Although the Supreme Court overruled a 24 year precedent challenging the sense of O.C.G.A. § 16-3-21 (b) (2), the field still seems ripe for picking.

Since appellate courts are courts for the correction of errors below, they can only decide issues which are raised and ruled on below. Consequently, the only other way to make sense of a statute or to attack it for its nonsense is to challenge its constitutionality as applied. See, e.g., *Santos v. State*, 284 Ga. 514, 514-515 (2008) (holding that "vagueness challenges to criminal statutes that do not implicate the First Amendment freedoms must be examined in the light of the facts of the case to be decided."). After all, criminal statutes should be strictly construed against the State.

At first glance, the plain language of O.C.G.A. § 16-3-21 (b) (2) seems innocuous and logical. Because it is the law, we accept it. But as Miyamoto Musashi once said, "Perception is strong and sight weak. In strategy, it is important to see distant things as if they were close and to take a distanced view of close things."

Let's take the following provision: "A person is not justified in using force under the circumstances specified in subsection (a) of this Code section [i.e., defense of self or others] if . . . he: . . . [i]s fleeing after the commission or attempted commission of a felony." O.C.G.A. § 16-3-21 (b) (2).

If, for example, a defendant is charged with theft by taking against John Jones, does the statute prohibit a fleeing defendant from using force to defend himself if Jones chases him and attacks him with a knife or deadly weapon? According to the statute, it would appear so. But does it make sense to apply the statute strictly against defendant because Jones pursues him with a knife in retribution, effectively eviscerating defendant's justification defense?

If the incident forming the basis of defendant's justification defense arises out of a different transaction and occurrence, which is separated by time and space from the initial felony, is the law applied in this circumstance vague or overbroad?

A law is unconstitutionally vague if it "impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." (Citations omitted.) *Satterfield v. State*, 260 Ga. 427, 428 (1990). A statute can also be challenged on its face or as applied on the grounds of due process and equal protection. Perhaps some future case will make the law less nebulous.

Frances C. Kuo is a solo practitioner in Decatur, Georgia. Her practice is devoted to criminal appeals and post-conviction proceedings.