Supreme Court of Georgia
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SUMMARIES OF OPINIONS

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FINAL EXIT NETWORK, INC. ET AL. V. THE STATE (S11A1960)

The Supreme Court of Georgia has struck down as unconstitutional a Georgia statute on assisted suicide.

In a 7-to-0 decision, written by **Justice Hugh Thompson**, the high court has ruled that Official Code of Georgia § 16-5-5 (b) "restricts speech in violation of the free speech clauses of both the United States and Georgia Constitutions."

The case involves the late John Celmer of **Forsyth County,** who contacted Final Exit Network, Inc., after he was diagnosed with cancer in 2006. Final Exit Network is a national organization incorporated in Georgia. According to the organization's website, which lists Pennington, NJ as its address, all "[m]entally competent adults have a basic human right to end their lives when they suffer from a fatal or irreversible illness or intractable pain…." Under a mission statement, the organization states it offers "free service to all who apply, providing relevant information, home visits if possible…." "We do not encourage anyone to end their life, do not provide the means to do so, and do not actively assist in a person's death," the website says. "We do, however, support any member who requests it when medical circumstances warrant their decision."

According to briefs filed in the case, in May 2008, Celmer spoke to Nicholas Sheridan, the organization's Southeast Regional Coordinator, and sent him medical records and a statement that he wished to die. Sheridan assigned Celmer a "first responder," who completed by phone a questionnaire with Celmer, which she then submitted to Sheridan. Prosecutors say Sheridan then forwarded the questionnaire and medical records to Thomas Goodwin, the organization's

president who subsequently approved Celmer for assistance. He assigned Claire Blehr as Celmer's "exit guide." Blehr met with Celmer and he signed the organization's "Request for Volunteer Exit Guide Support" and "Statement of My Decision after Medical Advice." Celmer ordered an "exit hood" from the GLADD Group and purchased two tanks of helium from Party City. According to the State, in June 2008, Blehr and Goodwin went to Celmer's home to assist in his suicide. The exit hood was connected to one of the helium tanks, then placed on Celmer's head. Blehr and Goodwin then held Celmer's hands while he inhaled helium through the hood and died.

In March 2010, Sheridan, Goodwin, Blehr and Dr. Lawrence Egbert, a physician who served as the organization's medical director, were indicted by a Forsyth County grand jury on charges of offering to assist in commission of suicide, tampering with evidence (the State claims Blehr and Goodwin disposed of the hood and helium tanks in a dumpster) and violation of the Racketeer Influenced and Corrupt Organizations Act (RICO). All four pleaded not guilty. They filed motions to dismiss the charges and argued that Official Code of Georgia § 16-5-5 section (b) is unconstitutional because it violates the First Amendment and Equal Protection and Due Process clauses of the U.S. and Georgia constitutions. The statute says that any person "who publicly advertises, offers, or holds himself or herself out as offering that he or she will intentionally and actively assist another person in the commission of suicide and commits any overt act to further that purpose is guilty of a felony…" The trial court denied their motions and ruled the statute is constitutional.

But in today's unanimous decision, that ruling "is hereby reversed."

"Although the State attempts to portray § 16-5-5 (b) as simply a ban on assisted suicide, the clear language of the statute demonstrates otherwise," the opinion says. "It is undisputed that § 16-5-5 (b) does not ban assistance in all suicides, conduct which by itself is legal in Georgia."

"Individuals who offer to assist in the commission of a suicide in a less 'public' manner are not covered…," the opinion says. "Rather, as the State admits, § 16-5-5 (b) was carefully drafted and intentionally enacted for the purpose of preventing a 'Dr. Kevorkian type actor' from offering to assist in suicide while leaving others free to do so."

The Georgia legislature could have imposed a ban on all assisted suicides with no restriction on protected speech. Or it could have banned all offers to assist in suicide that are followed by the act. "The State here did neither," the opinion says.

"The State has failed to provide any explanation or evidence as to why a public advertisement or offer to assist in an otherwise legal activity is sufficiently problematic to justify an intrusion on protected speech rights," today's opinion says. "Absent a more particularized State interest and more narrowly tailored statute, we hold the State may not, consistent with the United States and Georgia Constitutions, make the public advertisement or offer to assist in a suicide a criminal offense."

(Judge Christopher S. Brasher served as designated judge in place of Justice David Nahmias.)

Attorneys for Appellants (Final Exit Network): Robert Rivas, Bruce Harvey, Donald Samuel, L. David Wolfe, Robert Rubin

Attorneys for Appellee (State): Penny Penn, District Attorney, Sandra Partridge, Chief Asst. D.A., Samuel Olens, Attorney General, Paula Smith, Sr. Asst. A.G.

CARDINALE V. CITY OF ATLANTA ET AL. (S11G1047)

The Georgia Supreme Court has ruled that the City of Atlanta violated the state's Open Meetings Act by refusing to name the City Council members who voted against amending its rules regarding public comment at committee meetings.

With today's split 4-to-3 decision, written by **Chief Justice Carol Hunstein**, the high court has partially reversed a decision by the Georgia Court of Appeals.

The case stems from a vote taken in 2010 during the Atlanta City Council's annual retreat, which was advertised as a "public meeting" and held at the Georgia Aquarium. On the second day of the retreat, the council voted on whether to amend its rules regarding public comment at its committee meetings. By a show of hands, the Council voted 8-to-7 to maintain the existing rules. The minutes of the meeting do not reflect how the members voted but state: "After an extensive discussion, it was determined that the membership was not in support of amending the existing law."

After obtaining a copy of the minutes, Matthew Cardinale, editor of Atlanta Progressive News, asked the City for the vote tally to see how individual members voted. When he was unable to get the vote's breakdown, Cardinale filed a "pro se" complaint (he's representing himself) in **Fulton County Superior Court**, claiming that under the Georgia Open Meetings Act, he had a right to the information. At issue in this case is the wording in the Act, which states: "In the case of a roll-call vote, the name of each person voting for or against a proposal shall be recorded, and in all other cases, it shall be presumed that the action taken was approved by each person in attendance unless the minutes reflect the name of the persons voting against the proposal or abstaining."

In his lawsuit, Cardinale sought not only a declaration that the City acted illegally by not disclosing the information, but also that the individual defendants be charged with a misdemeanor crime and charged a $500 fine. The City filed a motion asking the court to dismiss Cardinale's complaint, arguing that the Act did not require a detailed record of the vote and that Cardinale had failed to state a claim against the City that would entitle him to some relief. The trial court granted the City's motion to dismiss Cardinale's lawsuit, and he then appealed to the Georgia Court of Appeals. That court upheld the lower court's ruling, finding that nothing in the Act "demands detailed information on non-roll-call votes…."

In today's opinion, the majority disagrees. The Open Meetings Act "was enacted in the public interest to protect the public – both individuals and the public generally – from 'closed door' politics and the potential abuse of individuals and the misuse of power," the majority states. "While the Act provides for public access to agency meetings, it also fosters openness by, among other things, requiring agencies to generate meeting minutes that are open to public inspection so that members of the public unable to attend a meeting nonetheless may learn what occurred."

Given the legislative intent, the correct reading of the statute, "and the one that is most natural and reasonable, is that, having first mandated that meeting minutes include a 'record of all votes,' the subsection then sets forth alternative requirements for accurately recording individuals' votes in the case of both roll-call and non-roll-call votes," the majority opinion says. "In the case of a non-roll-call vote, the minutes must list the names of those voting against a proposal or abstaining. If no such names are listed, the public may correctly presume that the vote was unanimous."

To adopt the position that it's within the agency's discretion to decline to record the names of those voting against a proposal in a non-roll-call vote "conflicts with the Act's goal of greater governmental transparency."

It would also lead to "unreasonable results," the majority states. "We cannot conclude that the General Assembly intended to require members of the public to presume, incorrectly, that a non-unanimous, non-roll-call vote was, in fact, unanimous…even if some members of the public know from attending the meeting…that the vote was split."

As a private citizen, however, Cardinale lacks standing to initiate a criminal prosecution, the majority rules. "As such, the portion of the complaint seeking to impose criminal liability on the individual defendants was properly dismissed." The majority is joined by Justices Hugh Thompson, P. Harris Hines and David Nahmias.

In the dissent, **Justice Harold Melton** writes that the plain language of the Open Meetings Act "makes clear that the minutes of an agency meeting need not include the names of persons voting against a proposal or abstaining when the vote is not taken by roll-call."

In a roll-call vote, "the minutes must include the name of each person voting for or against a proposal," the dissent says. "However, in all other cases, a presumption exists that an action was approved by unanimous vote unless the minutes reflect otherwise."

"In short, while an agency is required to include in the minutes the name of each person who voted for or against a proposal in the case of a roll-call vote, in all other cases it has the *option* of including in the minutes the names of the individuals who voted against a proposal or abstained from voting, but it is not *required* to do so. There is nothing complicated or unreasonable about this straightforward interpretation of the statute." Joining the dissent are Presiding Justice George Carley and Justice Robert Benham.

Attorney for Appellant (Cardinale): Matthew Cardinale, pro se
Attorneys for Appellee (City): Cathy Hampton, City Attorney, Amber Robinson, Sr. Asst. City Attorney, Kristen Denius, Sr. Asst. City Attorney

MURPHY V. THE STATE (S11A1358)

A man convicted in **Muscogee County** of beating to death a 15-month-old baby girl will get a new trial under a ruling today by the Georgia Supreme Court.

In today's unanimous decision, **Chief Justice Carol Hunstein** writes that "[b]ecause the trial court's favorable comments regarding one of the State's witnesses could have been construed by the jury as bolstering that witness's testimony, we must reverse and remand for a new trial."

The jury found that on Sept. 19, 1998, emergency medical personnel arrived at the home of Carmen Jackson, where they found Jackson's 15-month-old daughter, Tytanna, not breathing and without a pulse. She was later pronounced dead at the hospital. At the time, Timothy Murphy lived with Jackson and her two children, and the couple later testified that Murphy had been babysitting that day while Jackson was at work. When she arrived home, the baby seemed to be fine. Around midnight, however, Murphy heard the child whining and found her struggling to breathe. The pair testified she called 911 while he administered CPR.

According to medical experts' testimony at trial, the baby had been beaten so severely her pancreas and duodenum were ruptured and the contents of her intestines had leaked into her abdomen. She had penetration wounds to her vagina and anus, two broken ribs and multiple

contusions on her face, scalp, back, abdomen and leg. Tytanna died of toxic shock two to four hours after she was injured. The couple testified no one else had been alone with the baby that week.

Murphy and Jackson were both charged with murder, aggravated sexual battery and cruelty to children. The sex charges were dead docketed, and the two were tried jointly. Both were found guilty of the other charges and sentenced to life plus 20 years in prison. In 2007, this court upheld her convictions and sentence. Murphy now appeals to the state Supreme Court.

"We find this evidence sufficient to enable a rational trier of fact to find Murphy guilty beyond a reasonable doubt of the charged crimes," today's opinion says.

At issue in this case, however, are the remarks of the trial judge during the testimony of a police officer. In response to an objection, Judge Douglas Pullen said, "You're asking this detective, who is a good detective, what is in someone, somebody else's head." The judge also said the detective "has worked a lot of cases and he's got a recollection and he's got a written memorandum and hopefully between the two of those and his good efforts we're going to find the truth of the matter."

Official Code of Georgia § 17-8-57 states: "It is error for any judge in any criminal case…to express or intimate his opinion as to what has or has not been proved or as to the guilt of the accused. Should any judge violate this Code section, the violation shall be held by the Supreme Court or Court of Appeals to be error and the decision in the case reversed, and a new trial granted…."

The purpose of that law, today's opinion says, "is to prevent the jury from being influenced by any disclosure of the trial court's opinion regarding the credibility of a witness."

Here, "[t]he jury could have interpreted the trial court's calling Tyner a 'good detective' as expressing a favorable opinion on his abilities and thus bolstering that witness's credibility," the opinion says. The jury also could have construed the judge's comments "as an expression of the court's opinion that Tyner's recollection of the defendant's statement was reliable or credible."

"Therefore, the trial court erred in making statements that could have been interpreted as offering an opinion on Tyner's credibility."

Attorney for Appellant (Murphy): William Mason
Attorneys for Appellee (State): Samuel Olens, Attorney General, Paula Smith, Sr. Asst. A.G., Benjamin Pierman, Asst. A.G., Julia Slater, District Attorney, David Helmick, Asst. D.A.

GUTIERREZ V. THE STATE (S11G0344)

In another 4-to-3 decision, the Georgia Supreme Court has ruled against a young man from **Barrow County** who had appealed a judge's refusal to transfer his criminal case to juvenile court.

In an opinion written by **Presiding Justice George Carley**, the high court has upheld a ruling by the Georgia Court of Appeals, agreeing that the evidence was sufficient to support an armed robbery charge.

According to the State's case, Francisco Gutierrez was 16 years old and the only juvenile in March 2009 when he and four masked men allegedly entered the China Wok restaurant in Winder, GA through the back door. They were armed with a handgun, an aluminum baseball bat, an Airsoft pistol, a hammer and a plastic gun. The suspect with the bat struck the restaurant's

owner, Susan Jiang, in the head, demanding money. She told them the money was in the cash register at the front of the store. The one with the bat and the suspect with the handgun then went to the front where Jiang's 11-year-old son, Jeffery Zheng, was. When they tried unsuccessfully to open the register, the mother told the child to open it. The boy opened the drawer and lifted the flap that held the money in place.

Meanwhile, an undercover officer was witnessing the incident from outside the store. He later testified he saw the five enter the restaurant and the one with the bat attack the owner. Fearing for the safety of the owner and her son, he shot at the armed suspect through the front glass window. Hearing shots, the defendants ran out the back door where officers arrested them. The owner and her son later told police they believed no money had been taken.

Gutierrez was indicted for armed robbery and other charges. Prior to trial, he filed a motion asking the superior court to transfer his case to juvenile court. Under state law, he argued, the superior court may assert jurisdiction of a matter normally within the jurisdiction of juvenile court only if the State presents "evidence sufficient to support the allegations of the indictment." Here the trial court found that while "no money was actually physically removed from the cash register," an armed robbery had occurred and denied Gutierrez's motion. Gutierrez then appealed to the Georgia Court of Appeals, arguing that there was no movement of the cash to constitute "a taking," which is a key element to proving armed robbery. The Court of Appeals disagreed, finding that "the armed robbery was completed at the time the son opened the cash register and raised the flap resting on top of the cash, thereby ceding control of the money to the perpetrators."

Under state law, today's majority opinion says, a person commits armed robbery when "he or she takes property of another from the person or the immediate presence of another."

Since the state Supreme Court's 1974 decision in *James v. State*, "this Court has held that, for the offense of armed robbery to be complete under [the statute], the 'slightest change of location whereby the complete dominion of the property is transferred from the true owner to the trespasser is sufficient asportation,'" the majority writes. (Asportation means movement or carrying away.) "Thus, Georgia has consistently required the conjunction of both the 'slightest change of location' and the transfer of 'complete dominion' over the property."

Here, "[t]he single act of pulling a cash drawer out from the register constitutes the requisite slightest change of location," the majority opinion says. "Furthermore, '[t]he slightest movement is sufficient to meet the element of asportation,' so long as it is 'a movement away from the area where the object was intended to be.'"

"In this case, the money was removed 'from its original position or place where the [victims] wanted it to be' and instead was placed and uncovered in front of the armed intruder in the place where he wanted it to be, and in this way, the money 'came within the dominion and control of [Gutierrez] and his accomplice[s], and the asportation, or taking was complete….'" Joining the majority are Justices Hugh Thompson, P. Harris Hines and David Nahmias.

In one of two dissents, **Justice Robert Benham** disagrees that the movement of the cash-register drawer constituted the asportation required to satisfy the "taking" element of armed robbery. In this case, "the perpetrator never had actual physical contact with the property he sought to take from its owner," the dissent says, and the perpetrator never obtained complete dominion over the money in the cash-register drawer.

"Because I believe the victim must comply with an order from the perpetrator requiring the victim to put the property in a particular location for asportation to have occurred, and no such order or action took place in the case at bar, I conclude the facts before us do not support armed robbery and the case should be transferred to juvenile court." Joining in this dissent are Chief Justice Carol Hunstein and Justice Harold Melton.

Justice Harold Melton has written a separate dissent, pointing out the need to distinguish between abandoning control and asportation. "For example, when an armed robbery victim extends her arm to hand over a purse; or gets out of the car; or, as in this case, opens a cash register drawer; there has been an abandonment of control over the property that could end up the subject of the armed robbery," he writes. "However, none of these events, by themselves, represent the completed offenses of armed robbery without the additional presence of asportation."

"The decisive factor in this case is that at no point did the money in the cash register ever leave the place where it otherwise always existed," the dissent says. "As such, there was no asportation of the money that would support the 'taking' element of armed robbery." Joining this dissent are Chief Justice Carol Hunstein and Justice Robert Benham.

Attorney for Appellant (Gutierrez): James Smith
Attorneys for Appellee (State): J. Bradley Smith, District Attorney, Deborah Wilbanks, Chief Asst. D.A.

THE STATE V. PRESCOTT (S11G1407)

The Georgia Supreme Court has reversed a decision by the Georgia Court of Appeals, and as a result, a man's conviction for child molestation has been reinstated.

At issue in this case is whether the State proved venue – or where the molestation occurred. Georgia's Constitution requires that "all criminal cases shall be tried in the county where the crime was committed," and therefore venue must be proven beyond a reasonable doubt.

The Court of Appeals reversed the man's conviction on the ground that the State failed to present sufficient evidence to prove the crime occurred in **Screven County**.

But in today's unanimous decision, written by **Justice Hugh Thompson**, "[b]ecause we find the evidence, albeit circumstantial, sufficient to prove venue beyond a reasonable doubt, we reverse."

According to briefs filed in the case, during a basketball game at Screven County High School, Richard Jerome Prescott – an 18-year-old student – was witnessed being given oral sex by a 12-year-old girl in the boys' bathroom. (The girl did not testify at trial.) Prescott was charged with aggravated child molestation, but in 2009, the jury convicted him of the less serious charge of child molestation. He was given a 15-year split sentence, with five years to be served in prison followed by 10 on probation. Prescott appealed and in May 2011, the Court of Appeals reversed Prescott's conviction, finding the State had failed to prove venue because "[n]o witness testified that Screven County High School is in Screven County."

In 2011, this Court ruled in *Thompson v. Brown* that evidence that a crime occurred in the City of Vidalia was insufficient to prove venue in Toombs County. The Court noted, however, that Vidalia is situated in both Toombs and Montgomery counties. "Unlike *Thompson* and other cases in which the State proved that a crime was committed in a city which was located in more

than one county,…the venue question in this case focuses on whether a fact finder can infer that a crime which was committed in the Screven County High School actually took place in Screven County."

"We think such an inference is reasonable in this case," the opinion says. "Nevertheless, we take this opportunity to reiterate that venue must be proved beyond a reasonable doubt and that prosecutors must commit themselves to doing so."

In addition to the fact that the crime took place in the county high school, other facts prove venue, including that the crime was investigated by an employee of the Screven County Sheriff's Office and Screven County Sheriff's Office forms were used for *Miranda* waiver purposes. "In light of the inference and these additional facts, we conclude the State proved venue in Screven County beyond a reasonable doubt," the opinion says.

Attorneys of Appellant (State): Richard Mallard, District Attorney, Keith McIntyre, Asst. D.A.
Attorneys of Appellee (Prescott): Robert Persse, Stuart Patray

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IN OTHER CASES, the Supreme Court of Georgia has upheld **murder** convictions and life prison sentences for:

* Kenyatti Collins (Baldwin Co.)	**COLLINS V. THE STATE (S11A1946)**
* Brian Dukes (DeKalb Co.)	**DUKES V. THE STATE (S11A1775)**
* Bilal Duvall (Fulton Co.)	**DUVALL V. THE STATE (S11A1541)**
* Benjamin Tinno Hill (Fulton Co.)	**HILL V. THE STATE (S11A1914)**
* Herman Ingram (Fulton Co.)	**INGRAM V. THE STATE (S11A1917)**
* James Mitchell (Chatham Co.)	**MITCHELL V. THE STATE (S11A1899)**
* Ernest Lee Walker (Cobb Co.)	**WALKER V. THE STATE (S11A1492)**
* Jarnard M. Williams (Chatham Co.)	**WILLIAMS V. THE STATE (S11A1431)**
* Eugene Neal (Fulton Co.)	**NEAL V. THE STATE (S11A1663)**

(In a concurrence, Justice David Nahmias writes he agrees with the judgment in this case. But he questions whether the Georgia Supreme Court has the constitutional authority to review direct appeals in murder cases in which the State is not seeking the death penalty, instead of the appeal going first to the Georgia Court of Appeals. "If we have no constitutional authority to decide non-capital murder appeals, then we must stop doing it," he writes. "If such appeals come within our death-penalty jurisdiction, then we must continue to decide them unless the General Assembly provides otherwise or the Constitution is amended." Murder cases are the single largest category of the high court's published decisions.)

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IN DISCIPLINARY MATTERS, the Supreme Court has accepted a petition for voluntary discipline and ordered a **review panel reprimand** of attorney:

* Valerie Brown-Williams **IN THE MATTER OF: VALERIE BROWN-WILLIAMS (S12Y0310)**