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The Devil's in the Details: The Supreme Court of Georgia Discharges and Acquits Defendant Because Jury Oath Was Never Administered

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I. INTRODUCTION

Behind the bench of the Supreme Court of Georgia, there is a phrase inscribed on the wall: *Fiat justitia ruat caelum,* Latin for "Let justice be done, though the heavens may fall."[1] This motto serves as a daily reminder that justice must be served, regardless of the consequences. It is often said that the judiciary's role is to apply the law as it exists. As such, judges must refrain from allowing their emotions to dictate their decisions—even when those decisions have unpleasant consequences.[2] Because the legal profession is self-regulated, its rules and regulations are only as effective as the professionals who enforce them. Respecting and adhering to the judicial process, even when the end result is difficult to accept, is service to the legal profession in its ultimate form.

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1. *FAQ*, SUP. CT. OF GA., https://www.gasupreme.us/faq/ [https://perma.cc/DR9F-AH53] (last visited Jan. 12, 2024).

2. *See* Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CALIF. L. REV. 1485, 1487 (2011).

The Supreme Court of Georgia decided *Bowman v. State*[3] on February 21, 2023.[4] Applying Georgia law, the court determined that the defendant, once convicted of child molestation, was to be discharged and acquitted due to a procedural misstep at trial.[5] To many, it is likely bothersome that a criminal may be able to walk free due to a technicality. However, these technicalities are what ensure that defendants are treated fairly and equally under the law. They allow justice to be done, though the heavens may fall.

II. FACTUAL BACKGROUND

On February 17, 2014, Logan Adam Bowman was indicted in Paulding County, Georgia for crimes against his daughter.[6] On September 18, 2014, Bowman filed a demand for a speedy trial under section 17-7-170 of the Official Code of Georgia Annotated[7] and asserted his constitutional right to a speedy trial.[8] On December 5, 2014, a jury convicted Bowman of one count of child molestation and one count of incest. Bowman was sentenced to serve fifty years with the first fifteen years in confinement. However, one crucial detail was missing: the convicting jury was unsworn.[9]

Section 15-12-139 of the Official Code of Georgia Annotated[10] requires that the judge or clerk administer an oath to the trial jury in a criminal case.[11] Instead, on December 2, 2014, the court gave preliminary instructions but failed to administer any oath to the jury.[12] On December 4, 2014, the parties made closing arguments, the court gave a jury charge, and the jury began deliberations.[13] After deliberating for one day, the unsworn jury returned its verdicts and Bowman was sentenced several weeks later.[14]

On January 13, 2015, Bowman filed a timely motion for a new trial.[15] The record indicates no ruling or any other significant action on this

3. 315 Ga. 707, 884 S.E.2d 293 (2023).
4. *Id.*
5. *Id.* at 707, 884 S.E.2d at 294.
6. State v. Bowman, 361 Ga. App. 465, 466, 863 S.E.2d 180, 182 (2021).
7. O.C.G.A. § 17-7-170 (2011).
8. *Bowman*, 361 Ga. App. at 466, 863 S.E.2d at 182.
9. *Id.* at 465–66, 863 S.E.2d at 182.
10. O.C.G.A. § 15-12-139 (2011).
11. *Id.*
12. *Bowman*, 315 Ga. at 708, 884 S.E.2d at 294.
13. *Id.*
14. *Id.*
15. *Bowman*, 361 Ga. App. at 466, 863 S.E.2d at 182.

motion until September 27, 2019, when Bowman's post-conviction counsel filed an amended motion for new trial.[16] This amended motion asserted that the trial court had "committed structural error by failing to swear the petit jury prior to its deliberations."[17] Because it was undisputed that the trial court failed to swear the petit jury, the State consented to the grant of a new trial on November 1, 2019.[18] The court entered a consent order setting aside Bowman's conviction and sentence and reinstated his case to active status on the court's trial calendar.[19]

On November 27, 2019, Bowman's counsel filed a motion for discharge and acquittal on the grounds that his statutory and constitutional rights to a speedy trial had been violated by the nullified verdict.[20] The trial court ultimately agreed, and on March 30, 2020, the court granted Bowman's motion for discharge and acquittal. On April 1, 2020, the court ordered Bowman's immediate release from custody.[21]

Not surprisingly, the State appealed the trial court's decision, arguing that "the trial court erred in concluding that Bowman was barred from retrial on statutory and constitutional speedy trial grounds."[22] In response, Bowman argued that because the jury had not been sworn, he had not been "tried" or on "trial" under the meaning of O.C.G.A. § 17-7-170.[23] The Court of Appeals of Georgia disagreed, concluding that Bowman was "tried" within the plain meaning of O.C.G.A. § 17-7-170 in December 2014.[24] In its reasoning, the court of appeals relied primarily on the following dictionary definitions of the word "trial": "[t]he examination and determination of a cause by a judicial tribunal; determination of the guilt or innocence of an accused person by a court" and "[a] formal judicial examination of evidence and determination of legal claims in an adversary proceeding."[25]

The court of appeals ruled that an unsworn jury rendering a null conviction and requiring a new trial does not mean that the first trial is "rendered a nullity such that a defendant is entitled to a discharge and

16. *Id.*
17. *Id.*
18. *Id.*
19. *Bowman,* 315 Ga. at 708, 884 S.E.2d at 295.
20. *Id.* at 708–09, 884 S.E.2d at 295.
21. *Id.* at 709, 884 S.E.2d at 296.
22. *Bowman*, 361 Ga. App. at 466, 863 S.E.2d at 182.
23. *Id.* at 467–68, 863 S.E.2d at 183.
24. *Id.* at 472, 863 S.E.2d at 187.
25. *Id.* at 471, 863 S.E.2d at 186 (quoting *Trial*, THE OXFORD ENGLISH DICTIONARY (last modified Dec. 2023)) (quoting *Trial*, BLACK'S LAW DICTIONARY (8th ed. 2005)).

acquittal . . . ."[26] Therefore, the court reasoned, Bowman could and should be retried.[27]

The Supreme Court of Georgia has previously held that when a defendant makes a statutory request for a speedy trial, "'a mistrial . . . does *not* constitute a trial that satisfies the State's obligation under the demand for trial statutes.'"[28] However, the court of appeals sought to distinguish Bowman's case by pointing out that his case did not involve a mistrial.[29] Rather, the court said that Bowman's case involved a failure to swear the petit jury that went unnoticed by everyone involved. As far as everyone was concerned, a trial had occurred.[30] As such, the court concluded that "while the trial court's failure to swear the petit jury renders Bowman's conviction a nullity, there is no statutory or precedential basis for concluding that he was not *tried* within the meaning of O.C.G.A. § 17-7-170."[31]

The court of appeals went on to explain that a trial and a conviction are "not synonymous, nor are they to be conflated."[32] Thus, the court held that "[t]here is simply no legal basis supporting Bowman's attempt to extend the nullification of a *conviction* due to a violation of O.C.G.A. § 15-12-139 to the underlying *trial* itself for purposes of O.C.G.A. § 17-7-170."[33]

On appeal, Bowman argued that his statutory and constitutional rights to a speedy trial had been violated because more than seventy-eight months had passed between his arrest and the grant of his motion for discharge and acquittal. [34] However, the court of appeals concluded that the proper calculation for the delay was the time between the trial court's ruling on the amended motion for a new trial (November 1, 2019) and the grant of the motion for discharge and acquittal (March 30, 2020).[35]

O.C.G.A. § 17-7-170(b)[36] requires acquittal if the defendant makes a demand for a speedy trial and is not *tried* before the next succeeding

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26. *Id.* at 469, 863 S.E.2d at 184.

27. *Id.* at 473, 863 S.E.2d at 187.

28. *Id.* at 470–71, 863 S.E.2d at 185 (emphasis added) (quoting State v. Varner, 277 Ga. 433, 434, 589 S.E.2d 111, 113 (2003)).

29. *Id.* at 471, 863 S.E.2d at 186.

30. *Id.*

31. *Id.* (emphasis in original).

32. *Id.* at 472, 863 S.E.2d at 186.

33. *Id.* (emphasis in original).

34. *Id.* at 474, 863 S.E.2d at 188.

35. *Id.*

36. O.C.G.A. § 17-7-170(b) (2011).

regular court term thereafter.[37] Using this timeline, the court of appeals held that Bowman's statutory right to a speedy trial had not been violated because the next regular court term had not yet occurred.[38] The court also found that Bowman's constitutional claim failed at the threshold because the delay was less than one year long, so it was not presumptively prejudicial.[39]

Accordingly, the court held that Bowman's statutory speedy trial demand had been satisfied, his conviction should be reversed, and a retrial should take place rather than a discharge and acquittal.[40] A null conviction meant that Bowman could be retried for all of the charges he faced, even those for which he was acquitted (one count of aggravated child molestation, five counts of child molestation, and one count of incest).[41]

III. LEGAL BACKGROUND

The right to a speedy trial is a cornerstone of United States criminal procedure. Though it is a familiar concept to many, it is much more nuanced than it originally appears. Georgians have both a statutory and a constitutional right to a speedy trial.[42] If both of these issues are raised in a case, courts will often conduct the statutory analysis before delving into the more complex constitutionality issue, and if a court finds that a statutory violation exists, it may choose not to conduct a constitutional analysis at all.[43] After all, statutory and constitutional speedy trial violations require the same end result: acquittal and dismissal of the case.[44]

A. Statutory Right to a Speedy Trial

Under O.C.G.A. § 17-7-170(a)[45], "[a]ny defendant . . . may enter a demand for speedy trial at the court term at which the indictment or accusation is filed or at the next succeeding regular court term

37. *Id.*

38. *Bowman*, 361 Ga. App. at 474, 863 S.E.2d at 188.

39. *Id.* at 475, 863 S.E.2d at 188.

40. *Id.*

41. *Id.* at 465 n.1, 469 n.15, 863 S.E.2d at 182, 184.

42. *Id.* at 466, 863 S.E.2d at 182.

43. *See State v. Bell*, 274 Ga. 719, 720, 559 S.E.2d 477, 479 (2002) (concluding that the defendant's constitutional speedy trial claim was moot since he was entitled to discharge and acquittal under the applicable speedy trial statute).

44. O.C.G.A. § 17-7-170(b); Teasley v. State, 307 Ga. App. 153, 163, 704 S.E.2d 248, 258 (2010).

45. O.C.G.A. § 17-7-170(a) (2011).

thereafter . . . ."[46] O.C.G.A. § 17-7-170(b)[47] states that if the defendant "is not *tried* when the demand for speedy trial is made or at the next succeeding regular court term thereafter . . . the defendant shall be absolutely discharged and acquitted of the offense charged in the indictment or accusation."[48] O.C.G.A. § 17-7-170(c)[49] provides that a statutory speedy trial demand expires "at the conclusion of the *trial* or upon the defendant entering a plea of guilty or nolo contendere."[50]

B. Constitutional Right to a Speedy Trial

The Sixth Amendment to the United States Constitution[51] states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . ."[52]

Almost identically, Article I, § I, Paragraph XI of the Georgia Constitution[53] states that, "[i]n criminal cases, the defendant shall have a public and speedy trial by an impartial jury . . . ."[54]

In *Doggett v. United States*,[55] the Supreme Court of the United States explained the analysis that must take place when determining whether a defendant's constitutional right to a speedy trial has been violated.[56] In the 2008 Supreme Court of Georgia case *Ruffin v. State*, [57] the State of Georgia adopted the *Doggett* analysis as follows:

> First, the court must determine whether the interval from the accused's arrest, indictment, or other formal accusation to the trial is sufficiently long to be considered "presumptively prejudicial." If not, the speedy trial claim fails at the threshold. If, however, the delay has passed the point of presumptive prejudice, the court must proceed to the second step of the . . . analysis, which requires the application of a delicate, context-sensitive, four-factor balancing test to determine whether the accused has been deprived of the right to a speedy trial.[58]

46. *Id.*
47. O.C.G.A. § 17-7-170(b) (2011).
48. *Id.*
49. O.C.G.A. § 17-7-170(c) (2011).
50. *Id.*
51. U.S. CONST. amend. VI.
52. *Id.*
53. GA. CONST. art. I, § 1, para. 11.
54. *Id.*
55. 505 U.S. 647 (1992).
56. *Id.* at 651.
57. 284 Ga. 52, 663 S.E.2d 189 (2008).
58. *Id.* at 55, 663 S.E.2d at 195.

If the delay is presumptively prejudicial, the four-factor balancing test analyzes (1) whether delay before trial was uncommonly long; (2) whether the government or the criminal defendant is more to blame for that delay; (3) whether the defendant asserted his right to a speedy trial; and (4) whether he suffered prejudice as a result of the delay.[59]

Under *Higgins v. State*,[60] a delay of more than one year is presumptively prejudicial.[61] If the delay is less than one year long, Georgia courts have held that it is not presumptively prejudicial and, accordingly, the constitutional claim must fail at the threshold.[62] When a claim fails at the threshold, there is no need to conduct the four-factor balancing test.

C. Precedent for Forgotten Jury Oaths in Georgia

In 1897, the Supreme Court of Georgia decided *Slaughter v. State*,[63] a case in which the defendant appealed his conviction because the jury had not been sworn.[64] Defendant's counsel realized during the trial that the oath had not been administered to the jury, but neglected to alert the judge.[65] However, this turned out to be inconsequential. The court held that the administration of the oath was essential to the legality of the trial and was therefore not a matter which could be waived either expressly or by silence.[66]

Similarly, in the 2007 case *Spencer v. State*,[67] the defendant was convicted by an unsworn jury and subsequently granted a new trial.[68] In the new trial, the defendant sought to exclude those charges for which he had been previously acquitted on the basis of double jeopardy.[69] Because jeopardy does not attach until the jury is both impaneled and sworn, the court held that the jury had not had the authority "to pass upon any of the issues at trial, and therefore, to make any determinations whatsoever

59. *Doggett*, 505 U.S. at 651.

60. 308 Ga. App. 257, 707 S.E.2d 523 (2011).

61. *Id.* at 259, 707 S.E.2d at 526.

62. *See, e.g.*, *Ruffin*, 284 Ga. at 55, 663 S.E.2d at 195 (explaining that if the delay is not presumptively prejudicial, the claim fails at the threshold).

63. 100 Ga. 323, 28 S.E. 159 (1897).

64. *Id*. at 323, 28 S.E. at 159.

65. *Id.*

66. *Id.* at 330, 28 S.E. at 161.

67. 281 Ga. 533, 640 S.E.2d 267 (2007).

68. *Id.* at 533, 640 S.E.2d at 267–68.

69. *Id.* at 533–34, 640 S.E.2d at 268.

regarding guilt or innocence," and that Spencer could be convicted of the charges that he had been previously acquitted of in his new trial. [70]

In 2010, the Supreme Court of Georgia decided *Adams v. State*,[71] another case in which the jury oath was not administered at the start of trial.[72] However, once the mishap was noticed, the judge administered the oath after the close of the evidence, before jury deliberations.[73] Although the best practice is to give the oath as soon as the jury is empaneled, the court nevertheless held that "in the absence of a showing of actual prejudice, there is no reversible error if a belated oath is given prior to the jury's deliberations."[74]

In contrast, the court in the 2016 case *State v. Desai*[75] concluded that the belated oath rendered the jury "fatally infirm" and the trial a mere nullity.[76] At trial, the judge realized that she had forgotten to administer the oath after the jurors had been deliberating for approximately thirty-eight minutes.[77] Immediately upon realizing her mistake, the judge recalled the jury and administered the oath.[78] However, because deliberations had already begun, the oath was deemed to have been administered too late.[79]

D. Textualism of the Supreme Court of Georgia

When interpreting constitutional and statutory provisions, the Supreme Court of Georgia tends to look first to the plain language of the text itself, then to legal background for further context.[80] Even if a word is seemingly plain in meaning, the court has refused to read it in isolation, opting instead to read it "in the context of the regulation as a

70. *Id.* at 534, 640 S.E.2d at 268.

71. 286 Ga. 496, 690 S.E.2d 171 (2010).

72. *Id.* at 496–97, 690 S.E.2d at 173.

73. *Id.* at 498, 690 S.E.2d at 174.

74. *Id.*; *see* Gamble v. State, 141 Ga. App. 304, 304, 233 S.E.2d 264, 265 (1977) ("Although no prejudicial or harmful error was shown . . . we deem it the better practice to administer the statutory oath to the jurors . . . prior to their dispersing even though there has been no presentation of the evidence at the stage of the trial proceedings.").

75. 337 Ga. App. 873, 789 S.E.2d 222 (2016).

76. *Id.* at 875, 789 S.E.2d at 224 (citation omitted).

77. *Id.* at 874, 789 S.E.2d at 223.

78. *Id.*

79. *Id.* at 875, 789 S.E.2d at 224.

80. *See* May v. State, 295 Ga. 388, 391, 761 S.E.2d 38, 41 (2014) ("In our search for the meaning of a particular statutory provision, we look not only to the words of that provision, but we consider its legal context as well.").

whole."[81] For context, the court may look to other law—constitutional, statutory, decisional, and common law—that forms the legal background of the provision in question.[82]

In the 2012 case *Smith v. Ellis*,[83] the court stated that, "[i]n construing statutes . . . we do not read words in isolation, but rather in context."[84] The court quoted Justice Antonin Scalia and Bryan Garner to justify its reasoning: "The subject matter of the document . . . is the context that helps to give words meaning—that might cause *draft* to mean a bank note rather than a breeze."[85]

Similarly, in the 2015 case *Chan v. Ellis*,[86] the court noted that a "statute draws its meaning, of course, from its text."[87] However, the court also emphasized that the analysis does not stop there: "The common and customary usages of the words are important, but so is their context."[88]

In the 2017 case *Lathrop v. Deal*,[89] the court stated that it must "afford the constitutional text its plain and ordinary meaning, view the text in the context in which it appears, and read the text in its most natural and reasonable way, as an ordinary speaker of the English language would."[90] And most recently, in its 2023 *State v. Sass Group*[91] decision, the court stated that a clause's legal and historical contexts are "the primary determinants of a text's meaning."[92] In each of the aforementioned cases, the court reiterated its textual approach while simultaneously emphasizing the importance of contextual background.

IV. COURT'S RATIONALE

The Supreme Court of Georgia granted Bowman's petition for certiorari and determined that the case turned on the meaning of the

81. City of Guyton v. Barrow, 305 Ga. 799, 805, 828 S.E.2d 366, 371 (2019) (quoting Upper Chattahoochee Riverkeeper, Inc. v. Forsyth County, 318 Ga. App. 499, 502, 734 S.E.2d 242, 245 (2012)).

82. *May*, 295 Ga. at 392, 761 S.E.2d at 41.

83. 291 Ga. 566, 731 S.E.2d 731 (2012).

84. *Id.* at 573, 731 S.E.2d at 736.

85. *Id.* at 574, 731 S.E.2d at 736 (emphasis in original); *see also* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 56 (2012).

86. 296 Ga. 838, 770 S.E.2d 851 (2015).

87. *Id.* at 839, 770 S.E.2d at 853.

88. *Id.* (citation omitted).

89. 301 Ga. 408, 801 S.E.2d 876 (2017).

90. *Id.* at 429, 801 S.E.2d at 882 (quoting Ga. Motor Trucking Ass'n v. Ga. Dep't of Revenue, 301 Ga. 354, 356, 801 S.E.2d 9, 12 (2017)).

91. 315 Ga. 893, 885 S.E.2d 761 (2023).

92. *Id.* at 897–98, 885 S.E.2d at 766 (quoting Ammons v. State, 315 Ga. 149, 163, 880 S.E.2d 544, 555 (2022)).

words "trial" and "tried" under O.C.G.A. § 17-7-170.[93] Ultimately, the court reversed the judgment of the Court of Appeals of Georgia.[94] All of the justices concurred with the exception of Justice Pinson, who was disqualified because he was on the court of appeals when the trial court's decision was reversed.[95]

The supreme court stated that it "presumes that the General Assembly meant what it said and said what it meant" when interpreting statutes.[96] Specifically, the court relied on the following quote from *Zaldivar v. Prickett:*[97]

> The common and customary usages of the words are important, but so is their context. For context, we may look to other provisions of the same statute, the structure and history of the whole statute, and the other law—constitutional, statutory, and common law alike—that forms the legal background of the statutory provision in question.[98]

While the court of appeals used the customary usage of the word "trial" in its holding, the supreme court believed that the "Court of Appeals erred in failing to give proper weight to the constitutional background of the applicable speedy trial statute and [the Georgia Supreme Court's] precedents."[99] For this background, the supreme court pointed to both *Slaughter* and *Spencer* as proof that "without the oath, there is no jury; and without the jury, there is no trial."[100]

For more than 125 years, the Supreme Court of Georgia has held that administration of the jury oath is "an indispensable prerequisite to a legally valid jury trial."[101] As such, a trial before an unsworn jury is nothing more than an "attempted trial" and an attempted trial does not satisfy the requirements of O.C.G.A. § 17-7-170.[102] In reversing the court of appeals' decision, the supreme court reasoned that Bowman had filed his demand for a speedy trial in September 2014, and more than five

93. *Bowman,* 315 Ga. at 709, 884 S.E.2d at 296.

94. *Id.* at 712, 884 S.E.2d at 297.

95. *Id.*

96. *Id.* at 710, 884 S.E.2d at 296 (quoting Deal v. Coleman, 294 Ga. 170, 172, 751 S.E.2d 337, 341 (2013)).

97. 297 Ga. 589, 774 S.E.2d 688 (2015).

98. *Bowman,* 315 Ga. at 710, 884 S.E.2d at 296 (quoting *Zaldivar,* 297 Ga. at 591, 774 S.E.2d at 691).

99. *Id.* at 710, 884 S.E.2d at 296–97.

100. *Id.* at 711, 884 S.E.2d at 297.

101. *Id.*

102. *Id.* at 712, 884 S.E.2d at 297.

years later, on November 27, 2019, he still had not been tried before a proper jury pursuant to O.C.G.A. § 15-12-139.[103]

As previously mentioned, O.C.G.A. § 17-7-170(b) states that a defendant shall be absolutely discharged and acquitted if the defendant "is not *tried* when the demand for speedy trial is made or at the next succeeding regular court term thereafter."[104] The Superior Court of Paulding County has two regular court terms each year, one beginning on the second Monday in January and the other beginning on the second Monday in July.[105] As such, Bowman's statutory right to a speedy trial was violated, and the supreme court held that the trial court correctly discharged and acquitted Bowman in 2020.[106]

The speedy trial that criminal defendants have the right to demand under O.C.G.A. § 17-7-170 is the same speedy trial that is guaranteed by the Georgia Constitution and the Sixth Amendment to the United States Constitution.[107] Because Bowman was statutorily entitled to discharge and acquittal, the supreme court noted that there was no need to separately address the court of appeals' treatment of Bowman's constitutional claims.[108] The State will not get the opportunity to retry Bowman pursuant to O.C.G.A. § 17-7-170 and *Teasley v. State*,[109] in which the court held that "[t]he only possible remedy for a violation of the constitutional right to a speedy trial is dismissal of the indictment with prejudice."[110]

V. IMPLICATIONS

The court's holding in *Bowman v. State*[111] emphasizes the importance of trial procedure. In particular, it highlights the burden on prosecutors and judges to remain diligent during trial proceedings. Although O.C.G.A. § 15-12-139 mandates that the jury oath be administered, the statute does not indicate a specific time for the oath to be given.[112] If the judge or prosecution in Bowman's case had recognized earlier that the jury oath had not been administered, a belated oath could have been

103. *Id.*

104. O.C.G.A. § 17-7-170(b) (2011).

105. *Bowman*, 315 Ga. at 707 n.2, 884 S.E.2d at 295; O.C.G.A. § 15-6-3(31.1).

106. *Bowman*, 315 Ga. at 707 n.1, 884 S.E.2d at 294.

107. *Id.* at 710–11, 884 S.E.2d at 297.

108. *Id.* at 707 n.1, 884 S.E.2d at 294.

109. 307 Ga. App. 153, 704 S.E.2d 248 (2010).

110. *Id.* at 163, 704 S.E.2d at 258 (quoting Strunk v. United States, 412 U.S. 434, 434 (1973)).

111. Bowman v. State, 315 Ga. 707, 884 S.E.2d 293 (2023).

112. *See* O.C.G.A. § 15-12-139 (2011).

administered and there likely would have been no prejudice that constituted a new trial.[113]

It is important that attorneys keep an ear out for the oaths that are administered in a criminal trial and that they know the difference between them. There are two different oaths that should be administered. The first oath is the oath of jury on *voir dire* which states, "You shall give true answers to all questions as may be asked by the court or its authority, including all questions asked by the parties or their attorneys, concerning your qualifications as jurors in the case of _____. So help you God."[114]

Once the jury is empaneled, the judge or clerk shall administer the jury oath for criminal cases pursuant to O.C.G.A. § 15-12-139.[115] This oath states the following: "You shall well and truly try the issue formed upon this bill of indictment (or accusation) between the State of Georgia and (name of accused), who is charged with (here state the crime or offense), and a true verdict give according to the evidence. So help you God."[116]

Georgia case law explains that while the *voir dire* oath can be waived, the criminal trial jury oath cannot be waived. In *Slaughter v. State*, the Georgia supreme court found this oath to be jurisdictional, stating that it must be given in order to render a conviction that is "binding and conclusive."[117] This means that if there is an inconsistency with the *voir dire* oath, defense counsel must object in a timely manner to prevent waiver.

Taylor v. State[118] perfectly illustrates the importance of distinguishing the *voir dire* oath from the jury panel oath.[119] Similar to Bowman, the defendant in this case was convicted of aggravated child molestation and child molestation.[120] His attorney filed a motion for a new trial on the grounds that the correct *voir dire* oath had not been administered. Although the jury had not been given the correct *voir dire* oath, they had been given the jury panel oath. The Court of Appeals of Georgia held that Taylor was not entitled to a new trial because he waived any objection to

113. *See Adams*, 286 Ga. at 498, 690 S.E.2d at 174.

114. O.C.G.A. § 15-12-132 (2011).

115. O.C.G.A. § 15-12-139.

116. *Id.*

117. Slaughter v. State, 100 Ga. 323, 323, 28 S.E. 159, 159 (1897); *see also* Taylor v. State, 264 Ga. App. 665, 666, 592 S.E.2d 148, 150 (2003).

118. 264 Ga. App. 665, 592 S.E.2d 148 (2003).

119. *Id.* at 666, 592 S.E.2d at 150.

120. *Id.* at 665, 592 S.E.2d at 149.

the giving of the incorrect oath.[121] The Supreme Court of Georgia denied certiorari on April 27, 2004.[122]

In *United States v. Indiviglio*,[123] the United States Court of Appeals for the Second Circuit stated that "federal courts, including the Supreme Court, have declined to notice errors not objected to below even though such errors involve a criminal defendant's constitutional rights."[124] While this statement certainly also applies to the *voir dire* oath in Georgia state court, it does not apply to the criminal trial jury oath. Objections to this oath (or the lack thereof) can be made at any time. Accordingly, prosecutors should pay special attention to the oaths administered at the beginning of trial to prevent future speedy trial complications.

The court's holding in *Bowman* shows that defense attorneys have every incentive not to raise the jury oath objection until after trial is over. The decision brings up an interesting question about sandbagging[125]—that is, trial counsel's intentional silence when a possible error occurs at trial, with the hope of preserving the issue on appeal—and its ethical implications. Though not illegal, sandbagging is widely considered to be unethical because it creates an unfair playing field.

This statement is in no way intended to suggest that defense attorneys strive to act unethically. Rather, it is intended to draw attention to the difficult balancing act that defense attorneys face on a daily basis. Georgia law directs attorneys to "maintain the respect due to courts of justice and judicial officers" while simultaneously "maintain[ing] inviolate the confidence . . . of their clients."[126] On one hand, knowingly remaining silent in the face of a potential error at trial seems inherently disrespectful to the court. If the error is indeed prejudicial, a new trial will be ordered, and the time and money spent on the first trial will be wasted. On the other hand, it seems as though using a procedural error to one's advantage is the ultimate act of loyalty to one's client—particularly in a criminal trial with such high stakes.

On that note, attorneys on both sides should make sure that they know the effect that jury oaths have on the Fifth and Sixth Amendments. The Double Jeopardy Clause of the Fifth Amendment[127] provides that no person can be prosecuted twice for the same crime, while the Sixth

121. *Id.* at 665–66, 666 n.1, 592 S.E.2d at 150.

122. Taylor v. State, No. S04C0638, 2004 Ga. LEXIS 372 (Apr. 27, 2004).

123. 352 F.2d 276 (2d Cir. 1965).

124. *Id.* at 280.

125. *Sandbagging*, BLACK'S LAW DICTIONARY (9th ed. 2009).

126. O.C.G.A. § 15-19-4 (1933).

127. U.S. CONST. amend. V.

Amendment states that the accused shall enjoy the right to a speedy trial in criminal proceedings.[128]

In *Spencer v. State*, the defendant, like Bowman, was convicted by an unsworn jury and granted a new trial.[129] The court held that jeopardy does not attach until the jury is both impaneled and *sworn*.[130] Since no oath had been administered, the defendant had never been placed in jeopardy and he stood to be convicted of the charges that he had been previously acquitted of in the new trial.[131]

If Bowman had only brought a double jeopardy claim in his appeal, his claim would have undoubtedly failed. The speedy trial demand that Bowman filed in September 2014 was the crux of his case. Because the supreme court determined that the trial that took place in December 2014 was not a true trial, Bowman waited significantly longer than the precedential time limit of one year to go to trial. In fact, Bowman never went to "trial" at all; he only went to "attempted trial" in the words of the court.[132] Thus, his right to a speedy trial was clearly violated and the court's only option was to discharge and acquit him pursuant to Georgia law.

If the supreme court had supported the court of appeals' point of view, Bowman would still be in prison preparing for his new trial. The court of appeals reasoned that "as far as all involved were concerned, Bowman was in fact *tried* (or had a *trial*) and then convicted of the crimes for which he was indicted . . . ."[133] But the supreme court felt that the definition of a trial should not be determined merely by the mental states of those involved. While it is clear that everyone involved in Bowman's first trial thought that they were facilitating a true trial, this was not sufficient in the eyes of the law. Instead, the supreme court used *Bowman* as an opportunity to set the standard for future criminal trials by providing lower courts with a clear definition of "trial" under O.C.G.A. § 17-7-170.

Finally, it is important to note the emphasis that the supreme court placed on contextual background in this case. For years, the supreme court has relied on textualism when interpreting statutory and constitutional law, looking first to the plain language of the text itself.[134]

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128. U.S. CONST. amend. V; U.S. CONST. amend. VI.

129. Spencer v. State, 281 Ga. 533, 533, 640 S.E.2d 267, 267–68 (2007).

130. *Id.* at 534, 640 S.E.2d at 268 (emphasis in original).

131. *Id.*

132. *Bowman*, 315 Ga. at 712, 884 S.E.2d at 297 (quoting *Spencer*, 281 Ga. at 535, 640 S.E.2d at 268).

133. *Bowman*, 361 Ga. App. at 471, 863 S.E.2d at 186 (emphasis in original).

134. *See*, *e.g.*, *May*, 295 Ga. at 391, 761 S.E.2d at 41; *Chan*, 296 Ga. at 839, 770 S.E.2d at 853; *Lathrop*, 301 Ga. at 429, 801 S.E.2d at 882.

Interestingly though, the court in *Bowman* found the court of appeals' purely textual approach unpersuasive. The court of appeals relied primarily on the dictionary definitions of the word "trial."[135] The supreme court, however, determined that it was necessary to consider context—constitutional, statutory, and common law background of the statute—to determine the true meaning of "trial."[136]

It may seem a bit counterintuitive that a textualist court relies so much on historical context while interpreting the law. However, in their book *Reading Law: The Interpretation of Legal Texts*[137], Scalia and Garner clarify that "the difference between textualist interpretation and so-called purposive interpretation is not that the former never considers purpose. It almost always does."[138] To distinguish textualism from purposivism, Scalia and Garner lay out four limitations: (1) the purpose must be derived from the text; (2) the purpose must be defined precisely; (3) the purpose must be described concretely; and (4) the purpose cannot be used to contradict or supplement the text.[139]

To illustrate this point, in 2020, the United States Supreme Court decided *Bostock v. Clayton County,*[140] holding that "[t]he limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."[141] The Court reiterated this point by stating that "[t]he people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration."[142]

Armed with the understanding that purposivism cannot override the plain meaning of a word, Georgia case law makes it obvious that historical context is, at the very least, a factor that the court considers when interpreting the law. Moving forward, attorneys should take note of the background context surrounding state statutes and constitutional provisions rather than solely relying on their plain meaning.

Bowman v. State reminds attorneys of the importance of remaining diligent during trial proceedings. A defendant that was once convicted of

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135. *Bowman*, 361 Ga. App. at 471, 863 S.E.2d at 186 (footnotes omitted).

136. *Bowman*, 315 Ga. at 710, 884 S.E.2d at 296 (citing *Zaldivar*, 297 Ga. at 591, 774 S.E.2d at 691).

137. SCALIA & GARNER, *supra* note 85.

138. *Id.* at 56.

139. *Id.* at 56–58.

140. 140 S. Ct. 1731 (2020).

141. *Id.* at 1737.

142. *Id.* at 1749.

child molestation has been released from prison and is not at risk of being retried due to what many might consider to be a technicality. In Bowman's case, the devil was in the details, and without close attention to those details, true justice would not have been served—though the end result is likely unsettling to most. *Fiat justitia ruat caelum*.