



# Court of Appeals

## Memorandum

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To: Holly K.O. Sparrow

From: William L. Martin, III

Subject: Clerk File for Certified Questions

Date: July 16, 2010

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This is a form file for when we certify questions to the Supreme Court. It also has the information enclosed wherein commuted research and later we found out that the Supreme Court has never really accept one of our certified questions.

Thank you.

/ld



# Court of Appeals

## Memorandum

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To: Presiding Judge John H. Ruffin, Jr.  
From: *W. L. Martin, III*  
Subject: Certified Questions  
Date: August 22, 2003

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Attached please find a corrected list of the cases dealing with Certified Questions from the Court of Appeals to the Supreme Court, the current IOM Section XXI dealing with Certified Questions and my attempt at a revised XXI. Please review these documents and let me know your thoughts and feelings regarding the post IOM change.

/ld

Attachments

## Cases indicating Court of Appeals Certified Questions to Supreme Court

Lombard Corp. v. Collins, 224 Ga. App. 282 (1997) Case No. A97A0150. This is certified question posed to Supreme Court. Supreme Court by an unpublished order, declined to answer and transferred the case back to the Court of Appeals. See 229 Ga. App. 654 (1997) and 270 Ga. 120 (1998).

DHR v. Phillips, 223 Ga. App. 520 (1996) Case No. A96A1449 This is list of certified questions posed to Supreme Court. Supreme Court ordered case transferred to it rather than answer questions. 268 Ga. 316 (1997).

Thorp v. State, 264 Ga. 712 (1994) final decision of Court of Appeals incorporating Supreme Court answer to certified question answered in 217 Ga. App. 275 (1994). 217 Ga. App. 275 has prior history note that certified questions arose from NOA filed 10-29-93 Lower Court #E15958, but I couldn't find a published certified question.

Hubert v. Southern General Ins. Co., 261 Ga. 227 (1991) In this opinion, the Supreme Court does not answer certified question, but indicates two cases mentioned in question are not in conflict.

Seagraves v. State, 259 Ga. 36 (1989) This opinion answers questions certified in Sept. 1988. Court of Appeals decision afterward is 191 Ga. App. 207 (1989).

Lawrence v. State, 225 Ga. App. 606 (1997) sets out certified questions for Supreme Court. In 268 Ga. 420 (1997), Supreme Court declines to answer since answers would constitute decision in main case; returns case to Court of Appeals.

Chastain v. Baker, 178 Ga. App. 649 (1986) Court of Appeals decision after Supreme Court without answering certified question remands case to Court of Appeals to determine if case moot. Supreme Court decision is 255 Ga. 432 (1986).

Branan v. Equico Lessors, 179 Ga. App. 593 (1986) No. 71287 Opinion following certified question which Supreme Court answers in 255 Ga. 718 (1986)

Smith v. State 178 Ga. App. 300 (1986) Appellant's motion to certify a question to Supreme Court or transfer case to Supreme Court after filing in Court of Appeals is declined by Court of Appeals.

Revised August 21, 2003

## XXI. CERTIFIED QUESTIONS

- A. All certified questions are to be circulated to the whole court for information only.
- B. Whenever a panel certifies a question, it should be circulated to the rest of the court as courtesy so the whole court knows the question is being considered by the Supreme Court.

## XXI. CERTIFIED QUESTIONS

- A. Whenever a judge of this Court wishes to certify a question to the Supreme Court of Georgia, that question shall be circulated to all twelve judges.
- B. If the Division agrees unanimously to certify the question to the Supreme Court of Georgia, the question shall be circulated to all judges with a statement that the Division wishes to certify a question to the Supreme Court. The question shall be certified to the Supreme Court unless seven of the twelve judges vote not to certify the question.
- C. If the Division is not unanimous on certifying a question to the Supreme Court, then that fact shall be made known to the other judges of the Court, and all twelve judges shall vote to certify or not certify the question. A majority vote shall prevail.
- D. If a majority of the seven judge Court determines the question should not be certified to the Supreme Court, then the judge or judges may request all twelve judges to vote on the issue of certifying the question to the Supreme Court, and a majority vote shall prevail.

EX.

**Court of Appeals  
of the State of Georgia**

ATLANTA, March 31, 1994

*The Honorable Court of Appeals met pursuant to adjournment.*

*The following order was passed:*

A94A0375. BRENDA H. THORP ET AL V. STATE OF GEORGIA

It is ordered that the Clerk of this Court transmit to the Supreme Court a properly certified copy of the question in this case upon which this Court desires the instruction of the Supreme Court.

*Court of Appeals of the State of Georgia  
Clerk's Office, Atlanta March 31, 1994*

*I certify that the above is a true extract  
from the minutes of the Court of Appeals of  
Georgia.*

*Witness my signature and the seal of said  
court hereto affixed the day and year last  
above written.*

*William R. Mc... Clerk.*

**SECOND DIVISION  
BIRDSONG, P.J.,  
COOPER & BLACKBURN, JJ.**

**MAR 31 1994**

In the Court of Appeals of Georgia

A94A0375. THORP et al. v. STATE OF GEORGIA. 93-26

The Court of Appeals desires instructions from the Supreme Court upon the following question, a determination of which is necessary for a decision on an issue in this case.

Brenda H. Thorp et al. appeal from the order of the trial court granting the State forfeiture of Thorp's 1988 Isuzu Trooper. Appellant was stopped for weaving while driving her Isuzu; she inadvertently left her vehicle in gear when she exited it, and the officer had to jump in and put the vehicle in park. Thorp claimed she was driving a little erratic due to some kind of prescription medication she was taking. Her eyes were slow to blink, her speech slurred, and her attention span was extremely short; she failed all the field sobriety tests. Two bags containing white powder were found in a briefcase in the vehicle's front seat. One of these bags contained cocaine. Appellant's vehicle was impounded; the briefcase was seized and

its contents subsequently inventoried. A relatively small amount of marijuana, scales for weighing cocaine, and small plastic bags used in packaging cocaine also were found in the inventoried briefcase.

A civil forfeiture proceeding brought against the 1988 Isuzu Trooper vehicle (as defendant) and appellant (as claimant) was initiated; a hearing was conducted in accordance with the provisions of OCGA § 16-13-49. During this hearing, the trial court raised the issue of disproportionality of forfeiture, and a discussion ensued regarding the excessive fine provision of the Eighth Amendment of the United States Constitution. In its final judgment, the trial court, after concluding that one of the two seized packages contained cocaine and that the smaller bag weighed approximately 20 grams, found that "although the claimant received a minimal sentence in the criminal case, this forfeiture [of her vehicle] does not represent an excessive fine in violation of the Eighth Amendment to the U. S. Constitution." No finding was made whether the contents of the smaller bag was pure cocaine or a mixture thereof (and if a mixture of what weight). Appellant enumerates two errors, the second of which (although less than a model of legal drafting) asserts that: "The court erred in considering whether forfeiture of an automobile was an excessive fine under the Eighth Amendment because it erroneously relied upon 105 grams as the amount of cocaine to consider in the analysis, and because it erroneously

believed that it was not excessive as a matter of law if the total disposition of the case did not exceed the constitutional limits of the fine."

On June 28, 1993, the United States Supreme Court decided the case of Austin v. United States, 509 U. S. (113 SC 2801, 125 LE2d 488), and concluded that the excessive fines clause of the Eighth Amendment applied to drug-related forfeitures of property to the United States under 21 USCS §§ 881 (a) (4) and 881 (a) (7). The analysis employed by the Supreme Court appears broad enough to extend Eighth Amendment protection to drug-related forfeitures of property under OCGA § 16-13-49. While OCGA § 16-13-49 is substantially remedial (see e.g. State v. Henderson, 263 Ga. 508, 509, n. 3 (436 SE2d 209); State v. Wilbanks, 208 Ga. App. 422 (430 SE2d 668) (dissenting opinion)), it has never been determined whether this forfeiture statute is solely remedial within the meaning of Austin, supra 125 LE2d at 505. However, it would appear, under the Austin analysis, OCGA § 16-13-49 may not meet the requirements of being solely remedial and therefore a forfeiture pursuant thereto could be deemed to serve, in part, a punishment function bringing it within the protective scope of the Eighth Amendment. Additionally, the United States Supreme Court in Austin, supra at 493, expressly declined to establish a test (or to specify facts to be considered) for determining whether a particular Eighth Amendment forfeiture is excessive. Although Justice

Scalia in a separate opinion, concurring in part and concurring in judgment, attempted to suggest that a difference in test may apply to an in personam criminal forfeiture than to a statutory in rem forfeiture, his theory is yet to be adopted by a majority of the United States Supreme Court.

Moreover, assuming arguendo the Eighth Amendment applies to a forfeiture under OCGA § 16-13-49, no precedent in Georgia currently exists establishing the proper test or tests to be employed in resolving a claim of an excessive fine in violation of the Eighth Amendment. It appears that some federal courts have adopted a test, with a paucity of guidance as the weight to be given differing factors, which involves consideration of the degree of disproportion (if any) between the nature and value of the property forfeited and the nature and value of the offense or offenses committed. United States v. All Assets And Equipment &c., Case No. 89C2736, decided November 23, 1993 (USDC, N.D. Ill.) (LEXIS 16757); United States v. Busher, 817 F2d 1409 (9th Cir.) (applying fluid factors in determining Eighth Amendment excessive fine issue in RICO forfeiture case); compare United States v. Certain Real Property, 943 F2d 721 (7th Cir.) (gross disproportionality between the offense for which convicted and the entire penalty) and United States v. Vriner, 921 F2d 710 (7th Cir.) (holding the test to prove an Eighth Amendment violation is that of gross disproportionality between the offense for which convicted and the entire penalty, but

declining to decide the standard to be used in an Eighth Amendment disproportionality claim regarding a forfeiture although listing the factors listed in Busher, supra; Vriner at 713, n. 5); see also United States v. Certain Real Property &c. (Whaler's Cove case), 954 F2d 29 (2d Cir.) (before Austin; forfeiture must not be disproportionate to the value of the requisite drug transaction, but a fine of many thousands of dollars for a minor drug offense is not beyond the pale); United States v. Real Property: 835 Seventh Street &c., 832 FSupp. 43 (USDC, N.D. N.Y.); United States v. One Parcel Property &c., 831 FSupp. 736 (USDC, E.D. Mo.) (relationship of property to the offense).

Pursuant to the provision of Article VI, Section V, Paragraph IV, Georgia Constitution of 1983, the following questions should be certified to the Supreme Court of Georgia:

1. Does the prohibition against excessive fines of the Eighth Amendment of the United States Constitution apply to forfeitures effected pursuant to OCGA § 16-13-49?

2. If so, what is the proper test to apply to determine whether a forfeiture is excessive?

3. If a proportionality test must be employed what minimal factors, if any, must be considered and weighed?

4. Is there a difference between the test to be applied in a civil in rem and in an in personam forfeiture action?

5. Did the trial court err in its determination that considering the claimant received a minimal sentence in the criminal case, this forfeiture does not represent an excessive fine in violation of the Eighth Amendment to the United States Constitution?

The Clerk of this Court is directed to prepare a certified copy of the foregoing questions and transmit the same, together with the records in this case, to the Supreme Court.

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*Court of Appeals of the State of Georgia  
Clerk's Office, Atlanta March 31, 1994*

*I certify that the above is a true extract  
from the minutes of the Court of Appeals of  
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*Witness my signature and the seal of said  
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*William R. Martin* Clerk.

**SECOND DIVISION  
BIRDSONG, P.J.,  
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its contents subsequently inventoried. A relatively small amount of marijuana, scales for weighing cocaine, and small plastic bags used in packaging cocaine also were found in the inventoried briefcase.

A civil forfeiture proceeding brought against the 1988 Isuzu Trooper vehicle (as defendant) and appellant (as claimant) was initiated; a hearing was conducted in accordance with the provisions of OCGA § 16-13-49. During this hearing, the trial court raised the issue of disproportionality of forfeiture, and a discussion ensued regarding the excessive fine provision of the Eighth Amendment of the United States Constitution. In its final judgment, the trial court, after concluding that one of the two seized packages contained cocaine and that the smaller bag weighed approximately 20 grams, found that "although the claimant received a minimal sentence in the criminal case, this forfeiture [of her vehicle] does not represent an excessive fine in violation of the Eighth Amendment to the U. S. Constitution." No finding was made whether the contents of the smaller bag was pure cocaine or a mixture thereof (and if a mixture of what weight). Appellant enumerates two errors, the second of which (although less than a model of legal drafting) asserts that: "The court erred in considering whether forfeiture of an automobile was an excessive fine under the Eighth Amendment because it erroneously relied upon 105 grams as the amount of cocaine to consider in the analysis, and because it erroneously

believed that it was not excessive as a matter of law if the total disposition of the case did not exceed the constitutional limits of the fine."

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Scalia in a separate opinion, concurring in part and concurring in judgment, attempted to suggest that a difference in test may apply to an in personam criminal forfeiture than to a statutory in rem forfeiture, his theory is yet to be adopted by a majority of the United States Supreme Court.

Moreover, assuming arguendo the Eighth Amendment applies to a forfeiture under OCGA § 16-13-49, no precedent in Georgia currently exists establishing the proper test or tests to be employed in resolving a claim of an excessive fine in violation of the Eighth Amendment. It appears that some federal courts have adopted a test, with a paucity of guidance as the weight to be given differing factors, which involves consideration of the degree of disproportion (if any) between the nature and value of the property forfeited and the nature and value of the offense or offenses committed. United States v. All Assets And Equipment &c., Case No. 89C2736, decided November 23, 1993 (USDC, N.D. Ill.) (LEXIS 16757); United States v. Busher, 817 F2d 1409 (9th Cir.) (applying fluid factors in determining Eighth Amendment excessive fine issue in RICO forfeiture case); compare United States v. Certain Real Property, 943 F2d 721 (7th Cir.) (gross disproportionality between the offense for which convicted and the entire penalty) and United States v. Vriner, 921 F2d 710 (7th Cir.) (holding the test to prove an Eighth Amendment violation is that of gross disproportionality between the offense for which convicted and the entire penalty, but

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4. Is there a difference between the test to be applied in a civil in rem and in an in personam forfeiture action?

5. Did the trial court err in its determination that considering the claimant received a minimal sentence in the criminal case, this forfeiture does not represent an excessive fine in violation of the Eighth Amendment to the United States Constitution?

The Clerk of this Court is directed to prepare a certified copy of the foregoing questions and transmit the same, together with the records in this case, to the Supreme Court.

76870. SEAGRAVES v. THE STATE.

It is ordered that the Clerk of this Court transmit to the Supreme Court a properly certified copy of the question in this case upon which this Court desires the instruction of the Supreme Court.

Court of Appeals of the State of Georgia

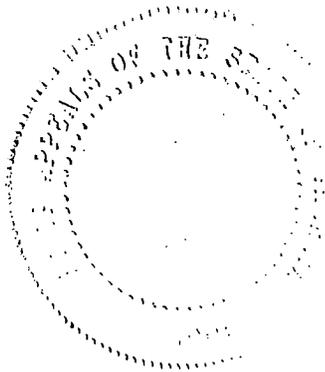
Clerk's Office, Atlanta

SEP 15 1988

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

*Victoria McLaughlin*  
Clerk.



In the Court of Appeals of Georgia

76870. SEAGRAVES v. THE STATE.

TO THE SUPREME COURT OF GEORGIA

Art. I, § I, ¶ IX of the Ga. Const. of 1976 provided:

"No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this State, in person, by attorney, or both." (Emphasis supplied.) In Burney v. State, 244 Ga. 33 (257 SE2d 543) (1979), a four-Justice majority of the Supreme Court construed this former constitutional provision as authorizing an individual who was otherwise represented by an attorney to assert his right of self-representation and actively participate in the trial as co-counsel.

provides: "No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this State."  
(Emphasis supplied.) "The primary issues debated during the two years of discussion of this paragraph [of the 1983 Constitution] were whether the 'or both' language should be deleted from the 1976 Constitution, and the possible consequences of this version." Nelms v. Georgian Manor Condominium Assn, Inc., 253 Ga. 410, 413 (3) (321 SE2d 330) (1984). "Proponents of the revision argued that elimination of the 'or both' language would, concomitantly, eliminate the problems created by [the Burney v. State, supra,] procedure. The 'or both' language was omitted from Art. I, Sec. I, Par. XII of the 1983 Constitution." Nelms v. Georgian Manor Condominium Assn, Inc., supra at 413 (3), fn. 7. Accordingly, the Supreme Court initially construed Art. I, § I, ¶ XII of the 1983 Constitution as "a 'right of choice' (between self-representation and representation by counsel) provision. . . ." Nelms v. Georgian Manor Condominium Assn, Inc., supra at 413 (3).

provision was followed in Cargill v. State, 255 Ga. 616 (340 SE2d 891) (1986). In that case, "[t]he appellant argue[d] that he was deprived of his constitutional right of self-representation through the trial court's refusal to permit him to serve as co-counsel in his own defense." Cargill v. State, supra at 622 (3). The Supreme Court held: "'Art. I, Sec. I, Par. IX of the Constitution of Georgia, 1976 . . . , provided that no person could be deprived of the right to defend himself, in person, by attorney, or both . . . [However,] Art. I, Sec. I, Par. IX, Constitution of Georgia, 1976, has been superseded by Art. I, Sec. I, Par. XII, Constitution of Georgia, 1983, and a person no longer has the right to represent himself and also be represented by an attorney, i.e., the right to act as co-counsel.' [Cit.]" (Emphasis in original.) Cargill v. State, supra at 622-623 (3).

The Supreme Court addressed the construction of the 1983 constitutional provision yet again in Cherry v. Coast House, Ltd., 257 Ga. 403 (359 SE2d 904) (1987). "The disqualification of [appellant] to represent himself presents

Georgia 1976, Art. I, Sec. I, Par. IX provided that no person could be deprived of the right to counsel, or to represent himself, or both. The Constitution of Georgia 1983, Art. I, Sec. I, Par. XII now provides that 'No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state.' The question to be answered is whether a person must be forced to choose between representing himself and being represented by counsel under the change which has occurred in the Constitution." Cherry v. Coast House, Ltd., supra at 405-406 (3). The Supreme Court held: "We find that the right to represent oneself does not evaporate when an attorney is hired. However, the court must have some mechanism for assuring that the possible conflicts which may arise between the client and his counsel do not disrupt the proceedings before it. . . . We hold that the court erred in barring [appellant] from representing himself because an appearance had been made for him by other attorneys. However, we find that the court is not required to accept random appearance and filings by both the client

are unable to coordinate their efforts so that they speak with one voice, the court is empowered to appoint a leading counsel who shall be the spokesperson." Cherry v. Coast House, Ltd., supra at 406 (3). In so holding, the Supreme Court did not expressly overrule or distinguish its earlier decisions in Nelms v. Georgian Manor Condominium Assn, Inc., supra, and Cargill v. State, supra.

Based upon the foregoing, in a case in which the appellant seeks or has sought to act in the capacity of co-counsel, it is unclear whether his efforts are entitled to judicial recognition and consideration pursuant to Art. I, § I, ¶ XII of the Ga. Const. of 1983. Therefore, the Court of Appeals desires instructions from the Supreme Court upon the following questions, a determination of which is necessary for a decision in this case:

1. Did the decision in Cherry v. Coast House, Ltd., supra, implicitly overrule earlier Supreme Court decisions which had interpreted the 1983 constitutional provision as a "right of choice" provision, so that the controlling construction of the 1983 constitutional provision is now

2. Or, is the decision in Cherry v. Coast House, Ltd., supra, distinguishable from the earlier Supreme Court decisions, so that the existing 1983 constitutional provision is construed as a "right of choice" provision under certain circumstances, but as a "right to act as co-counsel" provision in other circumstances?

\* { The Clerk of this Court is directed to prepare a certified copy of the foregoing questions and transmit the same, together with the record in this case, to the Supreme Court. }

*must have this wording*

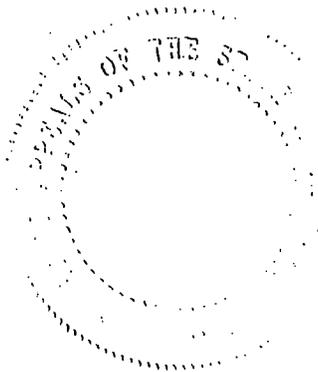
**Court of Appeals**  
of the State of Georgia

Clerk's Office

Atlanta, September 15, 1988

I hereby certify that the foregoing is a true copy of the question in the case therein stated, certified to the Supreme Court by the Court of Appeals, as appears from the original now on file in this office.

Witness my signature and the seal of said Court hereto affixed, the day and year above written.



*Victoria McLaughlin*

Clerk.

EX.

**Court of Appeals  
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ATLANTA, March 31, 1994

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**SECOND DIVISION  
BIRDSONG, P.J.,  
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Moreover, assuming arguendo the Eighth Amendment applies to a forfeiture under OCGA § 16-13-49, no precedent in Georgia currently exists establishing the proper test or tests to be employed in resolving a claim of an excessive fine in violation of the Eighth Amendment. It appears that some federal courts have adopted a test, with a paucity of guidance as the weight to be given differing factors, which involves consideration of the degree of disproportion (if any) between the nature and value of the property forfeited and the nature and value of the offense or offenses committed. United States v. All Assets And Equipment &c., Case No. 89C2736, decided November 23, 1993 (USDC, N.D. Ill.) (LEXIS 16757); United States v. Busher, 817 F2d 1409 (9th Cir.) (applying fluid factors in determining Eighth Amendment excessive fine issue in RICO forfeiture case); compare United States v. Certain Real Property, 943 F2d 721 (7th Cir.) (gross disproportionality between the offense for which convicted and the entire penalty) and United States v. Vriner, 921 F2d 710 (7th Cir.) (holding the test to prove an Eighth Amendment violation is that of gross disproportionality between the offense for which convicted and the entire penalty, but

declining to decide the standard to be used in an Eighth Amendment disproportionality claim regarding a forfeiture although listing the factors listed in Busher, supra; Vriner at 713, n. 5); see also United States v. Certain Real Property &c. (Whaler's Cove case), 954 F2d 29 (2d Cir.) (before Austin; forfeiture must not be disproportionate to the value of the requisite drug transaction, but a fine of many thousands of dollars for a minor drug offense is not beyond the pale); United States v. Real Property: 835 Seventh Street &c., 832 FSupp. 43 (USDC, N.D. N.Y.); United States v. One Parcel Property &c., 831 FSupp. 736 (USDC, E.D. Mo.) (relationship of property to the offense).

Pursuant to the provision of Article VI, Section V, Paragraph IV, Georgia Constitution of 1983, the following questions should be certified to the Supreme Court of Georgia:

1. Does the prohibition against excessive fines of the Eighth Amendment of the United States Constitution apply to forfeitures effected pursuant to OCGA § 16-13-49?

2. If so, what is the proper test to apply to determine whether a forfeiture is excessive?

3. If a proportionality test must be employed what minimal factors, if any, must be considered and weighed?

4. Is there a difference between the test to be applied in a civil in rem and in an in personam forfeiture action?

5. Did the trial court err in its determination that considering the claimant received a minimal sentence in the criminal case, this forfeiture does not represent an excessive fine in violation of the Eighth Amendment to the United States Constitution?

The Clerk of this Court is directed to prepare a certified copy of the foregoing questions and transmit the same, together with the records in this case, to the Supreme Court.

76870. SEAGRAVES v. THE STATE.

It is ordered that the Clerk of this Court transmit to the Supreme Court a properly certified copy of the question in this case upon which this Court desires the instruction of the Supreme Court.

Court of Appeals of the State of Georgia

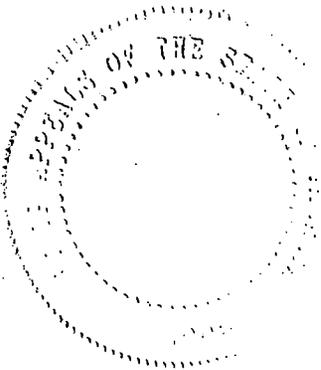
Clerk's Office, Atlanta

SEP 15 1988

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

*Victoria McLaughlin*  
Clerk.



In the Court of Appeals of Georgia

76870. SEAGRAVES v. THE STATE.

TO THE SUPREME COURT OF GEORGIA

Art. I, § I, ¶ IX of the Ga. Const. of 1976 provided:

"No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this State, in person, by attorney, or both." (Emphasis supplied.) In Burney v. State, 244 Ga. 33 (257 SE2d 543) (1979), a four-Justice majority of the Supreme Court construed this former constitutional provision as authorizing an individual who was otherwise represented by an attorney to assert his right of self-representation and actively participate in the trial as co-counsel.

provides: "No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this State."

(Emphasis supplied.) "The primary issues debated during the two years of discussion of this paragraph [of the 1983 Constitution] were whether the 'or both' language should be deleted from the 1976 Constitution, and the possible consequences of this version." Nelms v. Georgian Manor Condominium Assn, Inc., 253 Ga. 410, 413 (3) (321 SE2d 330) (1984). "Proponents of the revision argued that elimination of the 'or both' language would, concomitantly, eliminate the problems created by [the Burney v. State, supra,] procedure. The 'or both' language was omitted from Art. I, Sec. I, Par. XII of the 1983 Constitution." Nelms v. Georgian Manor Condominium Assn, Inc., supra at 413 (3), fn. 7. Accordingly, the Supreme Court initially construed Art. I, § I, ¶ XII of the 1983 Constitution as "a 'right of choice' (between self-representation and representation by counsel) provision. . . ." Nelms v. Georgian Manor Condominium Assn, Inc., supra at 413 (3).

provision was followed in Cargill v. State, 255 Ga. 616 (340 SE2d 891) (1986). In that case, "[t]he appellant argue[d] that he was deprived of his constitutional right of self-representation through the trial court's refusal to permit him to serve as co-counsel in his own defense." Cargill v. State, supra at 622 (3). The Supreme Court held: "'Art. I, Sec. I, Par. IX of the Constitution of Georgia, 1976 . . . , provided that no person could be deprived of the right to defend himself, in person, by attorney, or both . . . [However,] Art. I, Sec. I, Par. IX, Constitution of Georgia, 1976, has been superseded by Art. I, Sec. I, Par. XII, Constitution of Georgia, 1983, and a person no longer has the right to represent himself and also be represented by an attorney, i.e., the right to act as co-counsel.' [Cit.]" (Emphasis in original.) Cargill v. State, supra at 622-623 (3).

The Supreme Court addressed the construction of the 1983 constitutional provision yet again in Cherry v. Coast House, Ltd., 257 Ga. 403 (359 SE2d 904) (1987). "The disqualification of [appellant] to represent himself presents

Georgia 1970, Art. I, Sec. I, Par. IX provided that no person could be deprived of the right to counsel, or to represent himself, or both. The Constitution of Georgia 1983, Art. I, Sec. I, Par. XII now provides that 'No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state.' The question to be answered is whether a person must be forced to choose between representing himself and being represented by counsel under the change which has occurred in the Constitution." Cherry v. Coast House, Ltd., supra at 405-406 (3). The Supreme Court held: "We find that the right to represent oneself does not evaporate when an attorney is hired. However, the court must have some mechanism for assuring that the possible conflicts which may arise between the client and his counsel do not disrupt the proceedings before it. . . . We hold that the court erred in barring [appellant] from representing himself because an appearance had been made for him by other attorneys. However, we find that the court is not required to accept random appearance and filings by both the client

are unable to coordinate their efforts so that they speak with one voice, the court is empowered to appoint a leading counsel who shall be the spokesperson." Cherry v. Coast House, Ltd., supra at 406 (3). In so holding, the Supreme Court did not expressly overrule or distinguish its earlier decisions in Nelms v. Georgian Manor Condominium Assn, Inc., supra, and Cargill v. State, supra.

Based upon the foregoing, in a case in which the appellant seeks or has sought to act in the capacity of co-counsel, it is unclear whether his efforts are entitled to judicial recognition and consideration pursuant to Art. I, § I, ¶ XII of the Ga. Const. of 1983. Therefore, the Court of Appeals desires instructions from the Supreme Court upon the following questions, a determination of which is necessary for a decision in this case:

1. Did the decision in Cherry v. Coast House, Ltd., supra, implicitly overrule earlier Supreme Court decisions which had interpreted the 1983 constitutional provision as a "right of choice" provision, so that the controlling construction of the 1983 constitutional provision is now

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Direct - 2589

Rule 40(b)

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1 Proposed am

A - all cert ques shall be circulate to the whole court

B. whenever final cert - circulate to whole court

C. If a dissent - on question of cert. - case question circulates to 7 or 12 judge majority to decide -

D. Majority of 12 to decide the issue of certification -

↓  
Conflictin' authority from Supreme of - opportunity for Supreme to clear up conflict  
2  
2 question raise and no authority -

FILED IN OFFICE

AUG 21 2003

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CLERK COURT OF APPEALS OF CA

CLERK COURT OF APPEALS

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# Court of Appeals

## Memorandum

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**To:** Bill Martin  
**From:** H. Sparrow *HS*  
**Subject:** Certified Questions  
**Date:** August 19, 2003

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Although I found an additional case involving a certified question from the Court of Appeals and several final opinions issued after the certified questions I located earlier were answered by the Supreme Court, I did not discover anything more about the procedure in the Court of Appeals. There was no mention of whether one judge, the full panel, etc. voted to submit the question. Also, during the last 17 years, it appears that the Court of Appeals sometimes, but not always, published the certified questions. The current clerk's office instructions for handling certified questions (that Marti gave me) does not indicate that the questions will be published.