



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Monday, December 11, 2017

10:00 A.M. Session

THE STATE V. DAVIS (S17G1333)

In this **Chatham County** case, the State is appealing a Georgia Court of Appeals decision that allows a convicted child molester, who was later pardoned by the Georgia Board of Pardons and Paroles, to be released from the requirement that he register as a sex offender.

FACTS: In January 1994, the 6-year-old biological daughter of Barry Davis told family members that "Daddy made me suck his..." and she pointed to her private parts. She told them that "it tasted nasty." Davis's wife filed a police report, and a criminal investigation ensued. Police searched Davis's home and found an X-rated video entitled, "Taboo," which contained sexually explicit scenes involving incest between adult males and female children. Davis initially denied any wrongdoing and suggested that his daughter had been sexually suggestive in the past. However, he eventually confessed to the molestation, and on Aug. 21, 1995, pleaded guilty to aggravated sodomy. He was sentenced to 10 years with the first two to be served in prison. Under Georgia statutory law (Georgia Code § 42-1-12), Davis was required to register as a sex offender. Following his release from prison, Davis served the remainder of his sentence on probation until it ended July 15, 2005.

Davis subsequently applied to the Board of Pardons and Paroles for a pardon. The Georgia Constitution vests the parole board with exclusive power and authority over "executive

clemency, including the powers to grant reprieves, pardons, and paroles; to commute penalties; to remove disabilities imposed by law; and to remit any part of a sentence for any offense against the state after conviction.” On Feb. 13, 2013, the parole board granted Davis a pardon, stating in the pardon that its investigation had revealed that Davis “is a law-abiding citizen and is fully rehabilitated” and that the board therefore, “without implying innocence, hereby unconditionally pardons said individual, and it is hereby ordered that all disabilities under Georgia law resulting from the above stated conviction and sentence...are hereby removed; and ordered further that all civil and political rights, except the right to receive, possess, or transport in commerce a firearm...are hereby restored.” About a month after receiving the pardon, Davis moved from Savannah to Charlotte, NC without giving notice to the Chatham County Sheriff’s Office. Georgia Code § 42-1-12 requires convicted sex offenders to give notice at least 72 hours before moving. When Davis returned to Georgia, the sheriff’s office informed Davis of his failure to register as a sex offender and give notice of his plan to move. Davis claimed that his pardon removed the previous requirement for him to register as a sex offender. Nevertheless, the sheriff’s office obtained a warrant for Davis’s arrest, and on Feb. 26, 2014, the State charged Davis in an indictment with failing to register as a sex offender as required by § 42-1-12.

Davis subsequently filed a motion in court, arguing that the requirement to register as a sex offender constituted a “legal disability,” which the parole board’s pardon had removed. In January 2016, the trial judge denied Davis’s motion, finding that the registration requirement was not a “legal disability” and therefore was not removed by the pardon. Davis then appealed to the Georgia Court of Appeals, which is the state’s intermediate appeals court. That court reversed the trial court’s decision. Citing the parole board’s “unconditional” pardon of Davis’s aggravated sodomy conviction, the appeals court ruled: “Because the separation-of-powers doctrine requires us to adhere to the decision of the Board to issue Davis a pardon, and the plain meaning of the sweeping language used by the Board in that pardon removed the duty of Davis to register as a sex offender, we are constrained to reverse the trial court’s denial of Davis’s motion...” The Court of Appeals stated that, “Given that the registration statute requires one to provide law enforcement with significant details as to where one lives, where one works, and where one travels, it strains credulity to characterize compulsory registration as a sex offender as merely regulatory but not as an ‘incapacity’ in the eyes of the law,” and the Court of Appeals concluded that “we are constrained to conclude that [the registration requirement] is a disability.” The State now appeals to the Georgia Supreme Court, the state’s highest court, which has agreed to review the case to determine whether the Court of Appeals had the authority even to rule on this case given it involves a constitutional question which falls under the Supreme Court’s exclusive jurisdiction. If the Court of Appeals did have the authority, the high court asks whether the Court of Appeals correctly ruled that the registration requirements are a “legal disability” removed by the pardon.

ARGUMENTS: In response to the Supreme Court’s first question, the State – represented by the district Attorney’s office – argues that, “Since this case concerns construction of a provision of the Georgia Constitution, upon which this Court has never before issued an opinion, this Court possesses exclusive appellate jurisdiction of this case. Therefore, the Georgia Court of Appeals lacked jurisdiction and its opinion should be vacated.” In response to the second question, “The answer is *no*, the requirement to register is *not* a legal disability and Appellee’s [i.e. Davis’s] pardon did *not* remove him from his continued requirement to register

as a sex offender.” The requirement is not a legal disability “because it does not remove a right or benefit previously afforded to Appellee that he would have had but for his conviction. Additionally, it does not disable or restrain Appellee, as Appellee only has requirements to provide information to law enforcement.” Even assuming the state Supreme Court disagrees and rules that the requirement to register is a legal disability, “this Court should find that the Board did not use its power to remove Appellee from the sex offender registry,” the State argues. “Just like firearm rights are not automatically restored, removal from the registry is not automatically granted to every pardoned felon.” Davis’s “conditional pardon,” which did not restore his firearm rights, did not include his removal from the sex offender registry. The requirement to register “remains in place as part of the state’s police powers, powers, such as regulating sex offenders, that are not affected by a pardon.”

The public defenders representing Davis argue that the state Supreme Court’s constitutional question jurisdiction was not invoked in this case because “this Court has already construed the constitutional term ‘disability’ within the context of the power and authority of the Board of Pardons and Paroles.” In its 2013 decision in *Ferguson v. Perry*, this Court considered the scope of “the Board’s authority to remove disabilities imposed and restore civil and political rights lost as a collateral consequence of a criminal conviction,” and concluded that the parole board’s authority included the restoration of firearm rights. The high court construed the term, disability,” in that decision, stating that, “It is similarly clear that when a citizen is precluded by law from possessing firearms as a consequence of his felony conviction, he suffers a ‘disability imposed by law.’” Because this Court has previously construed the term, ‘disability,’ “This case merely presented an occasion for the Court of Appeals to apply this Court’s previously construed term to the facts of the case at hand,” Davis’s attorneys argue. Furthermore, the state parole board “has the constitutional authority to remove sex offender registration requirements through its pardon which removes disabilities under the law resulting from a conviction.” “A pardon is a declaration of record that a person is relieved from the legal consequences of a particular conviction.” And registration as a sex offender is a disability imposed by law as a result of a conviction. “The Board’s constitutional power and authority to ‘unconditionally’ and ‘fully’ pardon Mr. Davis and to remove ‘all disabilities under Georgia law’ relieve him of any duty to register as a sex offender,” the attorneys argue. Even though “registration as a sex offender may not be considered a punishment, it is no mere administrative formality or minor inconvenience,” the state Supreme Court stated in its 2010 decision in *Rainer v. State*. “A straight-forward reading of the language in Mr. Davis’s pardon reveals that all disabilities are removed,” Davis’s attorneys conclude. “A straight-forward application of the term, ‘disability,’ to the facts of this case reveals that registration as a sex offender is such a disability.”

Attorneys for Appellant (State): Margaret Heap, District Attorney, Christine Barker, Asst. D.A., Lyndsey Rudder, Dep. D.A.

Attorneys for Appellee (Davis): Amy Lee Ihrig, Robert Lawrence Persse

BIBBS ET AL. V. TOYOTA MOTOR CORPORATION ET AL. (S18Q0075)

A man who sued Toyota over his wife’s death 25 years after she was left in a coma from a collision is appealing a federal court’s ruling limiting the damages he can now collect in a wrongful death suit, based on damages he already received years earlier in a personal injury suit.

FACTS: On Sept. 19, 1992, 36-year-old Delia Bibbs and her three children were on their way to breakfast in their 1986 Toyota van when a man drove his Chevy Cavalier through a red light in **Gwinnett County** and slammed into the van. The children were ages 15, 2 and 1 at the time. All four in the van were wearing seatbelts, but Delia's came undone, the front passenger door swung open, and Delia was ejected from the van, hitting her head on the pavement. She suffered a closed-head injury from the impact, resulting in permanent brain damage that left her in a coma. That December, Delia's husband, Anthony R. "Tony" Bibbs, Sr., filed a lawsuit as his wife's legal guardian against the Chevy's driver, Toyota Motor Corp., and Toyota Motor Sales, USA, Inc., seeking damages for her injuries. He alleged that the Toyota van had a defective seatbelt latch and door locking system that caused her injuries. The case was tried in Fulton County State Court, but before the jury verdict was read on the record, Tony Bibbs and Toyota agreed to a confidential high-low settlement agreement that would resolve all claims. The agreement set "high" and "low" settlement amounts, with the final amount dependent on the jury's verdict. If the verdict came back above the "high" amount, Toyota would only pay the high amount agreed upon by the parties. If it came back below the "low" amount, Toyota would pay the low amount. Either way, the case would be "dismissed with prejudice," meaning that Tony Bibbs would be barred from bringing a future lawsuit on the same grounds.

On Oct. 1, 1994, the jury reached a verdict in favor of Anthony R. Bibbs that was higher than the "high" amount. Specifically, the jury awarded him \$446,000 in past medical expenses, \$6 million in future life care expenses, and \$30 million in past and future pain and suffering. Because the total was higher than the parties' agreed-upon high amount, Toyota paid the confidential "high" amount but no more. Afterwards, the parties disputed whether Tony Bibbs' release included the release of a future wrongful death claim. The trial court settled that issue in Tony Bibbs' favor, finding that the release only covered those claims that were – or could have been – raised at the time of the original lawsuit, and because Delia Bibb was still alive, it did not include a claim for her wrongful death. The Georgia Supreme Court ultimately upheld that ruling.

Delia remained in a coma until she died at the age of 58 on Oct. 5, 2014, 22 years following the wreck. Tony Bibbs and the three children, now adults, subsequently filed a second lawsuit under Georgia's wrongful death statute, alleging that Toyota caused her premature death and seeking damages for the full value of her life. Both parties filed motions arguing the court should rule in their favor. The Bibbs argued that Toyota was prevented from re-litigating the issues of product defect and causation, which they claimed were fully, fairly, and finally litigated in the first lawsuit. Toyota, in turn, argued that the only damages left for the Bibbs to recover were those for Delia Bibbs' funeral expenses. According to Toyota, all other wrongful death damages were released by Tony Bibbs in the original settlement agreement.

In December 2016, the United States District Court for the Northern District of Georgia ruled that 1) Toyota was not barred from re-litigating the issues of product defect and causation because Toyota denied liability in the settlement agreement. 2) Based on that agreement, the Bibbs could only recover damages that were not available in the first lawsuit. Because damages under the economic component of wrongful death, such as lost earnings, overlapped with damages that were available under the personal injury lawsuit, those damages were not recoverable here. On the other hand, compensation for the positive aspects of Delia Bibbs' life

that was cut short by her death were recoverable here. And 3) The recovery of those damages was based on the showing of the value of her life from her perspective before the car wreck.

The Bibbs asked the U.S. District Court to reconsider its December 2016 order, or in the alternative, send some questions to the Georgia Supreme Court to answer concerning Georgia law. The federal court opted for the latter and prior to the trial in federal court of the Bibbs' wrongful death claim, is asking the state's high court to answer whether, under Georgia law, damages that could be recovered in a wrongful death action are limited by a settlement reached by the parties in a previous personal injury suit that settled all claims raised in the suit. If the answer to that question is yes, what components of the wrongful death damages are barred?

ARGUMENTS: The Bibbs' attorneys argue that damages that may be recovered in the wrongful death claim are not foreclosed by the previous high-low agreement. The U.S. District Court "properly decided that the intangible element of Plaintiffs' [i.e. the Bibbs'] wrongful death damages are recoverable, and, 'The proper perspective for...recovery of the lost intangible value of Mrs. Bibbs' life is **her perspective before the car accident,**' they argue in briefs. "Every level of Georgia's courts have rejected Toyota's contention that the wrongful death claim was settled by the high-low agreement." Damages for the full value of the life of someone who has died are not recoverable in a personal injury action. "Because a claim for wrongful death does not accrue until the death occurs, it is impossible to determine the **nature of the loss...until the death,**" they argue. Damages for a wrongful death action include non-economic and economic components. The purpose of the wrongful death statute is to punish the wrongdoer and make homicide "expensive." "Even if there is duplication in the economic component of a wrongful death claim and an economic loss claim brought during a decedent's lifetime, the punitive aspect of a wrongful death claim supports the recovery of such losses." The full value of the life of Delia Bibbs is recoverable in this action because the high-low agreement did not include any wrongful death claim and all remedies available in such an action should remain available to the Bibbs, the attorneys contend. Also, a party should not be allowed to re-litigate an issue that a jury already decided adversely against it. If Toyota is permitted to re-litigate the issues of product defect and causation, "justice and judicial economy will not be served," the Bibbs' attorneys argue. Even Toyota has acknowledged in the District Court filings that the verdict in the personal injury case "found that the Defendants' [i.e. Toyota's] product was defective."

Toyota's attorneys argue that in answer to the first question posed to this Court, "Georgia law has long been clear that the plaintiffs in a wrongful death suit cannot recover any damages that the decedent had previously released in a personal injury action." "A release of all damages arising from personal injury bars a subsequent recovery for wrongful death based on the injury." In its 1900 decision in *Southern Bell Telephone and Telegraph Co. v. Cassin*, the Georgia Supreme Court "rejected the same arguments plaintiffs advance here, holding that neither the penal nature of our wrongful death statute nor its conferral of the right to sue on survivors...justifies the double liability plaintiffs seek to impose." As to the second question, regarding what components of wrongful death damages are barred, "the answer under these facts is 'all of them, except burial expenses,'" the attorneys contend. As the plaintiffs themselves have observed, Delia Bibbs' "life ended effectively when she was left in a coma at the age of 36." "Under these circumstances, her guardian was entitled to seek and recover – in a personal injury case – both the economic value of Ms. Bibbs' life and the value *to her* of all of the intangible things she would have experienced and enjoyed for the remainder of her expected life. Those are

the same underlying losses for which these plaintiffs propose to seek wrongful death damages. But because those damages were released in the personal injury action, they cannot be recovered again in a wrongful death suit.” Even aside from the high-low agreement, “the dismissal with prejudice of the personal injury action bars the subsequent recovery of any damages that could have been raised in that action,” the attorneys argue. “Other than burial expenses, the damages for Delia Bibbs’ premature death fall within the release because they could have been recovered in the personal injury suit based on her permanent coma.”

Attorneys for Appellants (Bibbs): Robert Cheeley, Keith Pittman, Keith Fryer, Roy Barnes, John Bevis

Attorneys for Appellees (Toyota): Frank Lowrey IV, Amanda Bersinger, Joel Smith

WILLIS V. THE STATE (S18A0035)

A homeless man convicted of raping and strangling to death a woman whose body was found in the parking lot where he slept is appealing his convictions and life prison sentence.

FACTS: The evening of May 23, 1996, Michael Boyd found Franckesteaa Woods’ body in the parking lot of his tire and wrecker service in **Fulton County**. She was nude from the waist down, and her shirt and bra had been pulled up, exposing her chest. Later investigation revealed the presence of sperm inside her body that was less than 48 hours old. The medical examiner ruled Woods’ death was caused by strangulation by ligature and blunt force trauma to the head. Shortly after law enforcement put crime scene tape around the parking lot, Detective Dwayne Mathis stopped Leroy Willis as he tried to enter the crime scene. Willis later returned on his bicycle and tried a second time to enter the crime scene, at which point the detective asked to see his identification. Mathis showed Willis a photo of Woods and asked if he knew her, but Willis refused to look at it, saying, “No, I don’t know.” Eventually, Mathis determined that Willis was a person of interest and obtained a search warrant to draw his blood.

In August 1996, law enforcement brought Willis to the Atlanta Police Department’s Homicide Office for questioning, and informed him he was suspected of murder. Willis again was shown a photo of Woods, and he again denied knowing her or having sex with her. His blood was subsequently drawn at Grady hospital. But according to the brief filed by the Attorney General’s office, the case soon was placed on inactive status. Due to the limited technology at the time, it was not possible to determine whose sperm it was in Woods’ body based on the small amount recovered. However, by 2008, the technology had improved and the recovered sample was again tested, revealing Willis to be the source.

A Fulton County grand jury indicted Willis for malice murder, felony murder predicated on rape, felony murder predicated on aggravated assault, as well as the crimes of rape and aggravated assault. At his trial, the owner of Boyd’s Tire & Wrecker Service testified that Willis was his former brother-in-law and had been his employee during the late 1980s when Willis had worked as a tow truck operator. A former Atlanta police officer testified that he had previously caught Willis, a homeless man, sleeping in one of the trucks on the business’s premises. Willis himself testified that he frequently slept there, including the night before Woods’ body was found. The State introduced evidence from four women who testified that Willis had previously sexually assaulted them at knife or gunpoint. Willis claimed that all these interactions were consensual and typically were in exchange for money or drugs. He claimed Woods was a prostitute and argued that the fact that Woods’ other clothes were not found near the parking lot

where her body was found showed that she had been killed elsewhere by someone else and transported to the area where he slept. In March 2011, the jury found Willis guilty on all counts, and he was sentenced to life in prison. Willis now appeals to the Georgia Supreme Court.

ARGUMENTS: Willis’s attorney argues the trial judge erred by telling the jury that the parking lot where Willis slept was the “scene of the crime.” “The defense at trial was that the victim had been killed elsewhere, and then dumped at Boyd’s, where Willis slept,” his attorney argues in briefs. “By instructing the jury that Willis’ home was ‘the scene of the crime,’ the trial court told the jury that the victim had been killed at Boyd’s.” The harm against Willis was compounded because Willis testified at trial that Woods’ body was merely dumped at the parking lot where he slept. “The trial court’s instruction undermined the defendant’s credibility by telling the jury, as a matter of law, that his account was inaccurate.” Under the version of the law in effect at the time of Willis’s trial (Georgia Code § 17-8-57), a reversal of Willis’s convictions was mandatory if the judge “expressed an opinion as to a disputed issue of fact,” the attorney argues. However, under a later version of the statute, the trial attorney is required to make a timely objection to preserve the issue for review by the appeals court. The judge must then either grant a mistrial or offer instructions to the jury to disregard what the judge said. In this case, the state Supreme Court will have to determine whether to apply the new rule to old trials, Willis’s attorney contends. Under another Georgia statute, however, the new § 17-8-57 applies prospectively but not retrospectively. “We respectfully request a new trial,” the attorney argues.

The State, represented by the District Attorney’s and Attorney General’s offices, argues that the trial judge did not improperly comment on the evidence and did not commit an error requiring reversal of Willis’s convictions. The State contends that the current version of § 17-8-57 applies in this case, although it acknowledges that in a 2016 opinion, the Georgia Supreme Court noted that it has not yet settled this issue. “Regardless whether it is the old or the new version which applies here, the State submits that the trial court did not make a ‘comment’ in violation of § 17-8-57,” the State argues in briefs. Even if under the new version of the statute, what the judge said qualifies as a “comment” on the evidence, it constitutes “harmless error” because it could not have harmed Willis’s case, and a new trial is not warranted. “Here, both the State and defense counsel referred to the parking lot where Woods’ body was found as ‘the crime scene,’” and the trial judge’s instruction to the jury “merely reiterated an uncontested characterization by both parties of the scene where Wood lay dead as the crime scene,” the State argues. This Court therefore should uphold Willis’s convictions.

Attorney for Appellant (Willis): Andrew Fleischman

Attorneys for Appellee (State): Paul Howard, Jr., District Attorney, Lyndsey Rudder, Dep. D.A., Michael Snow, Sr. Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew O’Brien, Asst. A.G.

CARR V. THE STATE (S18A0100)

A man charged with rape and child molestation, but found incompetent to stand trial, is challenging as unconstitutional a Georgia statute his attorney claims led to his confinement in a state hospital without a hearing first to determine whether he could be restored to competency.

FACTS: In June 2016, Ricky Lee Carr was arrested in **Catoosa County** for child molestation. Bond was set for \$5,000 and he was ordered to have no contact with minors. In

November 2016, the Catoosa County grand jury indicted Carr for rape, aggravated sexual battery, two counts of child molestation and criminal attempt to commit a felony, which was child molestation. Shortly after, Carr's attorney and prosecutors for the state agreed to a court order requiring Carr to undergo a mental evaluation. Dr. Samuel Perri, a forensic psychologist with the Georgia Department of Behavioral Health and Developmental Disabilities, evaluated Carr and found him incompetent to stand trial. In Perri's March 2017 report, he stated that based on Carr's "low intellectual functioning, there is a strong probability that Carr would not be able to be restored to competency" so that he could stand trial. Perri also stated, according to the defense, that any attempt to restore Carr to competency should "occur in a community setting rather than in a psychiatric facility." The following month, Carr's attorney filed in court a "Petition to Have Defendant Attempt Competency Restoration in the Community." In the petition, the attorney raised the constitutionality of Georgia Code § 17-7-130, stating that the statute "deprives defendant of due process and equal protection of the law as provided by the United States and Georgia constitutions." Carr's attorney challenged the statute's constitutionality based on its automatic and mandatory requirement that Carr be confined without a hearing to determine whether Carr could be restored to competency and to determine in what setting that would best be accomplished. Two subsequent hearings were held on April 28 and May 31, 2017 to deal with the issues raised in the petition. Following the April 28 hearing, the trial court signed an order finding Carr incompetent to stand trial. Following the May 31 hearing, Carr was taken to the Catoosa County jail to await inpatient placement in a state hospital. The same day, the trial court also ruled that § 17-7-130 was constitutional. Carr now appeals to the state Supreme Court.

ARGUMENTS: Carr's attorneys argue they followed proper procedure and filed their constitutional challenge on time. "The first opportunity to challenge the constitutionality of a statute does not equate to the moment arrest occurs, indictment is handed down, or arraignment takes place," they argue in briefs. "Rather, the first opportunity to challenge the constitutionality of a statute is when the consequences of the statute are applicable to the defendant." Here, Carr raised his challenge in his Petition to Have Defendant Attempt Competency Restoration in the Community." The attorneys argue the statute violates constitutional due process. "The trial court erred in failing to hold a hearing on defendant's restorability and need for inpatient hospitalization before confining him to jail and a State hospital, in violation of Appellant's [i.e. Carr's] due process rights," they argue. The statute requires that upon a finding of incompetency to stand trial, the court must transfer the accused to the physical custody of the Department of Behavioral Health and Developmental Disabilities, "and therefore, it does not permit an opportunity for a hearing and demands placement in jail and involuntary commitment to the state hospital. At a minimum, due process includes notice and an opportunity to be heard." The statute also violates the constitutional guarantee of equal protection, the attorneys argue, by allowing the confinement of one deemed mentally incompetent to be confined without a hearing. "Automatic pre-trial involuntary confinement of a mentally ill person, as a result of a finding of incompetency, unlawfully discriminates between individuals out on bond and those that are found incompetent."

Representing the State, the District Attorney argues Carr did not challenge the constitutionality of the statute at the first opportunity, and therefore he cannot do so now. In its 1996 decision in *Rowe v. State*, the Georgia Supreme Court wrote that, "A party cannot during

the trial ignore what he thinks to be an injustice, take his chance on a favorable verdict, and complain later.” That is what has happened in this case, the State argues. “The Appellant essentially ignored what the Appellant deemed an injustice and took their chance on a favorable result.” Dr. Perri’s report was completed March 5, 2017. But it was not until April 27, 2017 in Carr’s Petition that his attorneys made a “vague and nonspecific challenge” to the statute’s constitutionality. “As the Appellant’s challenges were not properly raised during the many opportunities afforded Appellant through scheduled arraignments, calendar calls, and two hearings, it should be dismissed,” the State contends. The trial court also did not err in rejecting the equal protection and due process challenges to § 17-7-130. “There is a legitimate government interest when a defendant is incompetent but may be made competent and tried before a jury,” the State argues in briefs. “Determining that this may be best accomplished in a secure in-house setting where the defendant is charged with a serious violent felony is a policy decision best left to the legislature.” Here, § 17-7-130 properly seeks “to balance that compelling State interest in community safety, the Appellant’s interest to be restored to competency, and the Appellant’s constitutional right not to be tried if he cannot be restored to competency,” the State argues.

Attorneys for Appellant (Carr): David Dunn, Circuit Public Defender, Amber Connell, Asst. P.D.

Attorneys for Appellee (State): Herbert “Buzz” Franklin, District Attorney, Clayton Fuller, Asst. D.A.