Supreme Court of Georgia
Jane Hansen, Public Information Officer
244 Washington Street, Suite 572
Atlanta, Georgia 30334
404-651-9385
hansenj@gasupreme.us

CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

Please note: *These summaries are prepared by the Office of Public Information to help news reporters determine if they want to cover the arguments and to inform the public of upcoming cases. The summaries are not part of the case record and are not considered by the Court at any point during its deliberations. For additional information, we encourage you to review the case file available in the Supreme Court Clerk's Office (404-656-3470), or to contact the attorneys involved in the case. Most cases are decided within six months of oral argument.*

Tuesday, August 6, 2019

10:00 A.M. Session

FORD, WARDEN V. TATE (S19A0825) and TATE V. FORD, WARDEN (S19X0826)

The State of Georgia is appealing a court order that vacated the two death sentences given to a man for his role in shooting to death a woman in **Paulding County** and slitting her 3-year-old daughter's throat. This is the second time this death penalty case has come before the Georgia Supreme Court.

FACTS: According to the evidence at trial, the morning of Dec. 11, 2001, 21-year-old **Nicholas Cody Tate** and two of his brothers, Dustin Tate, then age 18, and Chad Tate, age 15, left the home where they lived with their mother and went to a local sporting goods store to purchase ammunition, duct tape, and knives before driving to the home of Chrissie Williams. Williams's husband had previously sold Nicholas Tate methamphetamines, so the brothers devised a plan to burglarize her home, steal drugs and money, and rape her. When they arrived, Katelyn Williams, Williams's 3-year-old daughter, answered the door, and upon seeing the three armed men, ran through the house screaming. Dustin Tate found Chrissie Williams and shocked her with a stun gun, believing it would render her unconscious. When it did not, Dustin Tate forced her to the room across the hallway where her infant son lay screaming. The three brothers taped Williams's mouth and eyes with duct tape, handcuffed her hands to the headboard, and taped her legs to the footboard of the bed. Nicholas Tate threatened to beat Williams with his

handgun if she did not "shut up," then he and Chad Tate ransacked the home searching for drugs and money. They also undressed the 3-year-old for their sexual gratification. The little girl would not stop crying, and Nicholas Tate directed his younger brother, Chad, to silence her. When Chad Tate's attempt to strangle the child with a phone cord did not succeed, Nicholas Tate gave him his knife. Chad Tate then slit the child's throat; she bled to death. Dustin Tate told his older brother he could not stomach killing Chrissie Williams and left the home. Nicholas Tate then entered the room where Chrissie Williams was crying hysterically, placed a cushion over her head, and fired one shot through the pillow, killing her. The three brothers fled Georgia, and in Mississippi, kidnapped a woman and stole her vehicle. Eventually, at their father's suggestion, they surrendered to authorities in Oklahoma.

A year after the murders, Dustin and Chad Tate each pleaded guilty in Paulding County in exchange for life prison sentences with the possibility of parole. In November 2005, Nicholas Tate pleaded guilty to malice murder, kidnaping with bodily injury, conspiracy to commit armed robbery, child molestation, possession of a firearm during the commission of a felony, and cruelty to children. Tate waived his right to a jury trial, and following a bench trial (before a judge with no jury), the judge sentenced him to death for the two murders plus multiple consecutive terms of years for the remaining counts. In June 2010, the Supreme Court of Georgia upheld Tate's convictions and death sentences, and in 2012, his execution was scheduled for Jan. 12. On Jan. 31, 2012, hours before his execution, Tate filed a state petition for a writ of habeas corpus and stay of execution. (Habeas corpus is a civil proceeding that allows already convicted prisoners to challenge their conviction on constitutional grounds in the county where they're incarcerated. They generally file the action against the prison warden, who in this case was **Benjamin Ford**.) Following a hearing, in 2018, the habeas court vacated Tate's death sentences based on ineffective assistance of Tate's trial attorneys, but it left his convictions intact. The State now appeals the vacating of the death sentences to the state Supreme Court, while Tate's attorneys appeal the habeas court's denial of relief for Tate's other claims.

ARGUMENTS (S19A0825): The warden/State, represented by the Attorney General's office, argues that the habeas court erred in finding that Tate's trial attorneys deprived him of his constitutional right to effective counsel by failing to present mitigating evidence at his sentencing hearing regarding his family history. His attorneys were not ineffective because they properly advised Tate on the value of presenting mitigating evidence. This Court has found that, "Where a properly-informed, competent defendant insists that he prefers a death sentence to life imprisonment, his attorney does not violate any right of the defendant by attempting 'to comply with his client's wishes.'" The habeas court found that trial counsel failed to investigate: 1) Tate's abusive upbringing; 2) his longstanding drug usage; and 3) his psychiatric history and alleged mental illness. However, not only were Tate's attorneys aware of this potentially mitigating evidence, they tried numerous times to convince him to allow them to present it at the sentencing trial, but Tate refused to let them. Even if the mitigating evidence had been presented, Tate's attorneys cannot show there was a reasonable probability it would have resulted in a different sentencing result as "the aggravating evidence was overwhelming." The habeas court also erred in preventing the State from calling Tate as a witness, the State contends. "In denying the warden the ability to cross-examine Appellee [i.e. Tate], the habeas court abused its discretion," the State argues. This Court should reinstate Tate's death sentences, the State urges.

Tate's attorneys argue the habeas court was correct in vacating his death sentences after concluding he was denied effective assistance of counsel at his sentencing. "The lower court's finding of ineffective assistance is amply supported by the record," the attorneys argue in briefs. "As found by the habeas court, a reasonable investigation would have revealed that Nick's upbringing was characterized by poverty, neglect, violence, and shocking physical, sexual and emotional abuse, and incest." Furthermore, "Nick never told counsel not to investigate and present mitigation," his attorneys for his appeal argue. They also argue that the habeas court did not err in preventing the State from calling Tate as a witness. "It cannot be an abuse of discretion for a trial court judge to decline to do what is 'unprecedented' and for which the proponent of the evidence can provide no case law support," Tate's attorneys argue.

ARGUMENTS (S19X0826): In the cross-appeal, Tate's attorneys argue that more than seven errors were made, including that his trial attorneys were ineffective with regard to his guilty plea. All three brothers, including Nicholas Tate, had been offered plea deals, but Nicholas Tate turned it down after his mother told him not to take it, and his trial attorney "acted unreasonably in talking Mr. Tate into a bench trial," believing the judge would not sentence him to death. Among other errors, Tate's attorneys argue the trial judge operated under a conflict of interest which "violated Mr. Tate's right to an impartial, conflict-free and disinterested tribunal…." And Tate's right to a speedy trial was violated when four years passed between his arrest and trial, the attorneys argue.

The State argues the habeas court properly found that Tate's habeas attorney failed to establish that he was denied effective counsel in entering his guilty plea. Tate's habeas attorney alleged that if Tate's trial attorney had provided the psychologist evaluating Tate with more information, Tate would have been found incompetent to plead guilty. The habeas court, however, rejected this claim, finding that Tate had been evaluated twice prior to his plea and was found to be competent both times. The habeas court also properly found that Tate's habeas attorney failed to show ineffective assistance of counsel by his trial attorney in pursuing a bench trial for sentencing. And the habeas court was right to reject Tate's habeas attorney's allegation that the trial court denied Tate a speedy trial. The habeas court found the claim was procedurally defaulted, and Tate's attorneys failed to establish ineffective assistance to overcome the default.
Attorneys for State: Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Sabrina Graham, Sr. Asst. A.G.
Attorneys for Tate: Vanessa Carroll, Mark Olive

<u>LEE V. SMITH</u> (S18G1549)

A man is appealing a Georgia Court of Appeals ruling that stems from a $2 million jury verdict against him in a lawsuit brought by a young athlete who claimed the man caused a wreck that seriously injured him. At issue in this case is whether a trial court may exclude from trial an expert witness who wasn't identified until after the deadline set in the court's scheduling order.

FACTS: David A. Smith, II was a world-ranked high jumper who attended Auburn University when, in September 2012, he was involved in a car collision and suffered multiple injuries, including a fractured hip. **Donggue Lee** acknowledged that he was at fault for the wreck. Smith was treated for his injuries and in September 2014, sued Lee, asserting Lee had operated his vehicle negligently which caused his injuries, and seeking damages for pain and suffering and medical expenses. Smith returned to collegiate competition and competed in the

2016 Olympics, but in January 2017 underwent surgery to remove a bone chip from his hip joint that allegedly was caused by the 2012 collision. On April 5, 2017, a **Troup County** Superior Court judge entered a scheduling order that set Aug. 7 as the trial date and required identification of all witnesses by May 12, 2017. Smith filed his last set of responses to Lee's "interrogatories" on the same day – May 12, 2017. Interrogatories are written questions submitted to the opposing party as part of the discovery process, during which the sides must disclose to each other information about their cases. Based on those responses from Smith, Lee's attorney then deposed Smith's expert sports agent on June 20, and on June 28, sent an email to Smith's attorney identifying an expert Lee planned to call at trial to rebut the testimony of Smith's agent regarding the claims for alleged future earnings.

The parties dispute when Lee was made aware of Smith's claim for loss of future earnings. In his 2014 response to Lee's interrogatories, Smith stated he was not asserting a claim for lost earnings. In his supplemental responses filed March 30, 2017, Smith identified as an expert witness a sports agent who would testify "regarding the impact that Smith's injuries will have upon his future in various aspects of his personal life and athletic career." On May 12, Smith's attorney supplemented his responses by stating that, "In addition to past, current and future lost earnings, Smith has suffered special and/or general damages in the form of, inter alia, diminished earning capacity, diminished ability to work, labor or earn wages." Lee claims he only became aware of Smith's claim for loss of future earnings on May 12, the deadline to identify his witnesses, while Smith claims he disclosed the information on March 30.

At a pre-trial hearing, Smith's attorney argued that Lee's expert should be excluded because he was not named by May 12, the deadline set in the scheduling order. Lee's attorney argued he had not learned of the claim for lost earnings until May 12. The trial judge ruled that Lee's expert would not be permitted to testify because he had not been identified within the constraints of the scheduling order. At the trial, Smith's expert testified that a professional high-jumper's career is about 10 years; that if not for the surgery Smith underwent due to his injuries, "conservatively" Smith would have earned $1 million; that his "Top 5" ranking could have resulted in career-long earnings of $6 million; and that the agent could have negotiated a contract with incentive bonuses that would have earned Smith $2.5 million. During closing argument, Smith's attorney argued that Lee had not presented any evidence rebutting this testimony, pointing out that Smith had presented the only evidence regarding career earnings and, had his figures been wrong, Lee's attorney would have told the jury. After deliberating for 45 minutes, the jury returned a $2 million verdict for Smith.

Lee appealed to the Court of Appeals, the state's intermediate appellate court, which upheld the trial court's ruling, concluding the trial court did not abuse its broad discretion over setting scheduling deadlines and finding that Lee had an indication of Smith's potential damages claims as early as Smith's March 30 identification of an expert he planned to have testify about Smith's future athletic career. The decision was not unanimous, however, and the dissenting judge argued that Smith waited until the May 12 deadline to reveal his claim for lost earnings and the identity of his expert, making it impossible for Lee to name a rebuttal expert within the time constraints of the scheduling order. With regard to the finding that Smith's earlier filings should have given Lee an indication of Smith's potential claim, the dissenting judge observed that Lee was entitled to believe Smith's 2014 interrogatory response that he would not be seeking lost earnings. Lee now appeals to the state's highest court, which has agreed to review

the case to answer two questions: 1) May a trial court exclude an expert witness solely because the witness was not identified until after the deadline set in a scheduling order? 2) What factors should a trial court consider when exercising its discretion whether to exclude such a witness?

ARGUMENTS: Attorneys for Lee argue that the Court of Appeals' decision is contrary to several opinions from this Court, as well as the Court Appeals, that hold that a witness with relevant testimony cannot be excluded solely because the witness was identified late, even where a pretrial order required earlier disclosure. To allow the exclusion of such evidence without a consideration of factors beyond missing a deadline "may implicate due process concerns, constitute an abuse of discretion, and would operate contrary to the spirit of the Georgia Civil Practice Act providing that cases be decided on their merits," the attorneys argue in briefs. The trial court erred when it excluded Lee's expert witness solely because the witness was identified after the deadline set in a scheduling order. Before such a sanction may be imposed, trial courts should be required to consider these factors: 1) the justification for the late disclosure; 2) the importance of the testimony; 3) the damage to the opposing party's legal rights; and 4) the ability to fix any resulting damage. "The consideration of these factors would allow the trial court to exercise its inherent authority in determining the admissibility of evidence, while preserving equitable concerns such as fairness to the parties," Lee's attorneys contend.

Attorneys for Smith argue that although the first question presented by the Georgia Supreme Court "is an interesting one," it "has no application to this case or its litigants." "Appellant's," i.e. Lee's, "persistent and continued lack of candor and material misstatements go beyond aggressive advocacy and must be categorized as nothing less than attempts to deceive this Court," Smith's attorneys argue. The trial court held a hearing on whether Lee's expert sports agent should be allowed to testify. "Nowhere in the record of said hearing does the trial court state that it was basing its decision solely on the fact that the witness was identified beyond a particular date." The expert was excluded "because the justification Appellant offered to the trial judge for failing to abide by a deadline proposed and agreed to by the parties was not accepted." Lee's attorney "falsely stated to the trial judge that, 'Right at the very last deadline is when suddenly we're hearing this business about the agent claiming loss of future earnings.'" "There is no doubt that Appellant's counsel was in receipt of (and actually read) Appellee's [i.e. Smith's] March 30, 2017 discovery supplementation identifying both a sports agent and raising the possibility of an economist to support a future lost earnings claim," the attorneys argue. Lee "simply did not take the consent order seriously," and his argument was "that the trial judge had no authority to do anything other than grant a continuance so as to allow for Appellant's dilatory litigation tactics."

Attorneys for Appellant (Lee): Bradley Wolff, David Atkinson
Attorneys for Appellee (Smith): Matthew Alford, Aathan Cronic, Sr.

<u>COEN V. APTEAN ET AL.</u> (S18G1638)

A man is appealing a Georgia Court of Appeals decision upholding a **DeKalb County** court ruling that denied him punitive damages in his lawsuit against his former employer and its law firm for "abusive litigation."

FACTS: Timothy F. Coen worked for CDC Software Corporation, which was later bought by **Aptean, Inc.** After he was fired in April 2012, Coen filed multiple lawsuits stemming from his termination. He filed the first in DeKalb County State Court, alleging that his

employment contract entitled him to severance payments which CDC Software refused to pay. CDC Software hired **Sutherland Asbill & Brennan, LLP** to defend the company. Following a four-hour hearing, the trial court ruled in Coen's favor, finding he was entitled to his severance compensation and awarding him approximately $175,000 in legal fees. In 2015, Coen filed three separate actions in Fulton County State Court alleging that Aptean, Sutherland Asbill, and its attorneys engaged in various acts of abusive litigation, such as making false accusations. In 2016, Coen voluntarily dismissed the matters pending in Fulton County and refiled his lawsuit in DeKalb County under Georgia's renewal statute. In his suit, Coen claimed two kinds of damages: damages for injury to "peace, happiness, and feelings" under Georgia Code § 51-12-6, and punitive damages. The trial court dismissed Coen's complaint in its entirety, finding that a complaint filed under the Abusive Litigation Statute must allege a "special" damage and that the allegations of injury to Coen's peace, happiness, and feelings did not qualify as a "special" damage. The trial court also concluded that under the law, punitive damages were unavailable to Coen. On appeal, in 2018, the Court of Appeals reversed part of the trial court's ruling, finding that it is not necessary to plead "special" damages to state a claim for abusive litigation and it is instead sufficient to seek "general" damages for injury to peace, happiness, and feelings. But the appellate court upheld the trial court's ruling that under well-settled law, punitive damages are not available in actions for abusive litigation. Coen now appeals to the Supreme Court of Georgia, which has agreed to review the case to determine whether the language of Georgia Code § 51-7-83 (a) authorizes punitive damages in a claim for abusive litigation. Under the statute, a plaintiff who proves abusive litigation may recover "*all damages allowed by law* as proven by the evidence, including costs and expenses of litigation and reasonable attorney's fees."

ARGUMENTS: Coen's attorney argues that the answer to the Supreme Court's question is yes and that both lower courts erred in construing the language in § 51-7-83 (a), "all damages allowed by law," as excluding punitive damages. The legal history shows that prior to 1986, punitive damages were allowed as a remedy for litigation abuse. In its 1986 decision in *Yost v. Torok*, however, the Georgia Supreme Court held that a plaintiff suing for abusive litigation cannot recover punitive damages. Three years later, a clearly "dissatisfied" General Assembly enacted the current Abusive Litigation Statute (Georgia Code § 51-7-80 and succeeding sections) superseding *Yost* and refocusing the statute as a "remedy against deliberate, unrepentant, obstinate litigation abusers by expressly authorizing an award of 'all damages allowed by law,'" the attorney argues in briefs. "The statute thus reflects a legislative choice to adopt a different approach to damages from *Yost,* in that it omitted *Yost's* inclusion of a specific remedy and rejected *Yost's* exclusion of punitive damages." The statute's text, "all damages allowed by law," "is as comprehensive a term as possible, and it should be given that effect," Coen's attorney argues. "Ultimately, the trial court found the defendants and their legal counsel guilty of 'bad faith,' because their litigation tactics were so blatant and egregious. An award of punitive damages against them is clearly warranted in this case." The lower courts' decisions to exclude damages from abusive litigation cases "completely undercut the General Assembly's comprehensive and cohesive legislative scheme by reading into the statute an exclusion of punitive damages that never existed…." This Court "should hold that 'all damages allowed by law in § 51-7-83 (a) includes punitive damages, and the decisions below should be reversed to that extent," Coen's attorney argues.

Attorneys for Aptean, Sutherland Asbill, and the others argue that the answer to the high court's question is no, and that under the *Yost* decision, the phrase "all damages allowed by law" excludes punitive damages. The language is not an "anything goes" catch-all phrase, as Coen argues. Three years after the Court's decision, the Georgia legislature codified *Yost,* but before doing so it postponed voting on the bill that would become Georgia Code § 51-7-80 et seq. (the Abusive Litigation Statute) so that legislators could first meet with Supreme Court Justice Charles Weltner – *Yost's* author – and Chief Justice Thomas Marshall to get their input into the proposed bill. "After consulting with the *Yost* authors, the General Assembly enacted the bill, including § 51-7-83 (a), which authorizes a plaintiff who proves abusive litigation to recover 'all damages allowed by law,'" the attorneys argue. "When the General Assembly authorized a plaintiff who proves abusive litigation to recover 'all damages allowed by law,' the 'law' spoken of included the rule from *Yost* foreclosing punitive damages. In 2019, the rule from *Yost* continues to bar punitive damages for abusive litigation. The Court of Appeals has held as much on multiple occasions, and the General Assembly has never responded by amending the statute." The General Assembly could have included the words, "punitive damages" in § 51-7-83 (a) just as it has done in many other statutes. "It didn't." "Reinterpreting § 51-7-83 (a) to authorize punitive damages would risk making punitive damages the rule for abusive litigation rather than the exception," the attorneys argue.
Attorney for Appellant (Coen): Charles Cork, III
Attorneys for Appellees (Aptean et al.): Michael Bowers, Matthew Ames, Steven Collins, Samuel Rutherford, Elizabeth Brown, Richard Robbins, Alexa Ross, Rachel Gage

DOYLE V. THE STATE (S19A1005)

A man is appealing his murder conviction and life-without-parole prison sentence for his role in the shooting death of an unarmed security guard.

FACTS: In December 2010, Lyndon "Pookie" Tucker worked nights as a security guard for Midtown Towing, located on Ridge Avenue in Atlanta, **Fulton County**. At about 8:00 p.m. the night of Dec. 17, Tucker's girlfriend dropped him off at work where he checked cars in and out of the tow yard from a small guard shack. Later that night, his girlfriend went to a party at a nearby former auto shop that had been converted into a makeshift nightclub called "The Yard." During the party, a fight broke out between two groups of young men – one led by Pontius "Poochie" Thomas, and the other by Quantavius "Tay" Houston. The fight was over a girl with whom both men had a child. "Poochie" was mad at "Tay" after learning that "Tay" and the girl had been going out while "Poochie" was in jail. "Poochie" was the cousin of "Pookie's" girlfriend.

In December 2010, Keith Richardson was addicted to crack cocaine. He got his drugs from "Fat" Lewis Parks, who lived in the Oakland City neighborhood of Atlanta. Richardson drove a blue Ford Explorer and would give Parks rides whenever he needed them in exchange for cash or drugs. Late the night of Dec. 17, 2010, Richardson received a call from Parks who said he needed a ride to a club near Turner Field. Parks had heard about the fight at The Yard. When Richardson arrived at Parks's home, Parks, **Matthew Doyle**, and a third man, a relative of Parks, got into Richardson's Explorer. When they arrived at the club where the fighting had occurred, the four sat outside for about 20 minutes. Richardson later testified that his passengers discussed "hurting someone" and "getting payback." Parks then directed Richardson to drive

them to Midtown Towing on Ridge Avenue. After stopping the car, Richardson said "Fat" "racked his gun" and Doyle got out of the Explorer and started shooting at a building. After the first shots were fired, a witness who lived nearby saw a blue Ford "truck" with one man standing outside the vehicle and another hanging outside the passenger window making motions with his arms as if he were shooting. Richardson testified he tried to drive away as soon as he heard gunshots, but Parks told him to slow down so Doyle could get back in the car. Eventually, Richardson took the three men back to Parks's home. Meanwhile, after hearing the gunshots, Lyndon "Pookie" Tucker's co-worker stepped outside the building near Tucker's guard shack and found him lying on the ground, saying he'd been shot. She called 911, but Tucker later died from eight gunshot wounds. According to a firearms expert, he had been shot by a high-velocity AK-47 type of rifle. During the trial, Kerry "Kim" Henderson testified, but she claimed she could not recall the details of a conversation she had had the day after shooting with the lead detective on the case. The detective testified at trial that Henderson had contacted him and told him that Doyle and Parks had told her they had shot "Pookie" as some form of retribution related to the fight at The Yard, mistakenly believing that "Pookie" was the brother of "Poochie."

In July 2011, a Fulton County grand jury indicted Doyle and Parks on charges of malice murder, felony murder, aggravated assault, and weapons charges. They were jointly tried in June 2013 and both were found guilty on all charges. The Georgia Supreme Court upheld Parks's convictions in 2017. Doyle, who was sentenced to life without parole plus 10 years for the weapons charges, now appeals to the state Supreme Court.

ARGUMENTS: Doyle's attorney argues five errors were made during trial and all his convictions should be vacated. Among the errors, "The trial court plainly erred in failing to charge the jury that accomplice testimony must be independently corroborated," the attorney argues in briefs. Under Georgia law, the testimony of a single witness is generally sufficient to establish a fact. "However, in certain cases, including…felony cases where the only witness is an accomplice, the testimony of a single witness shall not be sufficient," Georgia Code § 24-14-8 states. "Nevertheless, corroborating circumstances may dispense with the necessity for the testimony of a second witness…." Doyle's trial attorney raised the issue of corroboration in his motion requesting a directed verdict in Doyle's favor, in which he argued there was nothing to connect Doyle with the case "other than Keith Richardson's testimony, and I don't think that's sufficient." The trial court denied the motion, finding there was sufficient corroboration of Richardson's testimony. Furthermore, the trial court found that "Richardson was not an accomplice." Yet Richardson drove the defendants to the scene of the crime after hearing them discuss, "hurting somebody,'" the attorney argues. Richardson drove them away from the scene after hearing gunshots; he failed to report the shooting for several months; and he told police he knew nothing about the crime. "Such evidence is clearly the type of evidence our courts view as supporting the finding that one is an accomplice," Doyle's attorney argues. The omission of the instruction to the jury about corroboration was harmful "because the corroborating evidence against Doyle was less than the 'slight' evidence required to support a conviction." The trial court also erred in excluding evidence that the defense had offered to contradict Richard's self-serving testimony that he was not violent, "never owned a gun," and had been convicted of nothing except drugs and burglary. Among other errors, the trial court plainly erred in allowing the State to elicit extensive, damaging, and inadmissible hearsay from the lead detective. Also, Doyle's former attorney for his appeal rendered ineffective assistance of counsel in violation of

Doyle's constitutional rights. And the evidence was insufficient to convict Doyle of any crime beyond a reasonable doubt, Doyle's attorney argues.

The State, represented by the District Attorney's and Attorney General's offices, argues that there was no plain error in the trial court's jury charge on accomplice corroboration. Doyle has not shown plain error from the trial court's charge "as the lack of the charge of accomplice corroboration was not erroneous, nor did it affect the outcome of the proceedings." In upholding Parks's convictions and sentences, the Georgia Supreme Court found that, "There was evidence independent of Richardson's testimony connecting [Parks] to the crime." The Court found that "Henderson reported to police that [Parks] and Doyle admitted to her that they had killed the victim." The trial court also properly excluded evidence of Richardson's prior conviction that was more than 10 years old. Under Georgia statutory law, evidence of a conviction more than 10 years old is not be admissible unless the proponent gives the adverse party sufficient advance written notice, and Doyle has not shown that notice was given, the State argues. Even if the trial court should have admitted Richardson's prior conviction, "any error in failing to do so is harmless in light of the substantial evidence against Appellant [i.e. Doyle]," the State contends, "including the evidence that Appellant and co-defendant Parks had admitted to shooting the victim when speaking with witness Kerry Henderson." There also was no plain error in the testimony of the lead detective. Finally, no remand is required for an evidentiary hearing on Doyle's claim that he received ineffective assistance of counsel from his appeals attorney. As the claim is being raised for the first time on appeal, it is "properly the subject of a habeas corpus proceeding rather than a remand," the State argues.

Attorney for Appellant (Doyle): Jacob Rhein

Attorneys for Appellee (State): Paul Howard, Jr., District Attorney, Lyndsey Rudder, Dep. D.A., Marc Mallon, Sr. Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Youn, Asst. A.G.

2:00 P.M. Session

<u>WILLIAMS V. THE STATE</u> (S19G0125)

A man is appealing a Georgia Court of Appeals ruling that under Georgia statutory law, he should be charged with 48 counts of possession of child pornography rather than just one. At issue in this pre-trial appeal is whether Georgia Code § 16-12-100 (b) (8) authorizes bringing multiple charges of child pornography against a person possessing multiple images of minor children engaged in sexual activity, or whether the person should be charged with a single count.

FACTS: Georgia Code § 16-12-100 (b) (8) states that, "It is unlawful for any person knowingly to possess or control *any material* which depicts a minor or a portion of a minor's body engaged in any sexually explicit conduct." A minor is anyone under the age of 18.

During a routine investigation in November 2015 by the **Gwinnett County** Police Department's Internet Crimes Against Children's task force, a digital "fingerprint" revealed an "IP" (Internet Protocol) address identifying a computer in Gwinnett County that had downloaded suspected files of child pornography. A detective was able to obtain subscriber information for the IP address, which yielded the name and home address of **Keith Eric Williams**. After obtaining a search warrant, detectives seized numerous computers and other electronic devices

from Williams's home, which yielded a plethora of images verified as child pornography. In September 2015, a Gwinnett County grand jury indicted Williams with 48 counts of Sexual Exploitation of Children in violation of Georgia Code § 16-12-100. The 48 counts were based on separate images and each count described the sexual conduct depicted in the image. Count 1 stated that on a certain date, Williams "did knowingly possess and control a photographic image depicting a minor engaged in sexually explicit conduct, to wit: minor child performing oral sex on an adult male, said count being separate and distinct from any other count alleged in this indictment…." The other 47 counts were similar except for the short description of the sexual conduct. Williams's attorney filed a motion to dismiss counts 2-48 under the theory of "multiplicity" – the improper charging of the same offense in multiple counts of an indictment, which violates the Fifth Amendment protection against double jeopardy. The attorney argued that the "unit of prosecution" under the language of the statute limited Williams's exposure to a single count because it is the possession of "any material" depicting child pornography that is "the aspect of criminal activity that the legislature intended to punish." In October 2017, the trial court agreed and dismissed 47 of the pending counts in Williams's indictment.

The State then appealed to the Court of Appeals, Georgia's intermediate appellate court, and in August 2018, that court reversed the trial court. Relying on its own 2017 decision in *Coates v. State*, the Court of Appeals concluded that § 16-12-100 (b) (8) allows a separate charge for each image of child pornography possessed by a defendant at a given time. In *Coates*, the Court of Appeals concluded that under another statute, Hubert Coates could be separately convicted and sentenced for each of the multiple firearms in his possession. Specifically, the appellate court found that the words "any firearm" in the statute "expresses an unambiguous intent to make each firearm a unit of prosecution." However, only 13 days after the Court of Appeals reversed the trial court's ruling in *Coates*, the state Supreme Court reversed *Coates,* finding that the statute "permits only one prosecution and conviction for the simultaneous possession of multiple firearms."

Williams now appeals to the state Supreme Court, which has agreed to review the case to determine whether the Court of Appeals erred in its identification of the unit of prosecution for possession of child pornography under § 16-12-100 (b) (8).

ARGUMENTS: Williams's attorneys argue that the indictment against him is improperly "multiplicitous" because it subjects him to punishment for the same conduct more than once in violation of his state and federal constitutional rights to due process. As the Supreme Court ruled when it reversed the Court of Appeals' *Coates* decision, the unit of prosecution is the *collective* possession of "any material" that is outlawed under § 16-12-100 (b) (8), as opposed to an individual count for each image of child pornography possessed at one time on a given day. "The Court of Appeals' flawed holding in determining the unit of prosecution would yield absurd results and therefore must be reversed," the attorneys argue in briefs. "For instance, under the Court of Appeals' approach, if a defendant possesses a single image depicting 100 minors each engaged in sexually explicit conduct, the defendant would be subject to being charged and convicted of 100 separate felonies because under their logic, 'each depiction of a child' would constitute a separate and distinct violation…." Also, if the unit of prosecution for an offense is unclear or ambiguous, it must be defined "in favor of lenity for the defendant," the courts have held. "If a charging statute does not express unambiguously the permissible 'unit of prosecution,' the rule of lenity resolves doubts about the intended unit in favor of the defendant

and dictates that a single criminal transaction should not result in charges for multiple offenses," Williams's attorneys argue. Finally, "The trial court's ruling on Appellant's [i.e. Williams's] motion does not disturb the State's interest in protecting minor children as suggested by the Court of Appeals in its opinion on this matter."

The State argues that the Court of Appeals "properly determined the unit of prosecution for possession of child pornography in accordance with the language and spirit of Georgia Code § 16-12-100 (b) (8)." The fact that this Court reversed the Court of Appeals' *Coates* decision does not dictate the same result in this case. "When construed according to its plain language and the canons of statutory interpretation, the term 'any material' in § 16-12-100 (b) (8) must be understood in a *qualitative* sense," the State argues. "'Material' is a word that always has a generic *nature*, but not always a generic *number*. It can be used as either a noun or an adjective, and from the context of § 16-12-100 (b) (8), it is clear that the General Assembly utilized it as a noun meaning either an object or a class of objects." Other states are split in how they interpret statutes such as Georgia's, the State contends. "Georgia would hardly be an outlier if this Court chose to give effect to the General Assembly's recognized intent and upheld the conclusion reached by the Court of Appeals…" Finally, interpreting § 16-12-100 (b) (8) to permit a separate charge for each image possessed "would be in consonance with the General Assembly's recognized intent in criminalizing such acts, and would not yield absurd results," the State argues.

Attorneys for Appellant (Williams): L. David Wolfe, Bingzi Hu
Attorneys for Appellee (State): Daniel Porter, District Attorney, Samuel d'Entremont, Asst. D.A.

<u>SMITH V. THE STATE</u> (S19A1098)

A man is appealing the murder conviction and life prison sentence he received for his role in the shooting death of a woman who was standing on her brother's porch when the man and his friends shot at her brother's apartment.

FACTS: The 2010 murder of T'Shanerka Smith is tied to a dispute her brother, Eddie Edwards, was having with a group of people that included **Omari Smith**, Jeneral Walter, Darron Cato, Andrew Neloms, and Derek McCarter. Edwards lived at an apartment complex in **Fulton County** where he was a maintenance worker. McCarter was squatting in one of the apartments there. On Feb. 13, 2010, McCarter had a party at the apartment where he was illegally living with several prostitutes and friends. The following day, Edwards went to the unit and began removing the locks from the doors, telling McCarter and the others they needed to leave. After Edwards returned to his own apartment, a group of four men drove through the complex, and from the backseat window, Walter shot at Edwards's cousins, who were standing outside Edwards's apartment. No one was injured. Subsequently, Edwards and a cousin tracked down McCarter and beat him up. Walter and his friends left the apartment complex, but later that day, Walter's girlfriend drove Smith, Walter, Cato, and Neloms back to the apartment complex to retaliate. Once she dropped them off, Smith, Walter, and Cato shot in the direction of Edwards's apartment where his sister, T'Shanerka Smith, was standing on the porch. She was shot and later pronounced dead at the hospital. At trial, a witness who had been on the porch with T'Shanerka Smith when she was shot, testified she had seen a woman driving a group of men through the neighborhood shortly before seeing Omari Smith, Walter, and Cato shooting toward the

apartment. A neighbor of Edwards testified that after hearing gunshots, she had seen three men running through a field and a fourth man, whom she later identified as Walter, putting a gun in his pants.

In May 2010, a grand jury indicted Omari Smith, Jeneral Walter, Darron Cato, and Andrew Neloms for malice murder, felony murder, aggravated assault with a deadly weapon, and possession of a firearm during commission of a felony in connection with the death of T'Shanerka Smith. A few days into a joint trial, the trial court granted a mistrial to Cato, although he was later found guilty of felony murder and possession of a firearm. Smith and Walter were found not guilty of malice murder but guilty of felony murder and all other charges. Neloms was found not guilty on all counts. On appeal, the Supreme Court of Georgia upheld Walter's and Cato's convictions and sentences. Smith, who was sentenced to life in prison plus a suspended five years, now appeals to the state Supreme Court.

ARGUMENTS: Smith's attorney argues that four errors were made during his trial and the state's highest court should void his convictions. Among the errors, the evidence was insufficient to prove Smith's guilt beyond a reasonable doubt. "The only 'affirmative act' that Smith was alleged to have engaged in was 'shooting,'" his attorney argues in briefs. Only one witness testified to Smith's involvement and her testimony at trial "was inconsistent not only with her prior 911 call, but also with a *televised* news interview and *three* recorded statements to law enforcement." The witness "essentially recanted her testimony against Smith during cross examination," the attorney argues. "This evidence cannot be held sufficient to convict someone of murder and impose a sentence of life in prison." The trial court also abused its discretion in denying Smith's motion for a separate trial from his co-defendants when it granted a separate trial to codefendant Cato after Cato's attorney suddenly became ill, Smith's attorney argues. In addition, Smith's trial attorney gave "ineffective assistance of counsel" in violation of Smith's constitutional rights by failing to object to the judge's instruction to jurors regarding "conflicts in testimony." "In the context of a murder trial with inconsistent testimony against multiple codefendants, a judge's instruction that the jury 'should' pick the 'best' option offered by the State is unfair and misleading, and no competent defense attorney should have allowed a jury to hear it without objection," the attorney argues. Among other errors, Smith contends his trial attorney was also ineffective for failing to investigate and present the testimony of his girlfriend who would have provided Smith an alibi. "Where the evidence against Smith was so slight, his alibi defense that he was with his girlfriend, Kristy Allen, for Valentine's Day was clearly plausible and should have been presented to the jury," his attorney argues.

The State, represented by the District Attorney's and Attorney General's offices, argues that the evidence was sufficient to support Smith's convictions. Smith's challenge consists of attacking the credibility of Priscilla Cofer, the State's witness who knew all four defendants. Smith contends that Cofer herself conceded that in pre-trial statements her identification of Smith as a *shooter* could have been "wrong." But the aspect Cofer conceded she had gotten wrong was in her not initially naming Smith as a *passenger* she had seen in the car driving through the apartment complex before the shooting. "At trial there was no equivocation in Cofer's identification of Smith as a shooter," the State argues in briefs. "And whether a witness's testimony should be believed is a matter to be decided by the jury that saw and heard the testimony, not by an appellate court reviewing a transcript." The State also argues that the trial court did not err in denying Smith's motion to sever his trial from his codefendants. "Here, the

evidence did not demand severing Smith from the trial of Neloms and Walter, and the trial court did not abuse its discretion by denying Smith's severance motion," the State argues. The trial court additionally properly exercised its power in denying Smith's motion to allow him to present evidence of an alibi witness. "In the instant case, Smith does not meet the statutory requirements of Georgia Code § 17-8-25 to warrant review by this Honorable Court," the State argues. Finally, Smith did not receive ineffective assistance from his trial counsel, the State contends.
Attorney for Appellant (Smith): Jacob Rhein
Attorneys for Appellee (State): Paul Howard, Jr., District Attorney, Lyndsey Rudder, Dep. D.A., Stephany Luttrel, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Michael Odham, Asst. A.G.

THE STATE V. WILLIAMS (S19G0005)

The State of Georgia is appealing a Georgia Court of Appeals ruling that reversed the conviction for aggravated sexual battery of a man in his 70s who was found guilty in **Cherokee County** of using his finger to penetrate the vagina of his 4-year-old step granddaughter.

FACTS: In 2013, E.H., who was 4 years old, was staying at the home of her grandmother and step-grandfather, **Kenneth Howard Williams,** when she called her mother, crying and asking to come home. After her mother picked her up, E.H. told her mother she had a "secret" with "Poppy," the name she used for Williams. E.H. said "Poppy touches my hoo-hoo and I touch his wee-wee," words that E.H.'s family used with the child to refer to the vagina and penis. E.H. later told the same thing to her father and was upset and crying when she did so. At some point in 2013, E.H. told her mother that Williams "had put his finger inside her vagina." Later at trial, E.H. responded affirmatively when asked if Williams had touched her "in" her privates, but also testified that he had only touched her on the outside of her privates and that her panties had been "up" when he touched her.

After E.H. made an outcry to her mother, Williams told his wife, E.H.'s grandmother, about a number of incidents occurring in 2012 and 2013 in which E.H. had approached him, squeezed his penis or testicles, sometimes punched his testicles, and taken his finger to touch her vagina. The grandmother testified that Williams demonstrated for her how he had touched E.H. at the top of her vagina, on the outside. The grandmother testified that Williams never specifically said he had not put his finger inside E.H.'s vagina. The grandmother took notes on these incidents in an email that she eventually sent to E.H.'s mother and from which she was questioned at trial. When asked if E.H. "would touch his penis and he would touch her vagina," the grandmother said Williams had told her that it did not happen on each visit, but, "if it happened, it only happened once."

Jill Hesterlee, a registered nurse and forensic interviewer, interviewed E.H. in August 2013 at the Carroll County Child Advocacy Center. The recorded videotaped interview was later played for the jury. During the interview, Hesterlee showed E.H. drawings of male and female subjects, and had her identify various body parts. E.H., pointing at the genitals on the drawings, said that "Poppy" touched her and she touched him, more than once, in places that were not OK, but that "he said it was OK" and "we don't want Grammy to see because it was just our secret." E.H. told Hesterlee that she and Williams pulled down their pants and underwear and that he touched her vagina "with his fingers." When Hesterlee asked E.H.

whether Williams touched her "hoo-hoo" (vagina) on the outside or the inside, E.H. responded, "both." Asked what this felt like, E.H. responded, "It tickles a little bit and it feels so good . . . it feels good in and out." E.H. said she did not want Williams to stop. Hesterlee then asked, "So he does his finger in and out?" E.H. nodded affirmatively. E. H. told a counselor, whom she was seeing at the time of trial, that she felt bad for not telling Williams "no" when he touched her, that she wanted the touching to stop, and that she did not feel comfortable.

Under § 16-6-22.2 (b), "A person commits the offense of aggravated sexual battery when he or she intentionally penetrates with a foreign object the sexual organ or anus of another person without the consent of that person." A finger is considered a foreign object. Following trial, the jury convicted Williams of two counts of child molestation and one count of aggravated sexual battery. Williams was sentenced to 25 years in prison for aggravated sexual battery and 20 years for child molestation. On appeal, the Court of Appeals affirmed Williams's convictions for child molestation, but it reversed his conviction for the more serious crime of aggravated child molestation, saying that, "We are constrained by a 2015 decision of the Georgia Supreme Court to reverse his conviction for aggravated sexual battery and remand the case for a new trial on that issue." That 2015 decision to which the Court of Appeals referred was *Watson v. State,* which the state Supreme Court issued 17 days after Williams was convicted. *Watson* stated that, "We decline to construe the sexual battery statute in a manner that would criminalize a wide range of apparently innocent conduct," such as a parent changing a baby's diaper. "Instead, we construe the statute to require actual proof of the victim's lack of consent, regardless of the victim's age."

In Williams's case, the trial judge instructed the jury that under Georgia statutory law, a person commits the offense of aggravated sexual battery "when one intentionally penetrates with a foreign object the sexual organ of another person without the consent of that person." The trial judge immediately added, however, that a child under the age of 16 "cannot legally consent to any sexual act." On appeal, the Court of Appeals – Georgia's intermediate appellate court – ruled that under *Watson,* the trial court erred by instructing the jury that a child under 16 lacks the legal capacity to consent to any sexual act. "Because the erroneous jury instruction here effectively relieved the State of its burden to prove an essential element of the crime of aggravated sexual battery, the instruction cannot be said to have been harmless," the Court of Appeals said in its opinion. The Court of Appeals also ruled that reversal was necessary under the "pipeline rule." The "pipeline rule" allows for potential retroactive application of new procedural rules in those cases that are already in the appellate "pipeline" – i.e. between conviction and direct appeal and not yet final, as Williams argued was the status of his case when this Court issued its opinion in *Watson.*

The State now appeals to the Georgia Supreme Court, which has agreed to review the case to answer two questions: Is the State required to show lack of consent to prove an aggravated sexual battery against an alleged victim under the age of 16 under Georgia's aggravated sexual battery statute (Georgia Code § 16-6-22.2)? If so, did the Court of Appeals err in applying the "pipeline rule" to reverse Williams's conviction for aggravated sexual battery?"

ARGUMENTS: In its brief, the State "prays that this Court establish that *Watson v. State* was a sexual battery case…, that the Court clarify that the offense of sexual battery under § 16-6-22.1 is different in kind from aggravated sexual battery under § 16-6-22.2, and prays that the Court ultimately reverse the Court of Appeals in the present case on the ground that…the reasoning in *Watson* has no place whatsoever in the aggravated sexual battery context." The

State is not required to prove consent in aggravated sexual battery cases involving underage victims, the State argues. "Binding precedent established that 'the age of consent in Georgia is 16. In other words, generally speaking, it is a crime to have physical sexual contact with a person 15 years of age or younger.'" Prior to Williams's trial, the Court of Appeals had established that sexual battery under § 16-6-22.1 – which states that, "A person commits the offense of sexual battery when he or she intentionally makes physical contact with the intimate parts of the body of another person without the consent of that person" – does *not* necessarily involve sexual conduct. "Aggravated sexual battery, on the other hand, has been held to be a sexual act." "The *Watson* decision is limited, both by its express terms and its legal reasoning, to the crime of sexual battery as codified under § 16-6-22.1." If a person "intentionally penetrates with a foreign object the sexual organ or anus of another person without the consent of that person," then that person has committed a sexual act and a person under the age of 16 cannot legally consent to that sexual act, the State contends. "There is no statement in *Watson* even suggesting that this Court intended to treat an offense occasioned by conduct as minor as a socially-inappropriate slap on the behind as equivalent to an offense occasioned by the nonconsensual penetration of the vagina or anus of another with a foreign object." In its brief, the State suggests that, "with the benefit of hindsight, the remedy fashioned in *Watson* may have exceeded what was minimally necessary to effect the beneficial result intended." The Court of Appeals decision in Williams's case "must be reversed and the scope of *Watson* must be clarified for the lower court's benefit," the State contends. The State also argues the "pipeline rule" does not apply here.

Williams's attorney argues the State is required under § 16-6-22.2 to show lack of consent to prove an aggravated sexual battery against an alleged victim under the age of 16. Like the sexual battery statute, the aggravated sexual battery statute has the potential to criminalize a wide range of innocent conduct, and the attorney lists 12 examples of such conduct, including a parent taking a child's rectal temperature. The Court of Appeals accurately responded to the State's argument that penetration is always a sexual act for consent purposes by providing two examples of non-sexual acts of penetration: a gynecological exam of a 15-year-old and a parent conducting an anal exam of a child suspected of being infected with pinworms. Other statutes criminalizing the penetration of a child's sexual organs or anus have mechanisms in place to prevent the prosecution of innocent, consensual, non-sexual conduct, the attorney argues. Also, the Court of Appeals did not err in applying the "pipeline rule" to reverse Williams's conviction for aggravated sexual battery. "*Watson* constituted a substantive change in the law; therefore, trial counsel was not required to make an objection to the jury charge in order to preserve the issue for appeal," Williams's attorney argues. "Prior to *Watson,* a mother who slightly penetrated her child's vagina or anus while wiping the child's bottom after a bowel movement could be arrested for aggravated sexual battery." This Court should uphold the Court of Appeals decision and remand the case to the trial court for further proceedings, Williams's attorney argues.
Attorneys for Appellant (State): Shannon Wallace, District Attorney, Zachary Smith, Dep. Chief Asst. D.A., Cliff Head, Asst. D.A.
Attorney for Appellee (Williams): Bernard Brody