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.*

Wednesday, October 23, 2019

10:00 A.M. Session

DAVIS V. THE STATE (S19G0394)

A man who was arrested, but not indicted, for the alleged rape of a woman in **Muscogee County** is appealing a lower court's denial of his plea, in which he argued that the State could not prosecute him for the 1996 rape and other crimes because the statute of limitations had run out. The Court of Appeals upheld the ruling, finding that the man used the wrong legal mechanism to challenge his pre-indictment detention.

FACTS: According to State prosecutors, on June 4, 1996, **Dewey Armon Davis** broke into the home of a sleeping woman, burglarized her home, then raped the woman and forced her to commit oral sex on him. During the repeated rapes and aggravated sodomy, Davis left semen on her underclothing. After he left, the victim reconnected a phone line that had been disconnected when Davis took the phone out of the wall. She called 911 and explained that a stranger, whom she described, had sexually assaulted her. A sexual assault kit was completed at the hospital and sent to the Georgia Bureau of Investigation Crime Lab. By March 2009, technology existed that allowed for the comparison of DNA profiles to inmates in the Georgia penal system. At the time, Dewey Davis was incarcerated on other charges at the Augusta State Medical Prison, and the Columbus Police Department got a hit that matched his DNA from the semen found on the victim's clothing after the 1996 sexual assault. In interviews with law

enforcement, Davis denied knowing the victim or committing the crime. An arrest warrant was issued that contained the specific charges and details of the crime.

In June 2016, when Davis was released from prison, he was arrested for rape, burglary, aggravated assault, and sodomy stemming from the 1996 assault. Prior to the District Attorney presenting the case to the grand jury, Davis's attorney filed a "plea in bar," alleging that the state was barred from prosecuting him for any charges arising from the 1996 crimes because the statute of limitations had run out. The superior court ruled that the state could not prosecute Davis for aggravated assault or burglary because of the 4-year statute of limitations, but that the state could prosecute Davis for rape and aggravated sodomy because the statute of limitations on those charges had not run out. Davis then appealed to the Court of Appeals. Meanwhile, he remained held in the Muscogee County Jail on these subsequent charges until February 2019 when the trial court granted bond with restrictive conditions, including ankle monitoring. According to his attorney, Davis spent 937 days in jail without being indicted and granted trial.

In his appeal, Davis argued that the trial court erred in denying his "plea in bar" as to the rape and aggravated sodomy charges. The intermediate appellate court disagreed, saying that a "plea in bar" did not apply in his case. A special plea in bar, the Court of Appeals said, is defined in *Black's Law Dictionary* as a "plea that, rather than addressing the merits and denying the facts alleged, sets up some extrinsic fact showing why a criminal defendant cannot be tried for the *offense charged."* Because Davis had not been indicted, he had not been "charged," the Court of Appeals said. Instead of using a "plea in bar," Davis should have used a writ of habeas corpus, which is a civil proceeding that is used to ensure that a person's imprisonment is not illegal. "Because Davis alleges that he is being unlawfully detained before the indictment against him has been filed, the proper remedy is to file a petition for writ of habeas corpus," the appellate court ruled. Davis now appeals to the state Supreme Court, which has agreed to review the case to determine what a defendant should do when he is detained prior to being indicted and believes he has a valid statute of limitations argument. The high court has also asked the parties to answer whether its 2010 decision in *Williams v. Reece* is correct in stating that because a claim by an unindicted detainee "that the statute of limitations for his indictment has expired" may be raised in his pending prosecution, the claim may not serve as the basis for pre-trial habeas corpus relief.

ARGUMENTS: Davis's attorney argues that other than a pre-indictment plea in bar, there is no appropriate method for an individual to challenge his pre-indictment detention as barred by the applicable statute of limitations. The Georgia Supreme Court ruled in 2018 in *Holt v. Ebinger* that, "A petitioner in a habeas bears the burden of proof and the burden to complete the habeas with relevant records from the trial proceedings. The failure to meet that burden forecloses relief." Habeas relief is only available after a prisoner fails to obtain relief by direct appeal. Here, Davis remains unindicted and is still in the appeals process. "Because he is unindicted, there is no discovery available," the attorney argues in briefs. "The state is not required to furnish petitioner with any police report, witness statement, or any test result before indictment and no later than 10 days before trial." Under our laws, in a habeas challenge, "he is presumed innocent but is now required to prove that his incarceration was unlawful and he is expected to do so without the benefit of counsel," the attorney argues. "Requiring the petitioner, without any formal legal training to know or understand how to supplement the record with all relevant transcripts and make complex arguments of law is antithetical to the fundamental tenants of our system of criminal jurisprudence." In addition, Davis is "precluded from raising

his statutory speedy trial right because his case is unindicted. "This case exposes the circular nature of assertion of rights when there is no indictment," the attorney contends. In answer to the second question posed by the state Supreme Court, the *Williams* decision "was correct to the extent that it holds that an unindicted detainee may raise the statute of limitations in his pending prosecution rather than a writ of habeas corpus." "In conclusion, petitioner has demonstrated that there is not an appropriate mechanism *pre-indictment* to challenge time-barred offenses save for a plea of bar," Davis's attorney argues. "Petitioner should not have to spend 937 days in jail with no viable mechanism to raise a plea in bar while waiting for the state to do what they are not legally entitled to do – indict offenses which are time-barred by the statute of limitations."

The state, represented by the District Attorney's office, argues that there is an appropriate method for an individual who has been detained but not indicted and who is challenging his pre-indictment detention on the basis that prosecution for the offenses he is alleged to have committed is barred by the statute of limitations. The appropriate method is bond review "because the most important issue is the restraint of liberty associated with pre-indictment detention and not the stigma of arrest associated with being arrested for a case that the appellant [i.e. Davis] believes should be dismissed based on his statute of limitations argument," the state argues in briefs. But the issue is moot because Davis has been released on bail with minimum conditions of release. The *Williams* decision was correct "because this claim may be raised in his pending prosecution and may not serve as the basis for pretrial habeas corpus relief. Thus, the court is recognizing that although his opportunity to challenge the statute of limitations won't be immediate (because of order and decency contained within criminal procedure), it will be heard," the state contends. "Furthermore, the analysis for his bond review incorporates many of the issues that pertain to pre-indictment incarceration. Once the case is indicted, then the defendant will have an absolute right to challenge the indictment on the basis that the statute of limitations for his indictment has expired…."

Attorney for Appellant (Davis): Victoria Novak
Attorneys for Appellee (State): Julia Slater, District Attorney, Ray Daniel, Asst. D.A.

<u>CLARK V. THE STATE</u> (S19A1344)

A man is appealing the murder conviction and life prison sentence he received in **Douglas County** Superior Court for shooting to death a man who confronted him about dating the mother of his children.

FACTS: On Nov. 14, 2016, **Shawn Anthony Clark** shot and killed Antonio Ellison after Ellison allegedly slapped Clark while Clark was sitting in his car. Witnesses later testified that Ellison was angry because his ex-girlfriend, Kira McClure, had gone on a date and spent the previous night with Clark. McClure and Ellison had three children together, and although the two were not romantically involved at the time of Ellison's death, McClure lived with Ellison in Lithia Springs, along with their children, Ellison's mother, and several other family members, including Ellison's brother, Sydrick Lindley. The day before the shooting, McClure had arranged for Clark to come by the house during the day to meet Ellison's mother, prior to their date that night. McClure did not have a car and she wanted to make sure Ellison's mother met Clark and was comfortable with him so Clark could later return to pick her up in front of the house. Clark later returned and he and McClure left. While they were out, Ellison sent McClure angry text messages saying he was putting her things outside and kicking her out of the house. McClure

stayed with Clark that night, and he gave her a ride back to Ellison's house the next day. Prior to their arrival, Lindley, Ellison's brother, helped move some of McClure's things outside because, he was told, she was being kicked out for causing "drama." The family had asked Lindley to be the "mediator" and help put her things in the car when she returned, and Ellison's mother had asked for McClure to park in the street away from the house. When Clark and McClure arrived, Ellison approached Clark's car. According to prosecutors, while Clark sat in the driver's seat, the two began to argue, then Ellison slapped Clark in the face and tried to pull Clark out of the car. As they tussled, Clark reached for his gun that was in the cup holder and shot Ellison three times, killing him. McClure later testified that Ellison, who was unarmed, had stopped struggling after the first shot and had his hands in the air. After he was shot, Ellison fell down into Clark's lap. Clark pushed the victim off him, closed the car door, and left, running over Ellison as he departed. McClure asked Clark to let her out of the car, which he did. She then ran back down to Ellison's house and called 911. At the scene, a group of people urged law enforcement to arrest McClure, and a Douglas County Sheriff's Deputy put her in a patrol car to keep her safe. While in the patrol car, McClure called Clark and asked him why he had killed her children's father. Clark told her he was in fear for his life, that he was afraid "they were going to come and get him, like jump on him" because Ellison was punching and kicking him. She rebuffed him, saying Ellison had only hit him once.

Once they had Clark's address, law enforcement officers surrounded Clark's house and, using a loud speaker, ordered him outside with his hands above his head. Once in custody, Clark told them he was a former Atlanta Police Department officer. Following a February 2018 trial, the jury found Clark guilty of malice murder, felony murder, and aggravated assault for the shooting death of Ellison. Clark was sentenced to life in prison and now appeals to the state Supreme Court.

ARGUMENTS: Clark's appeals attorney argues that Clark's trial attorney provided "ineffective assistance of counsel" in violation of Clark's constitutional rights. Clark contended he shot Ellison in self-defense. The trial court erred in ruling that Clark's case was not "prejudiced" – or damaged – by his attorney's failure to investigate and uncover Sydrick Lindley's two felony drug convictions, which should have been used to impeach Lindley as a witness during cross examination. Lindley was a key witness who "testified that Ellison was angry and confronted Clark in his vehicle, yet then insisted that the fight was 'child's play' and alternatively described Ellison's 'overhand hooks' and 'punches' as 'soft' hits," Clark's attorney argues. "Counsel's failure to impeach Lindley with his convictions prejudiced Clark because Lindley was a key witness in a self-defense case that primarily rested on witness credibility." The trial attorney also failed to object, or move for a mistrial, when, during opening and closing statements, the prosecutor improperly commented on Clark's failure to call 911 or turn himself in following the shooting. Among other arguments, the trial court also erred in ruling that Clark was not prejudiced by his trial attorney's failure during closing argument when the prosecutor improperly made an incorrect statement about the presumption of innocence, Clark's attorney argues.

The State, represented by the District Attorney's and Attorney General's offices, argues that all of Clark's arguments related to his contention that he received ineffective assistance of counsel from his trial attorney "lack merit," including the attorney's alleged failure to discover and impeach Lindley with his prior felony convictions, to move for a mistrial based on alleged

comments of Clark's pre-arrest silence, and to object to the prosecutor's comments during closing argument about the presumption of innocence.
Attorneys for Appellant (Clark): Manubir Arora
Attorneys for Appellee (State): Ryan Leonard, District Attorney, Aimee Sobhani, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith Sr. Asst. A.G., Ashleigh Headrick, Asst. A.G.

MCCLUSKEY V. THE STATE (S19A1397)

A man convicted of shooting and killing his wife is appealing his murder conviction and life prison sentence, arguing he shot her by mistake and the jury should have been instructed about the less serious crimes of reckless conduct and involuntary manslaughter.

FACTS: Clarence McCluskey and his wife, Lisa, had been married for 37 years. On Dec. 22, 2017, McCluskey went to South Rome to celebrate his birthday. He bought a bottle of vodka, spent a few hours at a friend's house, then went to a street party. By the time his wife picked him up later that night, McCluskey was drunk. According to prosecutors, after the couple returned to their home in **Floyd County**, they began arguing and at some point, McCluskey, who was "in a very intoxicated state," shot his wife in her upper-left cheek with a .25 caliber handgun. She died on the scene. During the incident, two of the couple's grandchildren, ages 16 and 14, were upstairs and after discovering what had happened, one called 911. Officers found the wife on the ground in a pool of blood while McCluskey was screaming and crying with a shotgun next to him. When one of the officers asked him to "let me see your hands," McCluskey cursed at the officer, stood up, and walked toward him, cussing, screaming and yelling. The officer grabbed McCluskey and took him outside, where McCluskey threatened to kill him, the other officers, and himself. The officer later testified that McCluskey seemed intoxicated and slurred his words. When McCluskey was arrested, he told another officer that he had shot his wife. Both grandchildren said they had heard their grandparents arguing but did not see their grandfather shoot their grandmother.

At his June 2018 jury trial, McCluskey testified he had shot and killed his wife by mistake because he did not expect her to lean over while she was folding laundry, putting her right in the line of fire. He also thought the gun was unloaded when he pulled the trigger near her head so she could hear the firing pin click, which he said he did just to "mess with" her. The jury found McCluskey guilty of malice murder, felony murder, aggravated assault, terroristic threats, aggravated battery, possession of a firearm during the commission of a felony, and third-degree cruelty to children – all in connection with the shooting death of Lisa McCluskey. He was sentenced to life plus 12 years in prison. McCluskey now appeals to the Georgia Supreme Court.

ARGUMENTS: McCluskey's attorney argues that the trial court erred when it denied the defense's request for reckless conduct and involuntary manslaughter jury charges. The difference between the charged crimes and the lesser-included crimes is the intent required to prove them, the attorney argues. The charged crimes require criminal intent while the lesser-included crimes only require criminal negligence. McCluskey killed his wife by mistake. "But the jury could not consider if McCluskey was criminally negligent because they were not instructed about reckless conduct or involuntary manslaughter," the attorney argues in briefs. "Because a written request to charge a lesser included offense must always be given if there is any evidence to support it, and because McCluskey's testimony provides any evidence he caused

the death of his wife through criminal negligence, the trial court should have given the reckless conduct and involuntary manslaughter jury charges." Also, the evidence is insufficient to convict McCluskey of cruelty to children in the third degree because there was no evidence that the two children could see or hear McCluskey shoot his wife, his attorney argues.

The State, represented by the District Attorney's and Attorney General's offices, argues that the trial court properly denied McCluskey's request to charge the jury on involuntary manslaughter because the evidence established aggravated assault. Georgia Code § 16-5-21 states that, "A person commits the offense of aggravated assault when he or she assaults someone with a deadly weapon." Georgia Code § 16-5-3 states that, "A person commits the offense of involuntary manslaughter in the commission of an unlawful act when he causes the death of another human being without any intention to do so by the commission of an unlawful act *other than a felony*." "To support a charge on involuntary manslaughter, the unlawful act underlying the unintentional death of the victim must be an act other than a felony," the State emphasizes. Here, even if McCluskey's testimony is believed, "it nevertheless establishes that Appellant [i.e. McCluskey] was at least engaged in the commission of aggravated assault – a felony – when he shot his wife," the State argues. "Even if the charges of involuntary manslaughter and reckless conduct should have been given, the evidence was overwhelming, and the trial court at most committed harmless error," and such error would not require a reversal of the judgment. Furthermore, the evidence is sufficient to uphold McCluskey's conviction of cruelty to children in the third degree, the State contends. "Appellant was aware that the children were in the house and had the ability to see and hear when he shot his wife," the State argues. "The children came downstairs shortly after the gun went off, they saw their grandmother bleeding out on the ground, and witnessed her death."

Attorney for Appellant (McCluskey): Ryan Locke

Attorneys for Appellee (State): Leigh Patterson, District Attorney, Kayleigh Carter, Asst. D.A., Luke Martin, Asst. D.A., Christopher Carr, Attorney General,