Supreme Court of Georgia
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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Tuesday, April 26, 2016

10:00 A.M. Session

EVANS V. THE STATE (S16G0280)

In this **Cherokee County** case, a man convicted of child molestation is appealing a Georgia Court of Appeals ruling that he must serve at least the minimum prison sentence of five years because he was also convicted of sexual exploitation of children.

FACTS: Sometime in 2005 or 2006, a little girl and her mother met Douglas Evans at church where Evans was involved with the youth group. The mother and her daughter, who was 4 or 5 at the time, became friendly with Evans and eventually the child, who referred to him as "Moose," began staying overnight at his house once a week. According to the facts at trial, during those overnight stays, Evans had the girl take a bath and after drying her off, had her lie on his bed while he rubbed lotion on her bottom, back and legs. On one occasion, he tried to rub lotion on the child's vagina, but she smacked his hand away and told him, "no." Evans also kissed the girl on her lips and bottom. In 2009, when she was 8 years old, the child told her teacher that "Moose" had kissed her and rubbed lotion on her vagina and bottom. Following the child's disclosure, a police officer conducted a forensic interview in which the child also revealed that Evans had taken pictures of her. Officers obtained a search warrant and upon searching his home, found electronic images of young children involved in sexual activities, including semi-nude photographs of the victim. Following a "bench" trial (before a judge with

no jury), the judge found Evans guilty of one count of child molestation regarding the improper touching and one count of sexual exploitation of children regarding the still images. At issue in this case is Evans' sentence. Following the verdict, a separate sentencing hearing was held where Evans' attorney encouraged the judge not to impose a lengthy prison sentence. The State prosecutor argued that five years behind bars was the mandatory minimum for child molestation and under Georgia Code § 17-10-6.2, the judge was not authorized to deviate from that mandatory minimum. The statute, which lays out the punishment for sex offenders, states that the defendant must be sentenced to the "minimum term of imprisonment specified in the Code section applicable to the offense." The statute also says that in its discretion, "the court may deviate from the mandatory minimum sentence…provided that:…(C) The court has not found evidence of a relevant similar transaction." The statute lists five other circumstances that must not exist for the judge to be able to deviate from applying the minimum prison sentence. Following the hearing, the judge sentenced Evans to 20 years with the first five to be spent in prison, consistent with the mandatory minimum sentence for child molestation. The judge found that under the statute, Evans' sexual exploitation of children conviction was a "relevant similar transaction," and noted, "I don't think I can meet the requirements of explaining a deviation." On appeal, the Court of Appeals agreed that Evans was disqualified from a sentencing deviation and upheld the trial court's decision. The appellate court found that "it seems implausible that the Legislature would allow a defendant convicted of more than one sexual offense to be eligible for a downward deviation from the mandatory minimum sentence simply because the offenses were tried together, rather than severed from another." Evans now appeals to the Georgia Supreme Court, which has agreed to review the case to determine whether the Court of Appeals erred in construing "relevant similar transaction" to include other sexual offense counts charged in the same indictment.

ARGUMENTS: Evans' attorneys argue the Court of Appeals erred in ruling that two separate counts in the same indictment were "relevant similar transactions" that disqualified Evans from receiving a deviation from the mandatory minimum sentence under Georgia Code § 17-10-6.2. "Since 'similar transaction' is a term of art referring to evidence of criminal acts wholly independent of those on trial, it follows that the term does not incorporate separate counts of a single indictment," Evans' attorneys argue in briefs. In its 2014 opinion in *Algren v. State*, the Court of Appeals ruled that during the guilt-innocence phase of the trial, the defendant was not entitled to have the jury instructed about the law regarding similar transaction evidence because he was actually indicted and tried on the offense that would have been the similar transaction had it been tried separately. As a result, the appellate court found in *Algren* that "the State did not present any similar transaction evidence" because the evidence at issue was part of the State's case on the indicted charge. In other words, "the evidence in each individual count might qualify as similar transaction evidence in separate trials but it is functionally different when the counts are joined and tried in a single trial," the attorneys argue. The attorneys also argue that construing the term "relevant similar transaction" to exclude alternate counts in a single indictment "does not lead to absurd rests as the Court of Appeals contends." This would not be the first time the Legislature has provided for more lenient treatment for defendants whose charges are combined on a single indictment, Evans' attorneys contend. For instance, the statute that governs the sentences of repeat offenders states that the "conviction of two or more crimes charged on separate counts of one indictment or accusation…shall be deemed only one

conviction." "Since Mr. Evans was ultimately tried on a single indictment, the alternate counts did not function as 'similar transactions' and the trial court erred in finding it could not deviate in sentencing pursuant to Georgia Code § 17-10-6.2," his attorneys argue.

The District Attorney's office, representing the State, argues that the Court of Appeals and the trial court ruled correctly and this Court should uphold their judgment. The legal analysis required to determine whether the State may introduce "similar transaction" evidence to jurors during the *guilt-innocence phase* of a trial "has no relevance for *sentencing* purposes at all," the attorneys argue in briefs. In Georgia Code § 17-10-6.2, the legislature opted not to define the term "similar transaction," and as a result, it intended the term to encompass any "transaction" that may be described as factually "similar" to the transaction underlying the defendant's respective convictions. "If the General Assembly had intended for the term 'similar transaction,' as found in § 17-10-6.2, to be treated as a mere legalistic term of art, our lawmakers certainly could have defined the term accordingly," the State's attorneys argue. The trial court ruled correctly that Georgia Code § 17-10-6.2 is a sentencing statute and therefore Evans' reliance on the *Algren* decision, which related to the admissibility of similar transactions during the guilt-innocence phase of trial, is misplaced. "The General Assembly has made a common sense determination that a person who is found guilty of a sexual offense and who has already demonstrated a propensity to reoffend must be subject to mandatory minimum sentencing without regard to underlying procedural niceties," the State argues. "What matters during the sentencing for a particular sexual offense is whether, among other criteria, the underlying conduct appears to be an isolated incident or whether it is instead indicative of a pattern of conduct as would be indicated by 'evidence of a relevant similar transaction,' regardless of how – or even whether – that evidence was introduced during the guilt-innocence phase of the defendant's trial. The General Assembly has wisely determined that a person who has engaged in sexual conduct similar to that for which he is being sentenced as to a particular count of an indictment must receive a mandatory minimum sentence in order to address the offender's established tendency to reoffend." "All that matters for sentencing purposes is whether the defendant has engaged in relevant conduct similar to that for which he is then being sentenced."
Attorneys for Appellant (Evans): Donald Roch, II, T. Jess Bowers
Attorneys for Appellee (State): Shannon Wallace, District Attorney, Jay Wall, Asst. D.A., Cliff Head, Asst. D.A.

CERTAINTEED CORPORATION V. FLETCHER (S15G1903)

A company that manufactures asbestos-containing water pipes is appealing a Georgia Court of Appeals ruling that it can be held liable in a lawsuit brought by a woman who claims she got mesothelioma from washing the clothes of her father who worked for the company.

FACTS: CertainTeed is a Pennsylvania company that has been manufacturing and selling asbestos-containing products since 1930. In 1962, it began manufacturing asbestos pipe for use in inn municipal water and sewer systems. James Fletcher was an employee of the City of Thomasville Waterville Water & Light Department from 1948 until he retired in 1983. James Fletcher became the "pipe specialist" whose primary duty from 1971 to 1977 was handling, cutting, installing, and repairing asbestos-containing cement pipe that had been manufactured by CertainTeed. When he cut and beveled the pipes, dust containing asbestos was deposited on his work clothing. At the end of the work day, he wore those clothes home. Marcella Fletcher, James

Fletcher's daughter, began washing her family's clothing three days a week in 1959 when she was 8 years old and continued until she was 26. During the years her father worked with the asbestos pipe, she said there was always a grayish dust on his work clothes that became a "mist" in the air when she shook them out before washing. After she contracted mesothelioma, a cancer of the lung usually linked to asbestos exposure, she sued CertainTeed in **Thomas County** State Court, claiming she got the disease, which is often fatal, as a result of her exposure to the asbestos fibers on her father's clothing. CertainTeed filed a motion for "summary judgment," asking the judge to rule in its favor on the ground that the manufacturer owed no "duty of care" to Fletcher "because she was neither a user nor a consumer of the product" and because CertainTeed "could not have reasonably foreseen that [she] would be affected by their product." (A judge grants summary judgment after determining a jury trial is unnecessary because the facts are undisputed and the law falls squarely on the side of one of the parties.) Following a hearing, the trial judge ruled in CertainTeed's favor and granted it summary judgment. Fletcher then appealed to the Georgia Court of Appeals, which partially reversed the state court's decision, ruling that her claims of defective design and failure to warn should go before a jury. CertainTeed now appeals to the Georgia Supreme Court, which has agreed to review the case to determine whether the Court of Appeals was wrong in reversing summary judgment to a manufacturer of asbestos-laden products where the plaintiff's alleged injury was not caused by her direct contact with the product but by her exposure to toxic dust brought home on the clothing worn by the person who did have direct contact.

ARGUMENTS: CertainTeed's attorneys, who include former state Supreme Chief Justice Leah Ward Sears, argue that based on this Court's 2005 decision in *CSX Transportation, Inc. v. Williams*, the answer to the question is yes and the Court of Appeals ruling should be reversed. "Merely 11 years ago this Court directly and unanimously held that 'Georgia negligence law does not impose any duty on an employer to a third-party, non-employee, who comes into contact with its employee's asbestos-tainted work clothing at locations away from the workplace," the attorneys argue in briefs. "Yet, in a 4-to-3 decision, a panel of the Court of Appeals refused to apply *Williams*, holding instead that a product manufacturer does owe a duty in circumstances nearly identical to *Williams*," the attorneys argue. As a result, while *Williams* held that employers – those with direct control over the work environment – owe no duty to a party injured by off-the-jobsite exposures to asbestos product residue, the Court of Appeals has held that a manufacturer – who has no such control and no relationship with the plaintiff – does in fact have such a duty. "This result is inherently unfair and ultimately arbitrary." The attorneys argue that by reversing summary judgment in favor of CertainTeed, the Court of Appeals erred for four reasons. First, it held that the existence of a duty turned on whether at the time of Fletcher's claimed exposure, a manufacturer knew or should have known that the exposure could *foreseeably* cause an asbestos-related disease. "The court was simply incorrect," the attorneys argue. In *Williams,* this Court "categorically rejected a foreseeability analysis in determining whether a duty existed under the same circumstances," stating, "we decline to extend on the basis of ***foreseeability*** the employer's duty beyond the workplace to encompass all who might come into contact with an employee or an employee's clothing outside the workplace." This Court warned in *Williams* "of a potentially limitless class of plaintiffs." Second, regarding the negligent failure to warn claim, the Court of Appeals majority held that Georgia law already imposed a duty upon manufacturers to warn any person who may be foreseeably injured by a

product. “In fact, this is flatly wrong: No case in Georgia has ever held that a manufacturer owes a duty to warn ***any (and every)*** third party of foreseeable risks,” the attorneys argue. “Rather, the duty to warn in our state (like the duty to use reasonable care in designing a product) focuses predominantly on public policy concerns, not foreseeability. As a result, duty is circumscribed to defined categories of individuals: purchasers, expected users, and bystanders to the use of a product.” Bystanders of the product are defined as those who “share in its use.” Third, regarding the failure to warn claim, the Court of Appeals mistakenly held that “whether CertainTeed ***had a duty to warn*** of the risks of its asbestos-containing water pipe ***remains a question for the jury to resolve***. This statement “directly conflicts” with the Court of Appeals’ own statement earlier in its opinion that the “legal duty is a question of law” for the court, i.e. the judge and not a jury, and “represents a complete departure from bedrock principles.” Finally, the Court of Appeals incorrectly held that *Williams* does not apply in this case in “determining whether a manufacturer ***violated*** its duty of care in a design defect case.” “This analysis is again incorrect,” CertainTeed’s attorneys argue. “Whether CertainTeed violated a duty to Plaintiff was not the question before the trial court or the Court of Appeals. Instead — as the trial court and dissent recognized — the question was whether the defendant ever owed such a duty to begin with.” In conclusion, the Court of Appeals “recognized a negligence duty that (1) has never before been acknowledged in Georgia; (2) is inconsistent with *Williams*; and (3) is contrary to the vast majority of courts nationwide.”

Marcella Fletcher’s attorney argues that the Court of Appeals ruled correctly in reversing the trial court’s grant of summary judgment to CertainTeed. The company owed a number of duties to Fletcher based upon its status as a product manufacturer. “Georgia law has long recognized that in a product liability action an injured plaintiff may properly set forth ‘two separate causes of action in negligence: one based on the sale of a defective product and the other based on the failure to warn of a danger arising from the use of that product…,’” Fletcher’s attorney argues in briefs. The duties of a manufacturer differ from those of an employer. According to Georgia Code § 51-1-11(b), the manufacturer of any personal property sold as new property “shall be liable” to “any natural person who may use, consume, or *reasonably be affected* by the property and who suffers injury to his person or property because the property when sold by the manufacturer was not merchantable and reasonably suited to the use intended and its condition when sold is the proximate cause of the injury sustained.” Contrary to CertainTeed’s argument, the duty of a manufacturer is not limited to product users or consumers “but extends to third parties who are ‘reasonably affected’ by the dangerous propensities of the product, such as Marcella Fletcher in this action.” “The duty of a product manufacturer to persons who are not users or consumers of a product has existed under Georgia law for more than 40 years.” Likewise, as the Court of Appeals recognized, “foreseeability has always been the touchstone of duty as it relates to a manufacturer’s liability for the negligent design of a product under Georgia law.” And Georgia law imposes on a manufacturer a “distinct duty to warn” of “the dangers it knows, or reasonably should know of, associated with the intended and foreseeable uses of its products,” the attorney argues. Here, CertainTeed was well aware of the danger to family members coming in contact with asbestos-contaminated work clothing well before Fletcher was ever exposed to her father’s clothes. “The danger arising from contact with asbestos-contaminated work clothing has been known and publicly recognized in the published medical scientific, and industry literature in the United States since the early 1900s,” the attorney

argues. As early as 1914, physicians and others advocated that preventive measures be taken to avoid exposure to toxic dust by family members of person working with asbestos products. In a 1943 "Safe Practice Bulletin," the Pennsylvania Department of Labor and Industries recommended measures necessary to prevent workers from leaving work with asbestos dust on their clothes, including special locker rooms where workers should leave their contaminated clothes at the end of the day. The bulletin went to all industrial employers in Pennsylvania, including CertainTeed. And in 1973, the U.S. Occupational Safety and Health Administration (OSHA) issued a citation to Certain Teed for failing to provide its asbestos pipe workers with work clothes and proper changing facilities. Yet CertainTeed never placed any asbestos health hazard warnings on its asbestos cement water pipes," the attorney argues. "CertainTeed did not warn James Fletcher as a user. CertainTeed did not warn the City of Thomasville as a consumer. CertainTeed made no attempt to warn individuals reasonably affected by, or foreseeably injured by, the known dangers associated with its asbestos pipe that required cutting, sawing, filing, and beveling as part of its required and intended use." Fletcher's attorney argues that the *Williams* decision does not apply in this case. "In *Williams*, this Court was asked to define the duty of an employer (not a manufacturer) to third persons who suffered injuries away from the workplace," he contends. "Applying existing Georgia law, this Court held that the duty of an employer was limited to providing a safe work place to its employee, and did not extend beyond that…where the employer was not actively negligent in creating the danger." Here, it was CertainTeed, the manufacturer, not the City of Thomasville, the father's employer, that harmed Marcella Fletcher. The attorney argues that the existing public policy of Georgia requires that manufacturers be accountable for dangerous products that injure Georgia citizens. It does not limit liability or the duty of a manufacturer to "users and consumers" of products. Today Marcella Fletcher suffers from an incurable form of cancer that is treated with expensive combinations of drugs and ongoing chemotherapy. She has required repeated hospitalizations, all while being unable to work or maintain her insurance as she did before her diagnosis. "Absent a remedy against the product manufacturer responsible for causing the harm that injured her in the first place, the cost of Marcella Fletcher's continuing medical treatment and welfare will be unfairly cast upon the taxpayers of Georgia who will be unfairly stuck holding the bag." Finally, "CertainTeed's argument of limitless liability is factually unfounded," Fletcher's attorney argues, adding that according to the Centers for Disease Control, there are fewer than 36 deaths per year in Georgia attributable to mesothelioma.

Attorneys for Appellant (CertainTeed): Leah Ward Sears, David Marshall, E. Elaine Shofner, Hawkins Parnell

Attorney for Appellee (Fletcher): Robert Buck

MULLINS V. THE STATE (S16A0710)

In this **DeKalb County** murder case, a young man is appealing his conviction and life prison sentence for shooting and killing a man during an argument.

FACTS: On March 8, 2009, Marcus Rashad Mullins and a friend, Thomas Harris, went to a party together at the home of Lisa Gordon in DeKalb County. Two other friends came to the same party in a different car and the group planned later to go to a club. When they arrived, Mullins, who was about 20 years old, went inside looking for his girlfriend. Down the street, another group of young men, including Damian Daniels, were hanging out in front of the home

where one of them lived. They had been drinking vodka and beer, and Daniels was drunk. At one point, he was dancing on the roofs of the parked cars. They too planned to go to a club, but with so many cars and people attending the party down the street, they could not leave. Noticing the party, Daniels and his friends went up the street to see if they knew anyone. Mullins and his girlfriend eventually came outside, just about the time, gunshots rang out. The shots caused commotion, with some people running back inside while others jumped in their cars and left. Mullins told Harris it was time to leave, and they got into Mullins' car. At the same time, Daniels' group decided this might be their opportunity to leave for the club, so they too got in a car. As they were leaving the neighborhood, Daniels' hat flew out the window. He was retrieving his hat when Mullins' car did a U-turn from the party and almost hit him. Harris testified that Daniels ran to the car and drew his fist back as if he were about to hit Mullins. The two argued, and Mullins got out of his vehicle and waived his gun at Daniels. Harris got Mullins back inside the car while Daniels' friend also intervened to break up the altercation. Although Mullins resumed making a U-turn, according to prosecutors, he said to Harris, "I'm gonna get him," then beckoned Daniels back over to the car. After Daniels again approached Mullins' car, Mullins put one leg out of the car and started shooting Daniels. He hit Daniels five times – twice in the chest, once above the pubic area, once in the upper left thigh, and once in the right arm. While Mullins and Harris sped away, Daniels was taken to Grady hospital, where he was pronounced dead. A 9 mm bullet was recovered from Daniels' body. Shell casings were recovered at the scene, and two days after the killing, police detectives arrested Mullins, who led them to a home two houses away from his own, where he had hidden a 9 mm Hi-Point handgun and gloves in a white bag beneath a wheelbarrow in the property's yard. At trial, Mullins claimed he thought Daniels was reaching for his gun and Mullins shot him in self-defense and in defense of "habitation," i.e. in defense of his vehicle. According to the State, Daniels was unarmed.

Following a seven-day trial in October 2010, the jury convicted Mullins of felony murder, aggravated assault, and possession of a firearm during commission of a felony. He was acquitted of malice murder and sentenced to life plus five years in prison. Mullins now appeals to the state Supreme Court.

ARGUMENTS: Mullins' attorney argues the trial court was wrong to rule that Mullins failed to prove Daniels was the aggressor. When the correct legal standard is applied, which the trial court failed to do, "there was undoubtedly evidence from which a jury could determine that Mr. Daniels was the aggressor in both the first and second altercations," the attorney argues in briefs. "Indeed, Mr. Daniels' own friends made out this case, with their testimony that Mr. Daniels ran up to Mr. Mullins' car and demonstrated by his conduct that he was looking for a fight." The Georgia Supreme Court's 1991 decision in *Chandler v. State,* "allows evidence of a victim's violent history to demonstrate his character." The trial court erred by not allowing in evidence that in a prior incident, Daniels had been the driver and participant in an essentially unprovoked drive-by shooting. "Here the prior violence demonstrates that Mr. Daniels finds it appropriate to meet disrespect with violence which is certainly relevant to the instant case." This evidence "would have assisted the jury in the difficult credibility determination it faced," Mullins' attorney argues, and the exclusion "of this critical evidence was harmful error." Mullins' trial attorney rendered "ineffective assistance of counsel" in violation of Mullins' constitutional rights. Mullins' defense theory at trial was two-fold. His attorney argued he was justified in the killing based on the principles of defense of self and defense of habitation.

Defense of habitation applies when there is a threatened attack from a person outside a vehicle on a person inside a vehicle. "In this case, the threatened attack at issue came from outside the vehicle, and was aimed at a person inside the vehicle." If the jury determined that Mullins' conduct constituted self-defense, then it would also have to find he was justified in defense of habitat. But the trial attorney improperly failed to object when the judge instructed jurors to essentially ignore the defense of habitation, which has a much lower standard of proof than defense of self. The trial judge's instructions to the jury "not only failed to clearly delineate between the two, but in several respects wrongly encouraged the jury to apply the more difficult standard to the defense of habitation," the attorney argues. By failing to object, Mullins' trial attorney allowed these errors. "This case has compelling facts supporting the defense of habitation standard, but relatively weak facts making out the heightened defense of self standard," Mullins' appeals attorney argues. "In the circumstances of this case, counsel's failure to protect the more favorable standard prejudiced Mr. Mullins. This Court should grant Mr. Mullins a new trial."

The Attorney General and District Attorney argue on behalf of the State that the trial court correctly found there was insufficient evidence to show that the victim was the aggressor, and the court therefore correctly denied admission of Daniels' prior incident. "The general character of the victim and his conduct in other transactions is generally irrelevant and therefore inadmissible," the State argues in briefs. The court "properly excluded irrelevant evidence of the victim's prior arrest." Here, there "was no evidence of an act of violence by the victim." It is correct that under *Chandler*, this Court held that evidence of a victim's violent character may be admitted to show: (1) that the victim was the aggressor, (2) that the victim assaulted the defendant, and (3) that the defendant was honestly seeking to defend himself. But in this case, Mullins "failed to establish a prima facie case of self-defense," the State contends. After reviewing the transcript, the trial judge concluded that Mullins initiated the confrontation which led to the shooing and Daniels' death. The judge stated that "when I look at all the evidence in the case, I just don't think that this victim [i.e. Daniels] can be considered the aggressor….My issue is, was he called to the car…Because if [Daniels] were in fact called to the car and then he went up to the car, then that means that [Mullins] did initiate the second incident. That means that the defendant initiated the second incident, so [Daniels is] not the aggressor." The State also argues that Mullins' attorney during his trial offered effective legal assistance. The trial judge gave proper instructions to jurors on the statutes related to the theories of self-defense and defense of habitation and therefore the attorney's failure to object did not comprise ineffective assistance. And the trial court "clearly distinguished the jury instructions concerning defenses of self and habitation from one another."

Attorney for Appellant (Mullins): Gerard Kleinrock

Attorneys for Appellee (State): Robert James, District Attorney, Deborah Wellborn, Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Scott Teague, Asst. A.G.

2:00 P.M. Session

WALLACE V. THE STATE (S16A0654)

A man is appealing his murder conviction in **Lowndes County**, arguing that one of his codefendants was "selectively prosecuted" and convicted only of armed robbery because she was a white woman from Georgia while he was a black man from New York.

FACTS: According to prosecutors at trial, in 2013, Deron Michael Wallace and Michael Pindling moved from New York to Valdosta, GA, where they lived together on West Hill Avenue. In July that year, they began working at the local International House of Pancakes, where they met co-worker, Kathryn Cortez, who was about 21 years old. Wallace and Cortez soon became romantically involved and she spent nearly every night at the West Hill residence. Around this time Pindling and Wallace, who were about 23 years old, planned a road trip to New York because Wallace had "business to take care of" there. They invited Cortez, who had never been to New York, to go with them. On July 12th, the three pooled their money and rented a 2008 Ford Focus, which was equipped with a GPS navigator. The next day, however, all three were fired from IHOP and their plans changed. Because they needed money for the trip, they devised a plan to rob Robert Daniel "Big Rob" Pett, who was a drug dealer. (Wallace's attorney claims Cortez helped plan the robbery as she had previously purchased marijuana from Pett and that Wallace and Pindling had first met Pett at the Academy Sports store. State prosecutors claim Wallace and Pindling planned the robbery of Pett from whom they had previously bought marijuana and considered an easy target.) On July 13th, according to the State, Wallace called Pett and told him to meet them on Walnut Street and look for Cortez. Wallace then drove Pindling and Cortez to an abandoned house on Walnut Street where Pindling, armed with a 9 mm handgun, went inside and hid. Cortez went out front, flagged down Pett, and got him to follow her around to the back porch. Pett removed the marijuana from his book bag and Cortez paid him. Pindling then emerged from hiding and fired three shots at Pett, hitting him twice in the back and once in the shoulder, killing him. Cortez claimed she did not know they were going to kill him, and she said she dropped the marijuana and ran to the car. Wallace reached the car soon after, and gave Cortez Pett's book bag, which contained Pett's wallet and gun. Pindling claimed that he "kicked his lights out because he was making noises." After going back to the West Hill residence, the three drove to New York for several days where they stayed with Wallace"s mother. Meanwhile officers responded to a call about a disturbance on Walnut Street where they found Pett"s lifeless body on the back porch of the abandoned home. Through video surveillance, cell phone records, ballistic and other evidence, they linked the murder to Wallace and Pindling. They also traced the Ford Focus's movement through its GPS equipment and stopped the car in Savannah. Cortez eventually admitted her role in the robbery but claimed she did not know Pindling was going to shoot Pett, and she said both men had threatened to kill her if she told anyone about the crimes.

Cortez pleaded guilty to armed robbery and was sentenced to 10 years in prison, and Wallace and Pindling were tried jointly on a 7-count indictment that included charges of malice murder, felony murder and armed robbery. Cortez testified at their trial. In May 2014, the jury convicted Pindling of all charges and Wallace of all but malice murder. Pindling was sentenced to life in prison with no chance of parole. Wallace was sentenced to life plus five years in prison with the possibility of parole. He now appeals to the state Supreme Court.

ARGUMENTS: Wallace's attorney argues the trial court erred by convicting and sentencing him for murder, armed robbery, and other crimes. "These counts constitute selective prosecution because co-defendant Cortez, who was equally or more guilty, was allowed to plead to armed robbery for the minimum 10-year sentence," his attorney argues in briefs. The trial judge erred in denying Wallace's motion to dismiss the case based on selective prosecution, which is in violation of his constitutional rights. "Selective prosecution is a matter of equal protection," Wallace's attorney argues. "No person shall be denied equal protection of the law," as the Georgia Constitution states. Wallace's attorney argues that Cortez set up the robbery, had previously purchased marijuana from Pett, and made the call to Pett to set up the meeting. "Deron Wallace was a passive participant," his attorney contends. The question is why the two were treated so differently. The reason, his attorney argues: "Kathryn Cortez is white. Deron Wallace is black. Kathryn Cortez is a female. Deron Wallace is a male. Kathryn Cortez told the police that her father was a policeman in Georgia. Deron Wallace is not from Georgia and has no police or local connections." In equal protection cases, the burden is on the prosecution to "demonstrate a constitutionally permissible reason for the discrimination," the attorney argues. Yet the State "declined to provide any excuse or justification," thereby sustaining Wallace's claim of selective prosecution. Wallace is not asking to be freed. "The conviction for armed robbery should be affirmed," his attorney argues. "The other convictions should be reversed and the case remanded for sentencing commensurate with the sentence in Cortez's case."

Prosecutors for the State argue the trial court ruled correctly, and merely "showing that other people were not prosecuted for doing what the defendant is alleged to have done does not, in and of itself, prove that selective prosecution occurred." Under the Georgia Court of Appeals 1996 decision in *Russell v. State*, prosecutors are "vested with discretion in deciding what charges to bring against which defendants based on evidentiary considerations." It is also "firmly settled that prosecutorial discretion is quite broad and ill-suited to judicial review," the State argues. To rise to the level of a constitutional violation, the defense must show that the decision to prosecute was "based upon impermissible grounds such as race, religion," or some other arbitrary classification. Here the evidence clearly showed that "of the three involved, Cortez was the least culpable," the State argues. "Recall that after Pindling shot Pett, a shocked Cortez dropped the marijuana and ran back to the car. Pindling and Wallace remained behind to rob Pett of his belongings and continue to beat him 'because he was making noises,' as Pett essentially drowned to death on his own blood." They also threatened to kill Cortez if she told anyone about the crimes. "Under these facts, the defense has failed to meet its burden showing that the State's decision to allow Cortez to plead to armed robbery, which carried a penalty of 10 years to life, was in any way intentional and purposeful discrimination based upon some unjustifiable standard." The trial court correctly ruled that "the prosecution of the defendant was not selective or arbitrary." Wallace's assertion that Cortez took an active role in the robbery and assault while he "stood by," is "a gross misrepresentation of the evidence," the State contends. "Wallace was very much an active participant in these crimes." "The State merely exercised its broad discretion in the difficult charging and prosecution decisions of the defendants in this case," the State argues, and the Supreme Court should affirm Wallace's convictions.

Attorney for Appellant (Wallace): J. Converse Bright

Attorneys for Appellee (State): Jessica Clark, Sr. Asst. District Attorney, Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Crowder, Asst. A.G.

HOOKS, WARDEN V. WALLEY (S16A0660)

The State is appealing a lower court's ruling that threw out the sexual battery and child molestation convictions a man received in **Forsyth County** on the ground that the lawyer for the man's appeal rendered "ineffective assistance of counsel" in violation of his constitutional rights.

FACTS: According to the Georgia Court of Appeals, a 12-year-old child testified that Ray K. Walley touched her "private part" underneath her underwear in the middle of the night while she was asleep. Once she realized what he was doing, she rolled over so that he would stop. Walley was her mother's live-in boyfriend, and the child and her mother testified that Walley and the girl had had a good relationship and they were all "a family." At his trial, the judge allowed the State to introduce evidence of his prior rape of a 22-year-old woman. The victim, a flight attendant, testified that she had become suddenly ill while working on a flight with Walley, who was the pilot. She suspected food poisoning, and recalled that both the pilot and co-pilot assisted her to her hotel room where she continued to vomit, then believed she had "blacked out." When she awoke, she saw her "bare legs in the air" and Walley sitting in front of her. When she looked to her left, she saw the co-pilot who "ran out of the room" as soon as they made eye contact. She then blacked out again. When she awoke the next morning, she discovered her bra was undone, her underwear was around her knees and Walley was lying naked on the bed beside her. She contacted her supervisor and police. In May 2006, Walley was convicted of the aggravated sexual battery and child molestation of the 12-year-old girl, and he was sentenced to 20 years to serve 15 behind bars. He appealed to the Georgia Court of Appeals, arguing the trial court erred by allowing in the "similar transaction evidence" of the rape because it was not sufficiently similar to the allegations made against him by the 12-year-old. However, the Court of Appeals disagreed in a 2009 opinion and upheld his convictions.

In September 2013, Walley's attorney filed a petition for a "writ of habeas corpus," again challenging the validity of his Forsyth County convictions. (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 Brad Hooks.) In his habeas petition, Walley raised one ground for relief: He argued his attorney for his appeal was ineffective because he failed to argue his trial attorney had also rendered "ineffective assistance of counsel" based on the fact that he never told him the State had offered a plea arrangement in which he only would have had to spend five years behind bars. At a hearing in September 2014, his pre-trial attorney Billy Spruell, his trial attorney Charles Haldi, and his appeal attorney Brian Steel all testified. Following the hearing, the habeas court granted relief to Walley and threw out his convictions on the ground that attorney Steel's performance was deficient on appeal because he failed to argue that Spruell had been ineffective for failing to advise Walley about the State's five-year plea offer. The Attorney General's office, representing the State and the prison warden, now appeals to the Georgia Supreme Court.

ARGUMENTS: The State argues the habeas court erred in finding that his appellate counsel was ineffective for failing to argue on appeal that Spruell had been ineffective for failing to advise Walley about the five-year plea offer. Under the U.S. Supreme Court's 1984 decision

in *Strickland v. Washington,* to prove "ineffective assistance of counsel," a defendant must show that his attorney provided deficient performance and that, but for that unprofessional performance, there is a reasonable probability the outcome of the court proceeding would have been different. Walley has failed to do that, the State contends. In December 2005, the district attorney supposedly sent a letter to Spruell, Walley's first attorney, putting in writing the plea offer in which the district attorney agreed to dismiss the charge of aggravated sexual battery and recommend a sentence of 15 years to serve five in prison for the charge of child molestation. In a March 2006 hearing, Spruell stated that Walley had expressed an interest in entering a plea but Spruell did not think it was in Walley's best interest and he advised Walley to wait and see whether the court was going to allow in the similar transaction evidence of the rape before taking a plea deal. At that hearing, Walley stated he had never been told about the offer of five years to serve and he would have accepted it. However, once the trial court agreed to allow in the evidence of the rape, the State withdrew its offer. Walley said he wanted a new attorney, and the court appointed Haldi, who represented him at his May 2006 jury trial where Walley was convicted of both charges. On appeal, Walley was then represented by Steel. In 2012, the U.S. Supreme Court decided two companion cases, *Lafler v. Cooper* and *Missouri v. Frye*, which addressed the issue of ineffective assistance of counsel when plea offers are involved. In *Lafler* and *Frye*, the high court established a three-prong analysis for determining whether there is a reasonable probability that but for an attorney's deficient performance, the defendant would have accepted the plea offer, the court would have accepted its terms, and the conviction or sentence would have been less severe than the judgment or sentence that was ultimately imposed. Here, the State argues, the habeas court only considered whether Walley would have accepted the plea offer that was never communicated to him, finding that he would have. But the judge did not complete the analysis. For instance, there is no evidence in the record to establish that the trial court would have accepted the five-year prison sentence. Furthermore, the habeas court concluded the appellate counsel was ineffective without any evidence in the record as to whether the appellate lawyer considered raising the issue on appeal. As a result, Walley was relieved of his burden in proving that the attorney's performance was deficient, the State argues.

Walley's attorney argues the habeas judge's order "was sufficient to grant relief to Mr. Walley. However, if this Court concludes that the order did not contain sufficient findings to justify the court's ultimate conclusion this Court should remand for additional findings." If it does reach the merits of the habeas court's decision, it should affirm the grant of habeas relief, "because (1) trial counsel was ineffective for failing to convey a more favorable plea offer to Mr. Walley, who would have accepted the offer if it had been presented to him; and (2) appellate counsel was ineffective for failing to raise trial counsel's ineffective assistance on appeal," the attorney argues in briefs. The evidence clearly supports those conclusions. First, the habeas court in its order "expressly found that both trial counsel and appellate counsel were ineffective under *Strickland v. Washington,*" the attorney argues. Second, the habeas court clearly understood the nature of the prejudice analysis established by *Frye.* "Specifically, the court twice cited *Frye,*" the attorney points out. "Third, the court's conclusion that Mr. Walley had established the prejudice under *Strickland* is sufficient. This is because *Frye* is an application of the standard created in *Strickland.*" "Under *Strickland,* counsel's performance is deficient if counsel fails to advise a client of a plea offer from the prosecution." As the U.S. Supreme Court stated in *Frye,* "This Court now holds that, as a general rule, defense counsel has the duty to communicate

formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Walley has satisfied the three-prong analysis. In addition to proving that Walley would have accepted the plea, "as this Court knows, it is standard practice for courts to accept negotiated pleas between the State and criminal defendants." Finally, given that Walley is currently serving a 20-year sentence with 15 in prison, "the habeas court did not err by concluding that the offer was more favorable to Mr. Walley than the sentence he is currently serving," Walley's attorney argues. As to the appellate attorney, "there was evidence to show that Mr. Steele performed deficiently by failing to raise trial counsel's failure to convey the plea offer to Mr. Walley." Second, the appellate counsel's failure prejudiced Walley because, "if raised on appeal, it is clear that the court would have concluded that Mr. Spruell had provided ineffective assistance of counsel," Walley's attorney contends.
Attorneys for Appellant (State): Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Crowder, Asst. A.G.
Attorney for Appellee (Walley): Brenda Joy "B.J." Bernstein

WAYNE REID V. GINGER REID (S16F0618)

In this contentious **Cobb County** divorce case involving a number of trusts set up by the wife's parents, the husband is appealing a ruling by the court that blocks his ability to get an exact accounting of those trusts and requires him to pay for the cost of his children's private school education and their extracurricular activities.

FACTS: Wayne and Ginger Reid married in August 1995 and separated 16 years later. In August 2011, she filed for divorce, claiming the marriage was irretrievably broken. The couple had two children, both of whom attend private school. In September 2011, he filed a counterclaim, also asserting that the marriage was irretrievably broken. In July 2013, he amended the counterclaim for divorce, alleging that his wife's adultery was grounds for the divorce. In February 2015, the trial court entered its Final Judgment and Decree of Divorce, requiring him to pay her $5,000 a month in alimony for 60 months. He must pay more than $700 a month for "special expenses for child rearing" for the two children. The trial court reserved for later a decision about who would pay for legal expenses, but later determined Wayne Reid had unnecessarily expanded the proceedings related to child custody and required him to pay for his wife's legal costs.

One of the issues in this case is that Ginger Reid is a beneficiary of four trusts set up by her father, Ronald D. Balser. According to Wayne Reid's attorneys, Ginger has already received more than $1.3 million in benefits from the trusts. During "discovery" – the pre-trial process in which the parties' lawyers are able to obtain various documents and information from each other to prepare their case – Wayne's attorneys tried to compel disclosure of information about all of the trusts for which Ginger was a beneficiary. The trial court granted some of his requests, but ultimately ruled that Ginger "has a mere expectancy in the receipt of any distributions from the trusts established by her father, and as such, the assets held in those trusts are irrelevant to the matters pending before this court." Wayne Reid now appeals to the state Supreme Court, which has agreed to review the case with particular concern about the issues of attorney's fees and the "special expenses for child rearing." Both parties have included arguments about additional issues in their briefs.

ARGUMENTS: Attorneys for Wayne Reid argue the trial court made five errors. First, the award of periodic alimony and the reservation to later determine attorney's fees are errors in that both are barred by Ginger Reid's adultery. The trial court ruled that "the majority of the allegations of infidelity and adultery were unsubstantiated," but his attorneys argue that her "adultery is a cause of the separation." Under Georgia Code § 19-6-1 (b), "A party shall not be entitled to alimony if it is established by a preponderance of the evidence that the separation between the parties was caused by that party's adultery or desertion." "Here, the undisputed evidence is that Appellee [i.e. Ginger] committed adultery prior to the separation, concealed it from Appellant [i.e. Wayne], continued to cohabit with Appellant as his wife, and Appellant did not learn of Appellee's adultery until after the divorce was filed," his attorneys argue. Since an award of attorney's fees under the law is alimony, "the same analysis applies to attorney's fees that applies to periodic alimony." Among other arguments, the trial court was also wrong to refuse to permit full discovery of the trusts as they must be considered in determining the correct award of child support, alimony, property and attorney's fees. The trial court erred in its February 2013 order and its October 2013 order by awarding attorney's fees to Ginger Reid without holding a hearing on the evidence and entering its findings of fact and conclusions of law. And his attorneys argue the trial court erred in excluding the special expenses incurred for child rearing in calculating the child support he owed. The court gave no explanation for deviating from the child support worksheet by excluding such expenses, which included the cost of each child's bus transportation to and from school and expenses for extracurricular activities and camps. He paid 86 percent of such costs, and the court's failure to limit his obligation for such costs "constitutes an end run around Georgia's child support modification statute and eviscerates Appellant's right to modify child support downward once every two years," his attorneys argue.

Attorneys for Ginger Reid argue the trial court did not err in awarding alimony and reserving attorney's fees because "the evidence clearly established that adultery was not the cause of the parties' separation." Rather, there was sufficient evidence that the marriage was irretrievably broken long before any alleged acts of adultery by Ginger. Also, Wayne himself stated that the marriage was irretrievably broken long before he belatedly cited adultery as the reason. The trial judge correctly found after reviewing the evidence that adultery was "not the cause of the demise of the marital relationship" and that the marriage "had become irretrievably broken long before the date of the alleged infidelities." Also, the "trial court did not err in limiting discovery of the trusts, because Appellee does not have a present interest in the trusts," Ginger's attorneys argue. Wayne has no right to discovery related to a non-party's financial assets where he cannot show that the assets are of any relevancy to him. Here, Ginger is neither a trustee nor a direct beneficiary of the trusts. "She is merely one of multiple contingent beneficiaries, and as such, Appellant has no claim related to the corpus of the trust on the issues of alimony, child support, or division of assets," her attorneys argue. "Appellee's interest in the trusts must be categorized as nothing more than a bare expectancy." She has no present interest in the trusts and therefore, "any such expectation or interest cannot be included as part of her estate or assets." As with any inheritance, her interest in her father's trusts will only vest upon the death of her father, assuming the corpus of the trusts retain any value at that time. "To assign a value now amounts to nothing more than speculation about an undetermined inheritance," her attorneys contend. The trial court did not err in awarding attorney's fees to Ginger because it did

so after holding hearings, "and both orders identified the abusive conduct and the statutory provision permitting an award of fees." The orders awarding Ginger payment for her attorney's fees met the requirements under Georgia law. Finally, the trial court did not err but instead used its discretion in awarding to Ginger the final decision-making authority on the children's educational and extracurricular activities while requiring Wayne Reid to pay for them.
Attorneys for Appellant (Wayne): T.E. Cauthorn, III, Lisa Owen
Attorneys for Appellee (Ginger): Kurt Kegel, Carla Stern