Supreme Court of Georgia
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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Tuesday, July 12, 2016

10:00 A.M. Session

NEMCHIK ET AL. V. RIGGS (S16A1106)

A man who claims he has the right to use part of another man's property to get to nearby properties that he is developing is appealing a **Cobb County** court's pre-trial injunction preventing him from making any changes to the land until its ownership is determined.

FACTS: In this complex case, George and Tennie Nemchik claim they have legal right to an easement across Lot 9 of the Lanesborough Subdivision in Cobb County. The Nemchiks own lots in the subdivision that they want to develop and the easement provides access to the subdivision. Tony Michael Riggs, who bought Lot 9 in a foreclosure sale, claims the Nemchiks do not have any right to the easement. After the Nemchiks began cutting down trees and posting notices on the alleged easement they had a right to, Riggs sued the Nemchiks for trespass and sought damages and an injunction to prohibit them from accessing his property. Following a hearing, the trial court found this was "an urgent case for the issuance of an Interlocutory [i.e. pre-trial] Injunction" and that Riggs had "no adequate remedy at law" other than an injunction because he "suffered damage and will suffer irreparable damage if the [Nemchiks] are not restrained from changing the existing condition of Lot 9." In its interlocutory injunction issued Nov. 19, 2015, the trial court also restrained Riggs from making any changes on the property as well until the court made a final ruling on the status of the easement. After entering the

interlocutory injunction, the trial court issued a judgment in favor of Riggs, finding that the Nemchiks do not have an easement across Lot 9. In a separate appeal, the Nemchiks have appealed that part of the ruling to the Georgia Court of Appeals, which has jurisdiction – or legal authority – over the matter. Meanwhile, the Nemchiks now appeal the pre-trial injunction to the state Supreme Court.

ARGUMENTS: The Nemchiks' attorney argues the trial court erred in issuing an injunction because they have a valid easement across Lot 9 of Lanesborough subdivision. "The easement has been incorporated into the legal description of every deed instrument conveying title to property in Lanesborough subdivision," the attorney argues in briefs. "Once the bank took title to Lot 9 subject to the easement, every subsequent conveyance was subject to the same encumbrance." The Nemchiks argue this Court should reverse the trial court's ruling and dissolve the interlocutory injunction. "While Mr. Riggs has not been and will not be harmed by legally authorized use of the easement, the Nemchiks' inability to use the easement has already caused them harm and prevented development of other property they own," their attorney argues. "The Nemchiks' plans to develop their property have been entirely stymied by the trial court." "The interlocutory injunction entered impairs the Nemchiks' ability to sell their property and caused them harm." "In addition, if Mr. Riggs would like to build a house on the numerous lots he owns he can still do so as long as he does not interfere with the Nemchiks' lawful use of the easement." The trial court abused its discretion by entering an injunction against the Nemchiks. "Mr. Riggs took title to Lot 9 of Lanesborough subdivision that can only be as good as was obtained in foreclosure," the attorney argues. "The Deed Under Power for Lot 9 conveys title subject to the easement." "As a result, Lot 9 was and remains subject to the easement."

"This appeal concerns the unremarkable entry of an interlocutory injunction order that prohibited neighbors from altering land until the trial court could issue a final ruling on the parties' rights to use that land," Riggs' attorneys argue. The Nemchiks' appeal attempts to "obtain a ruling on a legal matter currently pending before the Court of Appeals." The trial court properly exercised its discretion to maintain the status quo on Lot 9 by issuing an injunction until final resolution of the case. "In deciding whether to grant an interlocutory injunction, a trial court has broad discretion, keeping in mind the purpose of an interlocutory injunction which is to preserve the status quo pending a final adjudication of the merits of the case," the attorneys argue, quoting a 2015 decision by the Georgia Supreme Court. "This Court has routinely approved similar interlocutory injunctions in which the trial court has enjoined both parties in a case concerning the parties' respective rights to use disputed land." The Nemchiks' argument that they have suffered harm or will suffer harm "is pure fantasy, wholly unsupported by the trial court record." "In context, their conclusory assertion that their harm is 'undisputed' borders on the sanctionable." As the trial court ruled, "the claimed easement does not exist as a matter of law," the attorneys argue. "Because no valid easement was ever conveyed over Lot 9, the Nemchiks have no rights in Lot 9 whatsoever." The "frivolity" of this appeal "has caused unnecessary delay and expense to Riggs, and has wasted this Court's resources, both of which warrant consideration of sanctions," Riggs' attorneys argue. "Accordingly, Riggs respectfully requests the Court affirm the order granting the interlocutory injunction."

Attorney for Appellants (Nemchiks): Matthew McLaughlin
Attorneys for Appellee (Riggs): James Humphries, IV, Jordan Stringer

GLISPIE V. THE STATE (S16G0583)

A man is appealing a Georgia Court of Appeals ruling upholding his convictions in **Rockdale County** for drug possession, felony obstruction of an officer and other charges, arguing the trial court erred by admitting as evidence text messages on his phone.

FACTS: The evidence shows that on February 7, 2013, at about 2:00 a.m., Nathan Watts, a Rockdale County sheriff's deputy, was on patrol in a marked patrol cruiser on Flat Shoals Road when he observed a Mercedes Benz vehicle without a working headlight in the left turning lane of Salem Road. Watts got behind the vehicle and activated his cruiser's emergency lights and siren to initiate a stop of the vehicle, which then turned onto a side street and stopped. As Watts got out of his car, the driver of the Mercedes drove away "in a hurry." Watts returned to his cruiser, pursued the vehicle, and announced his pursuit over the radio, giving a description of the vehicle and the direction in which it was going. After the Mercedes "blew through" two intersections, Watts stopped his cruiser, deactivated its emergency lights, and in the interest of other motorists' safety, ended his pursuit. He proceeded to the address in Rockdale County associated with the driver's license of the registered owner of the car. The vehicle that Watts had pursued was parked in the driveway, and two men were in front of the residence. One looked as though he was "about to run," and with the help of another officer – Deputy Curtis Thompson who had responded to Watts' announcement of the pursuit – they were able to handcuff the man, later identified as Jaylend Devone Glispie. As Thompson started to pat Glispie down, Glispie again tried to flee and kicked Thompson in the knee cap. Eventually Thompson knocked Glispie to the ground and sat on him. He then searched Glispie's pockets where he found one plastic bag with 14 rocks of suspected crack cocaine; another plastic bag containing five clear capsules, each filled with a white powder; a couple of lighters; two cell phones; some cash; and a razor or box cutter. The rocks had a total net weight of 2.07 grams and later tested positive for cocaine. The capsules had a total weight of less than one gram and later tested positive for methylone or "Molly." Thompson later testified at trial that the amount of drugs recovered and their packaging was consistent with an intent to distribute.

Law enforcement obtained a search warrant for the contents of one of the phones found on Glispie. Prior to trial, Glispie's attorney filed a motion to exclude the text messages, but the trial court denied the motion. At trial, a third law enforcement officer, Sgt. Jason Welch, testified that text messages extracted from one of the cell phones found on Glispie indicated that he used the cell phone to sell drugs. Welch recited the contents of several sample messages, explaining how the language used indicated drug transactions, such as, "I got some concrete you might like," "I need a g of molly," and "I need some boy," to which Glispie responded, "I got some real good s---," and "I got 3."

Following trial, in 2013, the jury convicted Glispie of violating the Georgia Controlled Substances Act, obstructing an officer, fleeing and attempting to elude an officer, failure to stop at a stop sign, and driving an unsafe and improperly equipped vehicle. Glispie appealed to the Court of Appeals, which upheld all his convictions except the failure to stop at a stop sign. Glispie now appeals to the state Supreme Court, which has agreed to review the case to determine whether the Court of Appeals erred in concluding that the text messages sent to Glispie's cell phone were admissible as

evidence and in concluding that the trial court did not err in denying Glispie's motion to exclude the text messages.

ARGUMENTS: Glispie's attorney argues the Court of Appeals was wrong to conclude that the text messages sent to Glispie's cell phone were admissible as admissions by Glispie. "Under the ruling from the Court of Appeals, a message that a third party sends to a cell phone in the accused's possession becomes the statement of the accused himself, even though the accused did not write or adopt the statements," his attorney argues in briefs. "Here, there is no dispute that the incoming messages originated from the thoughts of others and that other people sent these messages to the cell phone in Mr. Glispie's possession." All of the texts that Welch read to the jury contained out-of-court statements, and the State offered them to prove the truth of the matters it asserted — that others wanted, had, or were planning to purchase drugs. By ruling that inadmissible and unfairly damaging hearsay statements from third-party out-of-court parties are admissible as statements by the defendant, the decision of the Court of Appeals contradicts the Georgia Supreme Court's prior rulings and the unambiguous language of the Georgia statute that applies here, Glispie's attorney argues. With this decision, the Court of Appeals "carves out a new exception to the hearsay rules that disregards and contradicts [the Georgia Supreme Court's] prior rulings." The Court of Appeals also erred in affirming the trial court's denial of Glispie's motion to exclude the text messages. "The search warrant application failed to provide sufficient probable cause to justify the issuance of a warrant to search for and seize the cell phone text messages," the attorney argues. In its 2014 decision in *Riley v. California,* the U.S. Supreme Court has suggested that the privacy interests at stake in a cell phone search are equal to, or perhaps greater than, that of a search of the home. The text messages themselves were inadmissible hearsay, and their admission was unfairly harmful to Glispie's case.

The State concedes that the Court of Appeals erred to the extent its opinion can be read as concluding that *incoming* text messages sent to the cell phone found in Glispie's possession were admissible as admissions by Glispie and the others. However, the incoming text messages were generally admissible as they were not hearsay statements. Rather, they were offered as evidence of Glispie's intention to distribute the controlled substances found in his possession to others. The *outgoing* text messages sent by Glispie's cell phone do fall within an exception to the hearsay rule for admissions by a defendant. The author of the outgoing messages identified himself as "Jaylend," Glispie's first name. The phone was found in Glispie's possession. Therefore, the outgoing text messages fall within an exception to the hearsay rule. Contrary to Glispie's contention, the Court of Appeals also correctly ruled the trial court had a substantial basis for believing probable cause existed to issue the warrant. Sgt. Welch's affidavit provided the issuing judge sufficient information to make a common sense decision (1) that there was probable cause to believe that the crime of possession of cocaine with intent to distribute had been committed and (2) that there was a fair probability that evidence of that crime would be found on the phone that was in Glispie's possession at the time of his arrest. Furthermore, it is highly probable that the testimony regarding the text messages did not contribute to the verdict, given the drugs and equipment Glispie had in his possession. Deputy Thompson did not even consider the text messages in reaching his expert opinion that Glispie possessed the drugs with the intent to distribute, the State argues.

Attorney for Appellant (Glispie): Clifford Kurlander
Attorney for Appellee (State): Roberta Earnhardt, Sr. Asst. D.A.

SUNTRUST BANK V. VENABLE (S16G0664)

SunTrust Bank is appealing a Georgia Court of Appeals ruling that it did not file its lawsuit in time against a woman, Mattie Venable, who quit paying for her car under the terms of the sales contract she signed when she purchased it.

The **Paulding County** Superior Court ruled in the Bank's favor, but after Venable appealed, the Georgia Court of Appeals reversed the trial court's ruling. The Appeals Court ruled that under Georgia statutory law, a four-year statute of limitations applied because this was a lawsuit involving breach of contract having to do with the sale of goods, rather than the six-year statute of limitations that applies to contracts having to do with the sale of services in which the common law of contracts applies. Venable made no further payments on her car after Nov. 1, 2007, but the Bank did not sue to recover what she still owed until October 2012 – nearly five years later. As a result, the Bank missed its deadline, the Court of Appeals ruled.

The Bank now appeals to the state Supreme Court, which has agreed to review the case to determine whether the Court of Appeals erred in concluding that the primary purpose of the contract to finance the purchase of a car was to sell goods rather than create a security interest for the Bank involved.

Attorney for Appellant (Bank): Craig Lefkoff
Attorney for Appellee (Venable): Kris Skaar

FEIN V. BESSEN, JUDGE (S16A1190)

An out-of-state attorney, Frederick J. Fein, is appealing a **Fulton County** Superior Court ruling dismissing his petition for a "Writ of Mandamus" to force Fulton State Court Judge Diane Bessen to rule on motions in a lawsuit that stemmed from a car crash.

Fein claims Bessen has damaged his career by revoking his admission as an out-of-state attorney who originally represented a tire company that was a defendant in the lawsuit. However, the case against that tire company was later dismissed. Bessen claims that under the law, Fein had no legal right to seek a mandamus action against her because Fein no longer represents a party in the case. The judge also claims that she no longer has authority over the case because another defendant has filed for bankruptcy and only the bankruptcy court can lift the stay allowing her to enter an order.

Attorneys for Appellant (Fein): Michael Bowers, Christopher Anulewicz, Brooke Gram
Attorneys for Appellee (Bessen): Melody Bray, Kristen Williams, Kaye Burwell

2:00 P.M. Session

BENTON v. THE STATE (S16A1085)

In this **Fulton County** case, a young man is appealing his murder conviction for opening fire into a crowd after a fight between two groups on Clark Atlanta University's campus, resulting in a Spelman College student's death.

FACTS: On the evening of Sept. 2, 2009, Tiffani Nixon, a student at Clark Atlanta University, had friends over to her dorm room to celebrate her birthday. Also on campus that night were several members of the rap group, "SPC" or "Shady Park Click." Devonni Benton, who was 20 or 21 years old, was one of the group's members there that night, wearing a red

shirt, carrying a red and tan book bag, and wearing his hair styled in a red Mohawk. A group of men leaving Nixon's birthday saw the "SPC" group walking up the street. After exchanging hostile words and "mean mugging" at each other, witnesses say that the man with the Mohawk pulled a pistol from inside his book bag. The group leaving the birthday party then called Anthony Miller, who was still at the party, and told him that someone had just pulled a gun on the group. Miller and his brothers ran outside, and Jasmine Lynn, a Spelman College student, followed. By the time they got outside, a physical fight had broken out between the groups and people had gathered to watch the melee. The man with the Mohawk ran down the street while Lynn attempted to break up the fight. But gunfire erupted, and people began to duck for cover. Miller testified that he saw the man with the Mohawk, Benton, shooting, as did other witnesses. A description of the clothing also matched Benton. Another witness, Marcis Strickland, testified that the shooter was not paying attention to where he was looking and that he was running away while he shot into the crowd.

During the shooting spree, Jasmine Lynn, 19, suffered a fatal bullet wound. Seeing Lynn was shot, Nixon ran down the street to find the shooter, but only found the book bag, which was later identified as Benton's. Immediately following the shooting, Benton changed his appearance to a low haircut that was no longer dyed red. One witness, Brandon Hall, picked Benton out of a photograph lineup as the shooter, and also identified him in court. Other witnesses provided a physical description which matched Benton's appearance prior to the shooting, but could not definitively testify that Benton was the shooter. Also at trial, defense witness Lizzie Erwin testified that prior to his arrest, Benton had told her he did not shoot Lynn. She also testified that another man, Clarence Carter, who had approached her immediately after the incident had admitted shooting Lynn. Like Benton, Carter was also a member of the SPC rap group, and like Benton, he too was wearing his hair in a Mohawk the night of the shooting. Erwin admitted that she never informed police of these conversations. Two other defense witnesses also testified that Carter, rather than Benton, had been the shooter. After the trial in February 2010, Benton was convicted and sentenced to life in prison plus 25 years for felony murder, aggravated assault, and possession of a firearm during the commission of a crime. His motion for new trial was denied in September 2015, and he now appeals his convictions to the Georgia Supreme Court.

ARGUMENTS: Benton's attorney argues that his trial counsel was ineffective for failing to fully investigate Darius Brooks as a possible witness. He argues that Brooks' testimony would have "impeached" – or thrown into question the credibility of – Hall, the only witness who actually identified Benton as the shooter. "[I]n this unconscionable situation, it is clear that the trial lawyer failed to adequately prepare for trial, and the failure to call the witness illustrates deficient performance which may have prejudiced the outcome of the case and thus, could mandate a finding of ineffective assistance of trial counsel," in violation of Benton's constitutional rights, his attorney argues. Brooks claimed he was with Hall the night of the shooting, and they both ran into a nearby campus building, where Hall allegedly told Brooks that he had not seen who the shooter was. Benton's attorney argues that if Brooks had been called to testify, he would have sworn that a person with a red-colored Mohawk was not the person who fired the gun. The attorney also argues that Benton's constitutional right to a public trial was violated. The hearing for Benton's motion requesting a new trial occurred on a Saturday, and the trial court drafted for the Sheriff a list of people who were allowed to enter the courthouse for the proceedings. The attorney argues that "the trial court made no accommodations, whatsoever, for

certain members of [Benton's] family or the general public who were not on this 'list' to enter the Courthouse. Thus, the Courthouse must be deemed to have been closed to the public." For these reasons, Benton is asking the Georgia Supreme Court to reverse his convictions and sentence, and to give him a new trial.

The State, represented by the District Attorney and Attorney General, argues that the trial court correctly addressed the issues that Benton raises here on appeal. They argue that Benton's trial attorney acted reasonably in not calling Brooks as a witness, and that the trial counsel's actions did not constitute "ineffective assistance of counsel." The transcript of Brooks' interview, which was the only material available for the trial attorney's review, does not indicate that Hall told Brooks he could not identify the shooter, the State contends. Furthermore, trial counsel made a reasoned, strategic decision to pursue a speedy trial demand, providing the State only two months to prepare for trial. The State also argues that the trial court did not violate Benton's right to a public hearing. While the hearing did occur on a Saturday, "It is clear from the evidence and the trial court's own order denying [Benton's] motion for new trial, that the names of persons allowed to enter the building were gathered by the trial court after inquiring of both the State and defense about who wished to be present for the Saturday jury deliberations. Among those allowed to enter the courthouse were not only several friends and relatives of [Benton,] but also a plethora of new media entities that covered the trial to presumably present the trial coverage to the general public." Therefore, the State argues that no reversible error occurred at Benton's trial, and the state Supreme Court should affirm his convictions and sentence.

Attorney for Appellant (Benton): Brian Steel of The Steel Law Firm, P.C.

Attorneys for Appellee (State): Paul Howard, Jr., District Attorney, Paige Whitaker, Dep. D.A., and Marc Mallon, Sr. Asst. D.A. of the Fulton County District Attorney's Office. Samuel Olens, Attorney General, Patricia "Beth" Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., and Mary Greaber, Asst. A.G. of the Georgia Department of Law.

WILLIAMS V. THE STATE (S16A0965) *

In this pre-trial appeal, a man who has been formally charged with felony murder for the death of an infant is appealing a **Bulloch County** judge's refusal to throw out the charge.

FACTS: Allan Ray Williams has been indicted for the death of Collen Durden, an infant boy who died in 2013 while in Williams' care. In a 5-count indictment, Williams stands charged with the following crimes: (1) felony murder, "predicated" – or based on – the crime of contributing to the deprivation of a minor; (2) contributing to the deprivation of a minor; (3) felony murder, based on cruelty to a child; (4) cruelty to children in the second degree; and (5) making a false statement. In October 2014, Williams' attorney, filed a "general demurrer" to count 1, objecting to the charge and asking the court to throw it out. Williams filed objections to his other charges, but it is the demurrer involving the first count that is the subject of this appeal.

Count 1 of the indictment states that in September 2013, Williams "did commit the offense of murder when the accused caused the death of Collen Durden, a human being, irrespective of malice while in the commission of a felony, Contributing to the Deprivation of a Minor, by willfully failing to care for said child so that said child died from asphyxiation in violation of [Georgia Code § 16-12-1]…." The second count of the indictment accuses Williams of contributing to the deprivation of a minor "in that accused did fail to properly supervise said child, said failure to act resulted in the death of said child…." Under state law (Georgia Code §

16-5-1), felony murder is defined as "when, in the commission of a felony, he or she causes the death of another human being irrespective of malice." It is punishable under the law by death, imprisonment for life without parole, or imprisonment for life with the possibility of parole. Under another state statute (Georgia Code § 16-12-1), contributing to the deprivation of a minor is defined as when a person, "Willfully commits an act or acts or willfully fails to act when such act or omission would cause a minor to be adjudicated to be a dependent child…." If the offense results in "serious injury" or death, it is a felony punishable by one to 10 years in prison for the first offense and three to a maximum of 20 years in prison for a subsequent offense. Williams objected to the felony murder charge because the punishment for contributing to deprivation of a minor that leads to death (up to 10 years in prison) is significantly lower than the punishment for felony murder (at least life in prison). He argues that a violation of § 16-12-1 cannot be the basis for a felony murder count because § 16-12-1provides its own penalty scheme for violations that result in death. In 2015, however, the judge denied Williams' objection to this charge, as well as the others. Williams now appeals to the state Supreme Court, which has agreed to review the issue prior to trial to determine whether the trial court erred in denying his objection to Count 1 of the indictment.

ARGUMENTS: Williams' attorneys argue the trial court erred in refusing to throw out Williams' Count 1 felony murder charge. "Permitting the offense of contributing to the deprivation of a minor to act as the predicate for a claim of felony murder is contrary to the basic rules for statutory construction," the attorneys argue in briefs. "By its plain terms, § 16-12-1 contemplates instances in which acts of deprivation might result in death and provides a specific penalty scheme when that happens. These terms reflect the General Assembly's intent that acts of deprivation resulting in death are to be prosecuted only under the provisions of § 16-12-1. Any contrary interpretation would be incompatible with the expressed will of the General Assembly as well as the general rules for statutory construction." The crime of contributing to the deprivation of a minor "cannot form the basis for a separate felony murder claim" because the General Assembly intended for § 16-12-1 "to address instances in which acts of deprivation resulted in death." "Importantly, § 16-12-1 was enacted by the General Assembly and subsequently amended in 2010 with the full knowledge of the law which existed at that time, including the existing felony murder doctrine." Furthermore, the trial court's decision is contrary to the rule regarding ambiguous criminal statutes, which are to be construed "strictly against the State and in favor of the accused." Under the Georgia Supreme Court's 2003 ruling in *Brown v State*, "Where any uncertainty develops as to which penal clause is applicable, the accused is entitled to have the lesser of the two penalties administered." "The State is bound by the specific provisions contained in § 16-12-1," Williams' attorneys contend. "Acts of deprivation which result in a minor's death then may only be prosecuted under these provisions and not separately as felony murder."

The State, represented by both the District Attorney's and Attorney General's offices, argues the trial court properly rejected Williams' demurrer. For one thing, the issue of what punishment applies should Williams be convicted of both felony murder and deprivation is not yet "ripe" for this Court's consideration because Williams has not yet been convicted. In 1996, the Georgia legislature added a felony sentencing provision to § 16-12-1 for causing serious injury or death. In 2010, the legislature increased the maximum penalty from five to 10 years imprisonment. "In the almost 20 years since this felony sentencing provision was passed,

apparently no case has directly addressed § 16-12-1 as a predicate felony for felony murder," the State points out. Georgia Code does not enumerate all the predicate felonies for felony murder but simply provides that a person commits felony murder when he causes the death of another. Williams' argument rests on his contention that the two statutes relevant to his case have contradicting penalties for the same act. However, "Contradicting penalties do not create an ambiguity requiring judicial construction of either of these statutes," the State argues. Under state law, "When the same conduct of an accused may establish the commission of more than one crime, the accused may be prosecuted for each crime." The felony murder statute "provides that a person commits the offense of felony murder when, in the commission of a felony, he or she causes the death of another human being," the State's attorneys argue. "The felony statute has an element that the deprivation statute does not, i.e., that the defendant cause the death of another. Therefore, the State contends, "there is no 'intent' of the General Assembly to punish an act of deprivation that resulted in a child's death only as the felony of contributing to the deprivation of a minor." Nothing in the language of the deprivation statute "suggests that it cannot be used as the predicate felony for the crime of felony murder." Georgia's appeals courts have addressed similar challenges to other predicate felonies. In the state Supreme Court's 1998 decision in *State v. Tiraboschi,* the accused had argued that the only homicide for which he could be indicted was vehicular homicide. But the high court disagreed, stating that "the fact remains that the acts alleged in the indictment fit the requirements of both felony murder and vehicular homicide."

Attorneys for Appellant (Williams): Robert Persse, Amy Ihrig, Office of the Public Defender
Attorneys for Appellee (State): Richard Mallard, District Attorney, Keith McIntyre, Sr. Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G.

* Please note: This case was originally scheduled May 10, 2016 for oral arguments but shortly before arguments, was postponed until July 12.

HARRIS V. THE STATE (S16A1188)

A man is appealing the convictions and life prison sentence he received in **DeKalb County** for murdering his wife.

FACTS: According to state prosecutors, Haneefah Harris and Stanley Harris were married but had been living separately for about a year. She lived in Conyers, GA with the couple's four children while he lived on John Wesley Drive in DeKalb County. On Sunday, Feb. 16, 2014, Haneefah drove to meet Stanley at a local McDonald's with two of the younger children, so they could spend the week with their father. Soon, Haneefah realized she'd forgotten to pack medication for their son, so she returned to her home to retrieve it. The couple's oldest daughter, Naimah, who was 16 or 17 at the time, had stayed at home but after her mother got the medicine, she decided to accompany her mother back to her father's house. When they arrived, Stanley was sitting on his porch, and Haneefah got out of the car to give him their son's medicine. The two younger children came outside and soon the family moved to the yard where they were all "laughing, talking and just having a good time." Stanley eventually told the two younger children to go back inside to bed, then hugged Naimah good-bye, and she got back into the backseat of her mother's car. Haneefah followed and was about to start the car when Stanley approached and asked if he could talk to her. She got back out of the car, and Stanley told

Haneefaf he did not want a divorce. Suddenly, according to Naimah, Stanley shot Haneefah. Naimah jumped out of the car and while her mother lay face down in the driveway, saw her father shoot her mother in the back. She testified Stanley then bent down and placed a gun in her mother's hand. Naimah called 911 and her maternal grandmother, Eunice Williams, and told them her father had shot her mother. Williams later testified about the call and what her granddaughter had told her. Meanwhile, Stanley walked away, talked on his cell phone, then walked back to where Haneefah lay on the ground and shot her once more in the head. DeKalb County police arrived at 8:29 p.m. and arrested Harris.

Detectives found a jammed .38 caliber gun on Stanley's porch, which indicated it had been fired in direct contact with the target. They found a .45 caliber gun in Haneefah's hand, although her finger was not on the trigger. Inside Stanley's house, investigators later found .38 caliber and .45 caliber ammunition which matched the gun used to shoot Haneefah and the gun found in her hand.

At trial, the medical expert testified that Haneefah had died from gunshot wounds to her head and chest. Stanley, who testified in his own defense, said that Haneefah was very aggressive and would physically strike him and verbally threaten that she was going to shoot and kill him. He said she told him she had been practicing shooting her gun and he was scared of her. He said that on the night of the shooting, Haneefah had pulled out a gun when she stepped out of the car and the two began arguing. He claimed he asked her if he could go into the house to put the children to bed before things escalated any further. When he returned outside, he brought his gun with him and shot her. He claimed the first two shots were in self-defense, and the third was an accident. One of the witnesses for the State, who was a longtime friend of the victim's, testified that Haneefah had once obtained a temporary restraining order against Stanley, and he had unsuccessfully tried to obtain a restraining order against her.

Following a January 2015 trial, the jury found Stanley Harris guilty of malice murder, felony murder, aggravated assault, possession of a firearm during the commission of a crime, and tampering with evidence. He was sentenced to life plus six years in prison. Harris' attorney filed a motion requesting a new trial, but the trial court denied it. Harris now appeals to the state Supreme Court.

ARGUMENTS: Harris' attorney argues the trial judge erred by refusing to instruct, or "charge," jurors before they began deliberating that they could consider Harris guilty of voluntary manslaughter rather than the more serious crime of murder. "A written request to charge on a lesser included offense must always be given if there is any evidence, however slight, to support the charge," the attorney argues in briefs. "When there is evidence of alleged provocation, the sufficiency of the provocation is generally for the jury to weigh and decide, not the trial court." Here there was evidence that the wife made physical and verbal threats; that there was a pending divorce Harris did not want; that she threatened to prevent him from seeing his children; that she had committed adultery; and that she pointed a gun at him at the time of the shooting. "Under these evidentiary circumstances, the failure of the trial court to charge on Appellant's [i.e. Harris'] timely and proper written request for the lesser included offense of voluntary manslaughter was error," the attorney argues, and therefore Harris' convictions must be reversed. In this case, "a reasonable jury could have found that Appellant (or a reasonable person) had some fear of danger which was sufficient provocation to excite the passion necessary for a voluntary manslaughter charge and conviction." Harris' attorney also argues the case

should be sent back to the trial court to determine whether Harris received "ineffective assistance of counsel" during his trial and during his hearing on his motion requesting a new trial. Harris' appeal attorney argues his prior attorneys failed to raise at least nine ways these attorneys had been deficient, and because these issues cannot be raised for the first time on appeal, they must go back to the trial court. Among the issues his trial attorney failed to raise was that Harris served 18 years with the United States Marines and suffered from Post-Traumatic Stress Disorder. The fact that Harris suffered from mental illness should have been used as a defense at trial, his appeal attorney argues. His trial attorney also failed to call critical witnesses who would have testified that the eyewitness, Naimah, who was the Harrises' adopted daughter, had a reputation for lying. Harris' convictions should be reversed and he should be granted a new trial.

The District Attorney and Attorney General, representing the State, argue the trial court properly declined to charge the jury on voluntary manslaughter because the evidence did not support it. "While intent to kill is an element of both malice murder and voluntary manslaughter, provocation, or the lack thereof, is what distinguishes the two offenses," the State argues in briefs. "Even taking into account Appellant's uncorroborated testimony that the victim was the one who initiated the encounter by pulling out her gun, the fact that Appellant walked away from the victim and into his house to retrieve his gun before he returned outside to shoot the victim demonstrates that there was a sufficient interval between him being 'provoked' by her pulling out her gun and Appellant actually shooting her." As to Harris' contention that he was denied effective assistance of counsel, it is too late in the process to bring up the nine additional claims his appeal attorney is making now. His attorney for the hearing on his motion for a new trial already raised other claims of attorney ineffectiveness. As the Georgia Supreme Court ruled in its 2009 decision in *Wilson v. The State*, "Where the issue of trial counsel's effectiveness has been raised on motion for new trial, any claims of ineffective assistance of trial counsel not raised at that time are waived," the State contends.

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